FEDERAL COURT OF AUSTRALIA

Construction Forestry Mining and Energy Union v Anglo Coal (Capcoal Management) Pty Ltd [2016] FCA 1582

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| File number(s): | QUD 935 of 2016 |
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| Judge(s): | **KATZMANN J** |
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| Date of judgment: | 23 December 2016 |
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| Catchwords: | **INDUSTRIAL LAW** — termination of employment purportedly on grounds of redundancy — application alleging that termination was adverse action taken for prohibited reasons, contrary to Pt 3­–1 of the *Fair Work Act 2009* (Cth) — interlocutory application for reinstatement pending hearing and determination of application or further order — whether interim reinstatement order an “interim injunction” for the purposes of s 370 of the Act — whether interim injunctions should be made — whether prima facie case for relief — whether balance of convenience favours making of order — whether order should not be granted by reason of delay in bringing application |
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| Words & phrases: | “*interim injunction*” |
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| Legislation: | *Evidence Act 1995* (Cth) s 91(1)  *Fair Work Act 2009* (Cth) ss 19, 176, 336, 340, 342, 346, 347, 361, 365, 370, 453, 471, 539, 545, 604  *Federal Court of Australia Act 1976* (Cth) s 23  *Workplace Relations Act 1996* (Cth) ss 298U, 809 |
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| Cases cited: | *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57  *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL (No 4)* [2012] FCA 1323  *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 2)* [2011] FCA 953  *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers’ Union (AMWU) v McCain Foods (Aust) Pty Ltd* [2012] FCA 112  *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618  *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No 1)* (2012) 248 CLR 500  *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1  *Chenoskova v The University of Adelaide* [2014] FCA 1436  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Bluestfar Pacific Pty Ltd* [2009] FCA 726; 184 IR 333  *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FCA 563  *Construction, Forestry, Mining and Energy Union v Downer EDI Engineering Power Pty Ltd* [2012] FCA 661  *Construction, Forestry, Mining and Energy Union v Eco Recycler Pty Ltd* [2013] FCA 24  *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463  *Esso Australia Pty Ltd v Australian Workers’ Union* [2016] FCAFC 72; 258 IR 396  *Kenefick v Australian Submarine Corporation Pty Ltd (No 2)* [1996] IRCA 159; 65 IR 366  *Manos v Maras* [2007] SASC 192 (FC)  *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1  *Police Federation of Australia v Nixon* (2008) 168 FCR 340  *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238 |
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| Date of hearing: | 21 December 2016 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Solicitor for the Applicants: | Slater and Gordon |
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| Solicitor for the Respondent: | Ashurst Australia |

ORDERS

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|  | | QUD 935 of 2016 |
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| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION  First Applicant  RUSSELL WILLIAM HERDMAN  Second Applicant  LUKE KRISTOPHER SCOTTON  Third Applicant | |
| AND: | ANGLO COAL (CAPCOAL MANAGEMENT) PTY LTD  Respondent | |

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| JUDGE: | KATZMANN J |
| DATE OF ORDER: | 23 December 2016 |

THE COURT ORDERS THAT:

1. Upon:
   1. the usual undertaking as to damages given by the first applicant; and
   2. the undertakings given by each of the second and third applicants,
      1. to put the money paid to him by the respondent upon the termination of his employment into a term deposit; and
      2. not to withdraw the funds from the account until further order of the Court,

until the hearing and determination of this application or further order, the respondent reinstate Russell Herdman and Luke Scotton to their positions as coal operators at the German Creek Mine on the terms and conditions of employment that obtained immediately before the decisions were made to make those positions redundant.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

1. In late November 2016 the respondent, **Capcoal**, wrote to 47 employees at the German Creek Mine to advise them that their positions were redundant, effective immediately. Thirty three of the employees (70%) were members of the CFMEU. Others belonged to the AMWU and another union. Only one was not a member of any union. Capcoal’s actions were taken during the bargaining period for new enterprise agreements. The bargaining has been protracted and from late August at least until the time the redundancies took effect, stop work meetings, mostly for the duration of entire shifts, had occurred almost daily. The industrial action caused what Capcoal described as “unplanned delay” and the “unplanned delay” precipitated the announcement of the redundancies.
2. The industrial action was lawful under the terms of the *Fair Work Act 2009* (Cth) (**FW Act** or **the Act**). It is referred to in the Act as “protected industrial action”. An employer who terminates the employment of an employee because the employee has engaged in certain kinds of industrial activity, including protected industrial action, contravenes the Act.
3. On 14 December 2016 the CFMEU and two of the affected employees commenced proceedings in this Court alleging that Capcoal had contravened the Act. Those employees are Russell Herdman and Luke Scotton, both active members of the CFMEU who had engaged in the industrial action and other lawful industrial activities at the mine. The originating application seeks declarations and consequential orders, including orders that they be reinstated, that they be paid compensation (for both economic and non-economic loss), and penalties. It also seeks interlocutory relief. This judgment is concerned with the application for interlocutory orders.
4. The nature of the applicants’ case is disclosed through the declarations they seek. A number of them are common to both employees. They are to the following effect:
5. that between September and November 2016 inclusive, Capcoal contravened s 340(1) of the FW Act by taking adverse action against the employee “in deciding to dismiss the employee by a reduction of positions across the mine site” because:

(a) he has a workplace right in that he was able to participate in a process under a workplace law or instrument, namely, protected industrial action and/or as an incident of that industrial action he was able to lawfully exert industrial pressure on Capcoal “by inflicting loss or damage”; and

(b) he exercised that workplace right by participating in such a process;

1. that between September and November 2016 inclusive Capcoal contravened s 346 of the FW Act by taking adverse action against the employee in deciding to dismiss him by reducing positions across the mine site because he was a member of an industrial association, to wit the CFMEU, and he participated in protected industrial action as an incident of his membership of the association and in that capacity encouraged or participated in public assemblies; and
2. that in or about November 2016 Capcoal contravened s 340(1) and 346 of the Act by taking adverse action against the employee in deciding to dismiss him “by applying assessment criteria to select employees for forced redundancy” because he had or exercised the above-mentioned workplace rights and because of the industrial activities in which he engaged as a member and an officer of the CFMEU by reason of his membership of the union’s Lodge Committee at the mine.
3. In Mr Herdman’s case, the last mentioned declaration includes that he exercised his right to participate as a “Nominated Employee Representative” in a dispute settlement under cll 1.3 and 5.1 of the Capcoal Surface Operations Union Collective Agreement 2010 (**Surface Agreement**). In Mr Scotton’s case it includes his engagement in industrial activity in representing or advancing views, claims or interests of the CFMEU in that he was a member of the union’s Lodge Committee at the German Creek mine as well as its bargaining committee for a replacement enterprise agreement and had represented members of the union “with” Capcoal.
4. The interlocutory relief sought takes the following form:
5. An interim injunction, pursuant to section 545(1) and (2)(a) of the *FW Act*, that orders [that] until the hearing and determination of this application, or further order, the respondent treat as null and void the termination of the employment of Russell William Herdman and reinstate Mr Herdman to his employment with the respondent in the position of Coal Operator at the German Creek Mine.
6. An interim injunction, pursuant to section 545(1) and (2)(a) of the *FW Act*, that orders [that] until the hearing and determination of this application, or further order, the respondent treat as null and void the termination of the employment of Luke Kristopher Scotton and reinstate Mr Scotton [to] his employment with the respondent in the position of Coal Operator at the German Creek Mine.
7. The Court has power under s 545 to make an interim injunction to prevent, stop or, relevantly, remedy the effects of a contravention of the Act.
8. Two questions arise on any such application.
9. The first is whether the applicant has made out a prima facie case in the sense that if the evidence were to remain as it is, there is a probability that at the trial of the action the applicant would be entitled to relief. The second is whether the inconvenience or injury the applicant is likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the respondent would suffer if the injunction were granted. See *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622–3; *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [65].
10. In the present case, Capcoal also submits that there are discretionary factors which militate against the grant of relief.
11. At first, Capcoal denied that the applicants had made out a prima facie case. Ultimately, however, it conceded as much in relation to the decision to implement the proposal for redundancies. But it did not concede that the applicants had made out a prima facie case in relation to the selection of the two employees. Nevertheless, it accepted that success at trial on the first question would entitle the applicants to relief so that its unwillingness to make the second concession is of little consequence. In the result the resolution of the present application turns on the balance of convenience and the discretionary matters raised by Capcoal.
12. Affidavits were read on behalf of the applicants from Mr Herdman and Mr Scotton, from Jeffrey Scales, a coal operator at the German Creek Mine and at all material times the president of the CFMEU’s German Creek Lodge and a member of the Board of Management of the Queensland District Branch of the Mining and Energy Division of the CFMEU, and from Adam Walkaden, a solicitor and a National Legal Officer for the CFMEU. Affidavits were read on behalf of Capcoal from Stephanie Oppermann, the Human Resources Manager at the mine, and Shannon Chapman, a solicitor with Ashurst Australia, which acts for Capcoal in this proceeding and in a related proceeding in the Fair Work Commission.

## Background facts

1. Both Mr Herdman and Mr Scotton were employed by Capcoal as “coal operators” at the German Creek Coal Mine, an underground coal mine near Middlemount in the Bowen Basin in central Queensland. A “coal operator” is defined in the Surface Agreement as “an Employee who is assessed by Capcoal as competent to perform the required tasks in a variety of operating circumstances and under limited supervision”. The CFMEU is the only union covered by the Surface Agreement.
2. Mr Herdman worked at the mine for over five years, beginning in about April 2011. He operated a dozer and a truck. He was also the captain of the Capcoal Surface Mines Rescue team. He held a Certificate 3 in Mine Emergency Response and Rescue, a level of qualification for Mines Rescue he believed no one else held. Mr Scotton had worked in the Coal Handling and Preparation Plant (known as the Washplant) for more than eight years (since August 2008). He joined the CFMEU when he joined Capcoal at the tender age of 22.
3. Mr Herdman joined the CFMEU when he commenced work in the mining industry in mid-2008. When he started work at the mine he became a member of the CFMEU’s German Creek Lodge. Mr Scales described a lodge as “an organised grouping of union members at each particular worksite”, which is “charged with protecting and acting in the interests of its members”.
4. Mr Herdman represented various employees in disputes with Capcoal and at meetings with Capcoal officials, including the Mining Superintendent, Ian Corkin, the Mine Manager, Michael Keough, and the Human Resources Superintendent, Annette King. Mr Scotton also represented employees at disciplinary meetings with management.
5. At the Annual General Meeting of the Lodge in December 2013 Mr Herdman was elected as a CFMEU delegate. At the following AGM in about October 2014 he was elected one of three vice-presidents. In his capacity as vice-president and as a member of the Lodge Executive, Mr Herdman said that he played “a large role in representing and supporting individual members of the CFMEU at the Mine in their interactions with the Company, and in representing the interests and the collective views of members of the CFMEU at the Mine in their interactions with the Company”. As a result of his interactions Capcoal was aware of his union membership and the position he held.
6. Bargaining meetings began for the proposed new surface agreement on 21 March 2014, shortly before the nominal expiry date of the 2010 agreement on 4 April 2014.
7. Early in 2016 Mr Herdman became a member of the CFMEU bargaining teams negotiating two new enterprise agreements, including a new surface agreement. Mr Scotton joined the bargaining team for the new surface agreement in about March 2016. The evidence suggests that both men attended all bargaining meetings that took place from the time they joined the team until the time their employment was terminated. Mr Scotton said that he took an active and vocal part in the negotiations, particularly in relation to issues affecting CFMEU members working at the Washplant.
8. On 25 July 2016 the CFMEU applied to the Fair Work Commission for a protected action ballot order in relation to those of its members employed by Capcoal at the mine who would be covered by a new Surface Agreement. Two days later the order was made and a secret ballot conducted. Union members voted overwhelmingly in favour of each of the questions that were put. The effect of the ballot was that, for the purpose of advancing claims in the negotiation of the new enterprise agreement, the voters authorised industrial action in the form of:

* separate, concurrent and/or consecutive stoppages of work, of between one and four hours and also for the duration of a shift; and
* bans on working non-rostered overtime.

1. According to Mr Scales, the CFMEU began “sustained and ongoing protected industrial action” on 19 August 2016, six days after the results of the ballot were declared.
2. Over the following fortnight Mr Herdman, Mr Scotton, and other CFMEU members took part in protected industrial action for whole shifts at a time, returning to work for only one shift each week. After that, Mr Herdman and other CFMEU members took protected industrial action almost every day. But for two shifts on 12 September 2016 and 25 September 2016 on which days Mr Herdman worked whole shifts, he was engaged in protected industrial action each day until his termination on 28 November 2016. During that period Mr Herdman flew to Brisbane to join other members of the Lodge executive inleading a protest march to Capcoal’s head office.
3. On 15 September 2016, Ms Oppermann sent Mr Scales an email from Mark Heaton, who described himself as Executive Head – Open Cut Operations. In the email Mr Heaton said, amongst other things,“[t]he strike is having an impact as you would expect and the mine plan (and as a result, potentially jobs) is being put at risk by the decisions taken by the CFMEU”. At the hearing before the Fair Work Commission, Mr Heaton explained in cross-examination that this was an allusion to “to the shovel having to park because of the protected industrial action and maybe not knowing, but intuitively realising, that we would get to a point where we would permanently have to park the shovel for a number of months”.
4. The reference to “the shovel” was a reference to a piece of equipment called a rope shovel. The rope shovel is a large machine used to remove and load overburden onto trucks, so that the underlying coal can be mined. According to Mr Scales, overburden can be removed using excavators too, but the rope shovel is more efficient. Almost all the operators of the rope shovel were CFMEU members, so the protected industrial action meant that it became very difficult for Capcoal to operate the rope shovel.
5. On 28 September 2016, Ms Oppermann told Mr Scales that Capcoal was considering making 90 redundancies as a result of “parking up the Rope Shovel” and an “unplanned delay”.
6. Between 28 September and 8 November 2016, the CFMEU and Capcoal conducted consultation meetings and correspondence was exchanged about the proposed redundancies.
7. On 4 November 2016, Mr Scales received a document entitled *Proposal regarding changes at the Capcoal Mine*. The **Proposal**’s “significant features” included that the “P&H1400 Shovel” would be “permanently parked” and the excavator teams retained. Implementation of the Proposal would lead to “a reduction of 83 positions” across the site, via a selection and forced redundancy process.
8. Three days later, on 7 November 2016, the CFMEU filed an application in the Fair Work Commission (**FWC**) for bargaining orders in relation to the dispute with Capcoal (see FW Act, Pt 2–4 Div 8). It sought orders that:
9. Capcoal “not terminate the employment of the CFMEU members … by reason of redundancy”; and
10. Capcoal provide a written apology to the CFMEU and its members “for engaging in capricious or unfair conduct that undermines freedom of association or collective bargaining”.
11. The matter was heard on 17 November 2016. At the conclusion of the hearing, Capcoal undertook, through Mr Neil, “that it [would] not give notice to any employee of their redundancy before at least 12 noon on 25 November 2016”.
12. On 25 November Deputy President Asbury dismissed the CFMEU’s application, finding that Capcoal’s conduct was neither capricious nor unfair, and that accordingly she was not satisfied that freedom of association or collective bargaining would be undermined by it.
13. Chris Gentle, Acting General Manager of Capcoal and the Senior Site Executive at the German Creek Mine, wrote to Mr Herdman and Mr Scotton, advising them that their positions were to be made redundant. The letters, which were both dated 25 November 2016, are attached to the originating application. They are identical in form and content. They read:

**Notification of Redundancy**

As a result of the organisational restructure that was outlined on 4 November 2016, it has been determined that your position is to be made redundant.

Anglo American has explored whether there are any other suitable positions for you to p[er]form within Anglo American, however, no such positions are currently available.

As such, it is with regret that we advise that your employment with Capcoal Mine will cease on the grounds of redundancy effective immediately.

You will be paid redundancy entitlements in accordance with the *Capcoal Surface Operations* *Union Collective Agreement 2010.*  A copy of your estimated total redundancy payment sheet is **attached**. Included is a Q&A document that will address any queries you may have. If you have any further queries please contact a member of the Human Resources team.

You may choose to use outplacement services that we have available to assist you in this transition. These services will be supplied by Chandler MacLeod and you may access the services by contacting 07 3003 7756 as outlined on the enclosed Outplacement Program notice.

Please note that the Employee Assistance Program is available to you and your family until February 2017, they are contactable on 1800 337 068.

We would like to thank you for your contribution to Capcoal and wish you the best in your future endeavours.

1. Mr Herdman and Mr Scotton did not receive the letters, however, until 28 November 2016 when they were handed to them.
2. On 1 December 2016, the CFMEU filed in a notice of appeal from the decision and orders of the Deputy President, seeking an expedited hearing. The stated reasons for urgency included that since the decision had been handed down, the employment of 47 permanent employees, of which 33 were CFMEU members, had been terminated “by reason of redundancy” and that Capcoal “ha[d] yet to confirm whether the redundancy process [was] complete or whether further redundancies [were] imminent”. The notice of appeal stated that the appeal was brought by the CFMEU on behalf of 25 employees named in a schedule to the notice. Messrs Herdman and Scotton were not included. The notice of appeal stated that “the events that have occurred subsequent to the hearing below [require] that Order 1 originally sought … below be amended to provide for an order of reinstatement in relation to [the 25 employees]”. Permission to appeal is required under the Act (see s 604) and permission was sought.
3. On 15 December 2016 the notice of appeal came on for hearing by a Full Bench (Vice President Catanzariti, Deputy President Deane and Commissioner Saunders). The Full Bench reserved judgment, although it apparently indicated at the hearing that permission to appeal would be granted.
4. During the hearing, the Full Bench was informed of the commencement of this proceeding, and the schedule of employees was amended to include a further six individuals. The result is that of the 33 CFMEU members whose employment was terminated, the cases of 31 are being pursued in the FWC, and those of the remaining two, Mr Herdman and Mr Scotton, are being pressed in this proceeding.

## A preliminary question: is the interim application competent?

1. Capcoal contended that the interim application is not competent. I reject the contention.
2. The contention was based on the terms of s 370 of the Act. Section 370 provides as follows:

**370 Taking a dismissal dispute to court**

A person who is entitled to apply under section 365 for the FWC to deal with a dispute must not make a general protections court application in relation to the dispute unless:

(a) both of the following apply:

(i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;

(ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or

(b) the general protections court application includes an application for an interim injunction.

1. There was no issue that the applicants (or at least Mr Herdman and Mr Scotton) were and are entitled to apply under s 365 of the Act for the FWC to deal with their dispute with Capcoal and that this application is “a general protections court application”. Nor was it in question that the FWC had not issued a certificate in relation to the dispute before the originating application was filed and that, accordingly, the criterion in para (a) is not met. Capcoal submits, however, that criterion (b) is not met either, because, notwithstanding what appears in the originating application, the applicants do not seek an “interim injunction”.
2. I have set out the applicants’ prayers for interlocutory relief at [6] above. The relief is described as “interim injunction[s]”, pursuant to s 545(1) and (2)(a) of the Act. Subsections 545(1) and (2) provide:

**545 Orders that can be made by particular courts**

*Federal Court and Federal Circuit Court*

(1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

...

(2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:

(a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

(c) an order for reinstatement of a person.

...

1. Capcoal submits that the relief the applicants seek is not “interim injunction[s]” within the meaning of para 370(b) of the Act, because s 545(2) “distinguishes between an interim injunction and an order for reinstatement and treats them as two entirely separate concepts.”
2. The submission is misconceived.
3. *First*, the ordinary meaning of “injunction”, in a legal context, is simply an order that a person do something or refrain from doing something (see *Manos v Maras* [2007] SASC 192 (FC) at [51]–[52]). An interim injunction is an order of that kind made pending some further event, most often the final resolution of the matter in which the interim order is made. The interlocutory orders sought by the applicants in this proceeding fit that description exactly.
4. *Secondly*, there is no indication in s 545(2) that the categories of relief listed are intended to be mutually exclusive. There is therefore no warrant for treating an “interim injunction” and an “order for reinstatement” as distinct and non-overlapping concepts within the Act.
5. *Thirdly*, the obvious purpose of s 370(b) is to allow an applicant entitled to an interim injunction to apply directly to a court, without first having the matter dealt with by the FWC as s 370(a) would otherwise require. The heading to s 370 is “taking a dismissal dispute to Court”. The section is only engaged where the applicant alleges that there was a contravention of the general protections provisions that has resulted in a person’s dismissal: s 365. It would substantially defeat the purpose of s 370(b) if the applicant were able to apply directly to a court seeking an interim injunction, but not an injunction reinstating the dismissed employee.
6. For all these reasons I consider that the words “interim injunction” in s 370(b) are apt to include the kind of interim orders that the applicants seek in this proceeding, and accordingly that s 370 presents no bar to their application.

## Should interim injunctions be made?

1. I am satisfied that the Court has jurisdiction to make interlocutory orders including reinstatement, if not under s 545 of the FW Act, then under s 23 of the *Federal Court of Australia Act 1976* (Cth), which gives the Court power to make such orders (including interlocutory orders) as it thinks appropriate. Save for the question of competency, Capcoal did not submit otherwise. Like the equivalent provision under the *Workplace Relations Act 1996* (Cth) (**WR Act**) (s 298U) s 545 is not exhaustive of the remedies that may be afforded to a successful party, on a final or interim basis. On the position under the WR Act, see, for example, *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 and *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 at [27]–[29], [35]–[40]. As Greenwood J explained in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Bluestar Pacific Pty Ltd* [2009] FCA 726; 184 IR 333 (***Bluestar***), in order to warrant the exercise of the Court’s discretion to grant interim reinstatement, the applicant must show “a sufficient likelihood of success in the principal proceeding at trial to justify, in the circumstances, the preservation of the status quo [strictly, the status quo ante] pending the trial”.
2. Before going any further, it is necessary to refer to the relevant provisions of the FW Act upon which the applicants’ case is based.
3. A person must not take adverse action against another person because that person has a workplace right, or has exercised or proposes to exercise that right (s 340) or because, amongst other things, the other person is or was a member of an industrial association or has “engaged in industrial activity” as that phrase is defined in s 347(a) or (b): (s 346). “Adverse action” includes dismissing an employee or altering the position of the employee to the employee’s prejudice: s 342(1). Both Mr Herdman and Mr Scotton have been engaged in industrial activity within the meaning of s 347(a) or (b). Such engagement extends to membership of or office-holding in an industrial association, encouraging or participating in lawful activity organised or promoted by an industrial association, and representing or advancing the views, claims or interests of the industrial association.
4. These provisions appear in Pt 3–1 of the Act. The objects of Pt 3–1 include the protection of workplace rights and freedom of association: s 336(1). The means by which freedom of association is protected is by ensuring, amongst other things, that people are free to participate (or not) in lawful industrial activities: s 336(1)(b)(iii).
5. In this case, as in *Bluestar*, the applicants claim that the employees have been deprived of their employment for a prohibited reason “in circumstances where the legislation enacting the prohibition and conferring [remedies for] contraventions of the prohibition, is directed to the protection and preservation of the freedom of association”: *Bluestar* at [21]. This is an important matter of context against which the claim for interlocutory relief must be assessed.
6. Sections 340 and 347 will be contravened even if the prohibited reason was not the sole reason the action was taken; it is sufficient if the reasons for the action taken include a prohibited reason (s 360) in the sense that the prohibited reason was “a substantial and operative reason” for the action: *Board of Bendigo Regional Institute of Technical and Further Education v* ***Barclay*** *(No 1)* (2012) 248 CLR 500 at [104] (Gummow and Hayne JJ).
7. If, in an application of this kind, it is alleged that a person took action for a particular reason and taking that action for that reason would constitute a contravention of Pt 3–1 of the Act (which includes ss 340–378), then it is presumed that the action was taken for that reason unless the person who took the action proves otherwise: s 361(1). In *Barclay* at [45] French CJ and Crennan J observed that “[g]enerally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer”. Section 361(2), however, states that the presumption does not apply in relation to orders for an interim injunction.
8. There is no dispute that at all relevant times Mr Herdman and Mr Scotton were members and officials of the CFMEU and that the CFMEU is an industrial association with standing to bring the proceeding: FW Act, s 539 item 11. Nor is there a dispute that during their employment with Capcoal the two men engaged in lawful industrial activities, the details of which appear in their affidavits. Furthermore, it is not in dispute that those activities included “protected industrial action” within the meaning of that term in Pt 3–3 Div 2 of the Act.
9. The applicants submit, consistently with what the Full Court said in *Kenefick v Australian Submarine Corporation Pty Ltd (No 2)* [1996] IRCA 159; 65 IR 366 at 370–371, that the adverse action taken by Capcoal was a two-step process. The first step was the decision to reduce the workforce. The second was the selection of the employees as persons whose positions would be made redundant. Declarations 1, 2, 5 and 6 are concerned with the first step, declarations 3, 4, 7, and 8 with the second. The evidence indicates that multiple decision-makers were involved in each step.
10. As I have already indicated, Capcoal ultimately accepted that there was a prima facie case in relation to the first step and that, without more, if the evidence remained the same at the trial the applicants would be entitled to relief, including the right to seek reinstatement. Capcoal’s argument turned on the balance of convenience.
11. The determination of this question involves the exercise of the Court’s discretion. As the Full Court said in *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238 (***Samsung***) at [61], “[i]n exercising that discretion, the Court is required to assess and compare the prejudice and hardship likely to be suffered by the defendant, third persons and the public generally if an injunction is granted, with that which is likely to be suffered by the plaintiff if no injunction is granted. In determining this question, the Court must make an assessment of the likelihood that the final relief (if granted) will adequately compensate the plaintiff for the continuing breaches which will have occurred between the date of the interlocutory hearing and the date when final relief might be expected to be granted”.
12. Neither party raised an issue about the interests of the public or third persons: cf. *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [65] and [68].
13. In its written outline of submissions Capcoal contended that interlocutory injunctions should not be granted for three reasons:  *first*, that there is little, if any, detriment to the applicants and “limited discernible utility” to any interim order at this time; *secondly*, that interim reinstatement is likely to have undesirable safety consequences; and *thirdly*, that the applicants would have an adequate remedy at the final hearing. During oral argument its senior counsel, Mr Neil submitted “there are no factors of convenience or inconvenience on either side”, and that there was therefore “nothing to be gained” by the applicants in obtaining the interim relief sought.
14. He also argued that relief should be refused because of unexplained delay in bringing the application.
15. The submission that interim reinstatement is likely to have undesirable safety consequences fails for want of evidence to support it.
16. Nevertheless, putting to one side for the moment the question of delay, to which I will return, and if one were to ignore the merits of the applicants’ case, there is much to commend Capcoal’s argument.
17. First, both Mr Herdman and Mr Scotton deposed that, if reinstated, and protected industrial action were still taking place, then they, too, would take protected industrial action.
18. Secondly, both Mr Herdman and Mr Scotton deposed that they were receiving weekly payments from the CFMEU of over $1,000 (whether gross or net they do not say). While they said that they have been made to understand that the CFMEU is shortly to reconsider the continuation of those payments, the CFMEU has offered no evidence to indicate that the payments are likely to cease.
19. Thirdly, although the employees deposed to suffering financial stress, Capcoal submits that since they were not working for weeks before they were informed that their positions would be made redundant, that stress could not be attributed to the termination of their employment but to their engagement in protected action during which they were either not paid wages or paid a reduced wage (see FW Act, s 471).
20. Fourthly, although before the termination of their employment, both employees lived in heavily subsidised housing owned by Capcoal, as Mr Herdman’s wife is independently entitled to free housing, Capcoal has approved Mr Herdman and his wife to continue to live in the same house rent-free. Capcoal has indicated (through Ms Oppermann) its preparedness to allow Mr Scotton to continue to occupy the house in which he resides until the final determination of the substantive proceeding.
21. Fifthly, during the course of the hearing Capcoal indicated that it would restore the applicants’ annual and personal/carer’s leave entitlements in the event that the employees prevailed at the hearing of the substantive application. Furthermore, on termination, Mr Herdman was paid $52,259.90 and Mr Scotton some $89,457.99 by way of redundancy payments, payment in lieu of notice, and accrued but untaken leave entitlements.
22. Thus the injury to the two employees is substantially mitigated.
23. On the other hand, each of the employees said that if a decision is made to end the protected industrial action he would return to work. Protected industrial action has been on foot now for several months. While the evidence does not permit me to say when it will end, I have no doubt it will end. It may also involve shorter stoppages. The parties indicated that a trial is not feasible before March next year. An *ex tempore* decision is highly unlikely. Consequently, it is likely to be many months before the outcome is known. There is every chance that protected industrial action will cease before judgment is pronounced, if not before the hearing. It is true, as Capcoal submitted, that the applicants could always move the Court again for interlocutory relief once the protected industrial action comes to an end. But that would come at a cost and it would not be in the interests of justice to put the parties to the expense of fighting another interlocutory application at that time.
24. Furthermore, I am persuaded that the employees have suffered an injury for which damages would provide an inadequate remedy in that, by reason of Capcoal’s actions, they have been deprived of their rights under the FW Act to engage in protected industrial action.
25. In *Esso Australia Pty Ltd v Australian Workers’ Union* [2016] FCAFC 72; 258 IR 396 at [240] Bromberg J explained the place of protected industrial action in the scheme of the FW Act:

Broadly stated, and consistently with the objects set out at ss 3(f) and 171(a)[, ]the FW Act provides for enterprise-level collective bargaining for the making of enterprise agreements, as a means of enabling industrial parties to resolve their industrial disputes. Collective bargaining is a process in which employees bargain with their employer as a collective rather than individually. To be successful, bargaining usually involves the making of concessions. Sometimes concessions are freely made, but an inherent feature of a collective bargaining regime is the recognition that concessions may need to be extracted through the application of industrial pressure. Industrial action is an available form of pressure and the capacity to lawfully exert such pressure, including by inflicting loss or damage, is permitted but is subject to certain conditions. As to the last-mentioned characteristic of collective bargaining, the FW Act calls permitted industrial action “protected industrial action”.

1. “Industrial action “ is defined in s 19(1) of the Act to mean action of any of the following kinds:
   1. the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
   2. a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
   3. a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
   4. the lockout of employees from their employment by the employer of the employees.
2. Furthermore, only employees covered by the proposed enterprise agreement may vote in a protected action ballot: FW Act, s 453.
3. It follows that Mr Herdman and Mr Scotton may only engage in industrial action as defined if they are employees. It is not to the point that the Act enables the employees to appoint them as their bargaining representatives: s 176. The CFMEU has been appointed and there is no evidence to suggest that there is any prospect either Mr Herdman or Mr Scotton would be appointed in lieu of, or (assuming it were possible) in addition to, the union. If their employment was wrongfully taken from them, subject to the terms of the Act they have also lost their right to withdraw their labour as a means of imposing pressure on the employer to agree to more favourable terms of employment. That is a valuable right for which damages would provide an inadequate remedy.
4. In any case, the merits cannot be ignored and in this case they are an important consideration. In *Samsung* the Full Court said at [67]:

As Sundberg J observed in *Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth* (2009) 81 IPR 339 at [15], when considering whether to grant an interlocutory injunction, the issue of whether the plaintiff has made out a prima facie case and whether the balance of convenience and justice favours the grant of an injunction are related inquiries. The question of whether there is a serious question or a *prima facie* case should not be considered in isolation from the balance of convenience. The apparent strength of the parties’ substantive cases will often be an important consideration to be weighed in the balance: *Tidy Tea Ltd v Unilever Australia Ltd* (1995) 32 IPR 405 at [416] per Burchett J; *Aktiebolaget Hassle v Biochemie Australia Pty Ltd* (2003) 57 IPR 1 at [31] per Sackville J; *Hexal Australia Pty Ltd v Roche Therapeutics Inc* (2005) 66 IPR 325 at [18] per Stone J; and *Castlemaine Tooheys* [*Ltd v South Australia* (1986) 161 CLR 148] at 154 per Mason ACJ.

1. It is therefore necessary to evaluate the strength of the parties’ cases on the evidence as it stands.
2. The only substantive issue at trial will be whether the adverse action was taken for any one of the reasons identified by the applicants, which I shall call a prohibited reason.
3. At the trial the onus of proof on this question will be on Capcoal because the presumption in s 361(1) applies. Here, however, it is on the applicants, because of the operation of s 361(2). Capcoal argues that s 361(2) prevents the Court from taking into account the availability of the presumption at the trial (and therefore the reverse onus) in determining the applicants’ likely success at trial. There is a good deal of authority to the contrary, which Capcoal submits is plainly wrong and should not be followed. Capcoal itself cited six decisions of this Court: See, eg, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 2)* [2011] FCA 953 at [19]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers’ Union (AMWU) v McCain Foods (Aust) Pty Ltd* [2012] FCA 112 at [45]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FCA 563 at [62]; *Construction, Forestry, Mining and Energy Union v Downer EDI Engineering Power Pty Limited* [2012] FCA 661 at [12]; *Construction, Forestry, Mining and Energy Union v Eco Recycler Pty Ltd* [2013] FCA 24 at [44]; and *Chenoskova v The University of Adelaide* [2014] FCA 1436 at [24]. To this list may be added *Police Federation of Australia v Nixon* (2008) 168 FCR 340 at [69] (Ryan J); *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FCA 563 at [63] (Greenwood J); *Construction, Forestry, Mining and Energy Union v Downer* *EDI Engineering Power Pty Ltd* [2012] FCA 661 at [12] (Logan J), and *Bluestar*, decisions under the equivalent provision in the WR Act, s 809(2)*.* I do not intend to suggest that the list is exhaustive. In *Police Federation v Nixon* Ryan J said of s 809(2)

If the effect of s 809(2) is to require an applicant to demonstrate, in the absence of any evidence at all from the respondent, a serious question to be tried as to each element of the cause of action, including the respondent’s reason or reasons for the impugned conduct, the applicant may suffer irreparable damage before he or she can be accorded a final trial at which, *ex hypothesi*, the presumption would enable the cause of action to be made out. I consider that such a restrictive and apparently unjust interpretation should only be given to a provision which occurs in what seems to be a beneficial or facultative legislative scheme, if the language of the subsection intractably requires it. In my view, a construction more consonant with the statutory context and history and the preparatory material is that s 809(2) precludes the court from finding, on an application for an interim or interlocutory injunction, even provisionally, by recourse solely to the presumption, that the respondent’s conduct was for a prescribed reason or for reasons that included a prescribed reason. However, I do not construe s 809(2) as preventing the court, in assessing whether there is a serious issue to be tried, from having regard to the availability of the presumption in the final determination of the application. Similarly, I consider that account can be taken of the ultimate availability of the presumption when assessing the respective strengths of the case for the applicant and that for the respondent as part of exercising the general discretion to grant or withhold interlocutory relief.

1. There is force in this reasoning. I am not satisfied that his Honour or the judges who have followed him are plainly wrong. Be that as it may, the evidence the applicants have adduced on this application is such that, even if the availability of the presumption at the trial is ignored, I am persuaded that they have demonstrated that they have a strong case.
2. I turn first to the decision to implement the proposal for forced redundancies — the first step in the decision-making process.
3. I accept the applicants’ submission that the relevant decision-makers were Mr Heaton, Mr Gentle, and Rod Fury, the Commercial Manager. To determine why the adverse action was taken, the Court is concerned with their reasons. The only evidence of their reasons was adduced by the applicants. Capcoal merely relied on a passage in Ms Oppermann’s affidavit in which she said:

To the best of my knowledge, information and belief, the reasons for the Proposal and the decision to implement it was as described by Deputy President Asbury of the Fair Work Commission in paragraphs 128 to 130 of her reasons for not making a bargaining order as sought by the CFMEU.

1. In paragraphs 128 to 130 of her reasons the Deputy President said that she accepted certain evidence from Mr Heaton and drew certain conclusions from it.
2. I fail to see how this evidence is admissible, let alone probative of the fact in issue. *First*, Ms Oppermann’s belief in the correctness of the conclusions reached by Deputy President Asbury is not relevant. It could not rationally affect either directly or indirectly the assessment of the probability of the existence of the reason in this proceeding. *Secondly*, to the extent that Ms Oppermann’s evidence might be treated as an opinion about the reasons for the Proposal, she does not disclose how she derived the knowledge and information on which that opinion is based. *Thirdly*, to the extent her evidence conveys the Deputy President’s account of Mr Heaton’s evidence and the Deputy President’s conclusions about that evidence, it is a mixture of second-hand hearsay and inadmissible opinion evidence. While second-hand hearsay may be adduced in an interlocutory proceeding if the source of the information is disclosed (see, for example, *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 at [117] per Merkel J; *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL (No 4)* [2012] FCA 1323 at [116] per Lander J and the authorities referred to there), the *Evidence Act 1995* (Cth) makes opinion evidence inadmissible for all purposes unless it falls within one of the exceptions in the Act and this evidence does not. What is more, s 91(1), which makes evidence of a finding of fact in an Australian proceeding inadmissible to prove the existence of a fact that was in issue in that proceeding). I therefore reject the evidence.
3. In any event, this evidence would not be admissible at the final hearing.
4. Capcoal repeatedly attributed the “organisational restructure” which supposedly necessitated the forced redundancies to “an unplanned delay”. For example, in an “Employee Question and Answer” sheet the following appears:

**Q. What is the decision that Capcoal is proposing to make?**

A. Due to an unplanned delay, Capcoal has reviewed the current Mine Plan. From this review Capcoal is considering an organisational restructure that would see Capcoal’s capacity reduced through the parking of the Shovel and ancillary equipment. No decision has been made, and consultation is commencing regarding this proposal.

...

**Q. Are you doing this because of the protected industrial action that the CFMEU has taken?**

A. No. Capcoal has reviewed the current Mine Plan because of an unplanned delay. From this review a proposal to park equipment is being considered. The reasons for the unplanned delay are not relevant to our considerations regarding the option that might be implemented in response to this delay.

...

**Q. Is the proposal in response to an unplanned delay or market conditions?**

A. Both. The unplanned delay triggered a requirement to review the mine plan which also needs to take into account the market conditions is coal prices etc. Despite the recent increases in coal prices Capcoal remains in a commercially challenging environment. However, no decision has been made to progress the proposal.

1. While in that document Capcoal denied the Proposal was due to the protected industrial action taken by the CFMEU, in cross-examination in the FWC, Mr Heaton admitted that the reference to “unplanned delay” was a reference to the protected industrial action, that there was no other unplanned delay unrelated to the industrial action, and that the proposal raised by Capcoal “was because of that unplanned protected industrial action”.
2. In the conversation with Mr Scales on 28 September 2016 Ms Oppermann advised that the company was considering redundancies “as a result of parking up the Rope Shovel” as well as the “unplanned delay”. Mr Heaton conceded in the FWC, and common sense supports the concession, that the rope shovel was parked because of the protected industrial action:

PN628 The reference to the unplanned delay is a reference to the protected industrial action which led to the shovel and the ancillary fleet only being able to be used as you described earlier on a few shifts?—Yes.

1. Mr Heaton also testified that much of the supporting ancillary fleet attached to the shovel was not in use because there were insufficient people at work to run the equipment, and those people were not at work because they were CFMEU members taking protected industrial action in support of their bargaining position.
2. In relation to the second step in the process culminating in the action taken against Mr Herdman, Capcoal identified the relevant decision-makers as Mining Superintendent Corkin, Mining Superintendent Neilson, and Operations Manager Keough. In relation to Mr Scotton, the decision-makers were said to be Coal Handling and Preparation Plant (**CHPP**) Production Superintendent Neroni, Acting CHPP Electrical Superintendent James; Acting CHPP Maintenance Superintendent Ryan, Acting CHPP Superintendent Bettens, and CHPP Manager Karooz.No evidence was adduced from any of these people. There is reason to believe that they, or at least some of them, had nothing to do with the decision to terminate the employment of the two employees and that the process of assessment that they purportedly undertook was not bona fide.
3. *First* and foremost, Messrs Corkin and Keough — two of the three decision-makers said to be involved in the decision affecting Mr Herdman — recorded in a pro forma assessment sheet that they had conducted their assessment after Mr Herdman had been informed that he would be made redundant: Mr Corkin on 30 November 2016 and Mr Keough on 31 (*sic*) November 2016. In Mr Scotton’s case Mr Neroni’s assessment purportedly occurred eight days afterwards on 6 December 2016 and Mr Bettens at an undisclosed time on 28 November 2016, three days after the date of the letter informing Mr Scotton of his redundancy.
4. *Secondly*, the evidence of both Mr Herdman and Mr Scotton (presently, at least, unchallenged) is that the decision-makers had little, if any, opportunity to assess their work.
5. *Thirdly*, there is no evidence to suggest that before the protected industrial action commenced there was ever an issue with the quality of their work or their value to Capcoal. Indeed, to the extent that there is any evidence on the subject it tells against Capcoal’s decision to terminate their employment. Mr Scotton was one of only three people in his crew who was competent and trained to work in all 11 sections of the Washplant. Moreover, he had worked as “a Step-up” Washplant Supervisor on approximately 14 shifts. It is highly unlikely he would have been entrusted with this responsibility if his work and his attitude were not well-regarded. I have already referred to Mr Herdman’s qualifications in mines rescue work and his position in the Mines Rescue Team.
6. Consequently, I accept the applicants’ submission that there is an available inference from the evidence that the value of the employees to Capcoal only diminished after they became involved in union activities and, in particular, the protected industrial action.
7. *Fourthly*, Mr Scotton’s evidence, which was not contested, is that nine coal operators working at the Washplant were made redundant and that seven of them were or had been CFMEU delegates. All nine have been replaced by labour hire employees or contractors, raising a serious question as to whether any of the redundancies in the Washplant, at least, were genuine.
8. I conclude that the strength of the applicants’ case tips the balance of convenience in the applicant’s favour. An interim injunction will restore the status quo ante and in the short term at least, as Capcoal itself acknowledged, that will occasion no inconvenience to the company. Furthermore, Mr Herdman and Mr Scotton gave undertakings to the Court to secure and not access their termination pay in the event that the injunctions were granted.
9. I am not persuaded that relief should be refused because of the delay in the institution of this proceeding.
10. The extent of the delay is insubstantial. The period between the notification to the two employees of the decisions to make them redundant and the institution of proceedings in this Court is two weeks or more precisely 16 days or 12 working days.
11. Capcoal does not claim that it is prejudiced by the delay. It does not suggest, for example, that the delay has resulted in the loss of evidence. Capcoal claims that delay alone can be enough. For that proposition it relies on the following passage from *Meagher, Gummow, and Lehane’s* *Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) at [21‑375]:

[A]uthority is not wanting that on an interlocutory application ... mere delay of itself can (not must) be fatal. Why should a court grant urgent relief when the plaintiff’s tardiness in applying for it casts doubt on the reality of his alleged injury?

1. It is trite to observe, however, that each case turns on its facts. While it is true that no witness gave evidence which explained why it took the applicants two weeks to make this application, there is evidence from which it may be inferred that the applicants were not tardy in applying for relief. Three affidavits were filed with the originating application. They were all affirmed on 14 December 2016. Mr Scales’ affidavit is 366 pages long, Mr Herman’s 58 pages, Mr Scotton’s 99 pages. It is likely that it would have taken some time to take instructions, prepare the affidavits, and assemble the relevant documents. In addition, the CFMEU was preoccupied with preparing for, and presenting, its appeal before the Full Bench.

## Conclusion

1. For the foregoing reasons, the injunctions effecting the reinstatement of Mr Herdman and Mr Scotton pending further order should be granted. The CFMEU has offered the usual undertaking as to damages (see Federal Court of Australia Practice Note GPN-UNDR) and the relief will be granted on that undertaking and the undertakings given by the two men to secure their termination payments.

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| I certify that the preceding ninety-nine (99) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann. |

Associate:

Dated: 23 December 2016