ASUnewsletter

Canon Bulletin • 21 May 2018

FWC Decision rejects Canon's "jurisdictional objection" to GPS Tracking dispute

Members will recall that there was a Hearing in the FWC on the 28 February 2018 regarding Canon's application arguing that the FWC did NOT have the jurisdiction to hear the dispute between the ASU and Canon concerning the GPS tracking of technician's mobile phones. Last Friday, the Commission released its Decision where it said there was a dispute on the GPS tracking issue and therefore rejecting Canon's jurisdictional objection.(see the attached Decision, particularly paragraphs 28, 30, 31, 37, 42, 44 and the Conclusion).

This means the ASU is now free to ask the Commission to list the GPS tracking dispute for Arbitration Hearing again.

However, members must note, that just because we won the Jurisdictional matter, this does NOT mean we will win the Arbitration case. They are 2 separate cases as is made clear in the attached Decision. The matter of the GPS tracking of mobile phones was not the subject of this current Decision. The GPS tracking issue will be fought out in the Arbitration case.

Members will be informed when the FWC decides the dates for the Arbitration Hearing.

If you have any questions, please contact your relevant ASU official below.

Branch	Contact	Email
National Office	Michael Rizzo	mrizzo@asu.asn.au
NSW/ACT	Lauren Hutchins Tom Edwards	lauren@asu.org.au tom@asu.org.au
VIC/TAS	Lisa Darmanin	ldarmanin@asuvictas.com.au
QLD	Tammy Gaze	Tammy.gaze@theservicesunion.com.au
WA	Jill Hugo	jill.hugo@asuwa.org

Join now

Stay informed

www.asu.asn.au

http://twitter.com/ASUnion

www.facebook.com/australianservicesunion

Authorised and published/printed by
Michael Rizzo, National Industrial Officer, Australian Services Union,
Ground floor, 116 Queensberry Street, Carlton South, Victoria, 3053, Australia

A•S•U

DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Australian Municipal, Administrative, Clerical and Services Union
v
Canon Australia Pty Ltd T/A Canon
(C2017/3345)

COMMISSIONER GREGORY MELBOURNE, 18 MAY 2018

Alleged dispute about any matters arising under the enterprise agreement – application of GPS Tracking Policy – jurisdictional objection – dispute not a matter arising under dispute resolution clause.

Introduction

[1] Canon Australia Pty Ltd ("Canon") is implementing a system whereby its technical consultants ("technicians"), who are involved in the repair and servicing of photocopy machines, will have GPS tracking devices installed on their mobile phones. It claims this will enable it to provide an enhanced service to its customers, including through better scheduling of the technicians. It also claims it will be able to provide greater support for the technicians in the field by having a better understanding of their location at any point in time. Canon has also compiled a policy document setting out how the devices are to be used, and how the data gathered will be utilised.

[2] The Australian, Municipal, Administrative, Clerical and Services Union ("the ASU") represents a significant number of the technicians employed by Canon. It has notified a dispute under s.739 of the *Fair Work Act 2009* (Cth) ("the Act") in regard to what Canon now proposes, and claims in its application that Canon is in breach of a number of the provisions in the enterprise agreement that covers the technicians. That Agreement is the *Canon Australia Pty Ltd (Technical Consultants) Enterprise Agreement 2015*[1] ("the Agreement").

[3] The issues have been discussed in a series of conferences in the Commission but to date have not been able to be resolved. Canon agreed to participate in those discussions but foreshadowed that if the ASU sought to have the dispute resolved by way of arbitration it reserved its right to raise a jurisdictional objection in response. The ASU does now seek to have the application determined by way of arbitration and Canon has raised a jurisdictional objection that must be determined before the application can be dealt with any further.

[4] The Commission issued directions for filing and service of submissions and evidence in regard to the jurisdictional objection and the matter was heard on 28 February 2018. Mr Glenn Trestrail, the Senior General Manager Business Transformation, appeared on behalf of Canon. Mr Michael Rizzo, National Industrial Officer, appeared on behalf of the ASU.

The Issue to be Determined

[5] The Act makes clear that the Commission's ability to exercise powers of arbitration in response to an application made under s.739 are not open ended. Sub sections 595(1) and (3) relevantly provide:

> "(1) The FWC may deal with a dispute only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.
>
> …
>
> (3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act."[2]

[6] Section 738 continues to provide, in part:

> "This division applies if:
>
> (a) a modern award includes a term that provides a procedure for dealing with disputes, including a term in accordance with section 146; or
>
> (b) an enterprise agreement includes a term that provides a procedure for dealing with disputes, including a term referred to in subsection 186(6)"[3]

[7] Finally, s.739 provides, in part:

> "(1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
>
> …
>
> (3) In dealing with a dispute, the FWC must not exercise any powers limited by the term."
>
> (4) If, in accordance with the term, the parties have agreed that FWC may arbitrate, however described, the dispute, FWC may do so.
>
> Note: FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595 (2)).
>
> (5) Despite subsection (4), FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.
>
> (6) FWC may deal with a dispute only on application by a party to the dispute."[4]

[8] These provisions in combination make clear that the Commission may only deal with a dispute if it is expressly authorised to do so. Section 738 indicates that the provisions in s.739 apply if a term in an enterprise agreement provides a procedure for dealing with

disputes. Section 739 makes clear that if a term in an enterprise agreement allows the Commission to deal with a dispute then it must not exercise any powers that are limited by that term, and must not make a decision that is inconsistent with the scope of that dispute resolution term.

[9] Clause 39 "DISPUTES AND GRIEVANCES" in the Agreement provides at paragraph (a):

> "All parties agree to abide by the following procedure in the resolution of any dispute/grievance arising under this Agreement or the National Employment Standards."[5]

The Dispute Notification

[10] The Form F10 application filed by the ASU indicates that the dispute relates to a number of issues arising from what Canon now proposes. These are set out in the application under the heading "**2.1 What is the dispute about?**" It is appropriate to set them out in full detail:

> **"2.1 What is the dispute about?**
>
> "The issue with which the employees and the Union is concerned is the introduction by Canon of a "GPS Tracking Policy". The policy is summarised as follows:
>
> > "It is Canon's policy for GPS Tracking in hand-held tool of trade mobile devices to be utilised".
>
> The policy goes on:
>
> > "*Company provided mobile devices will have GPS tracking activated and utilised for the purpose of providing customers with improved visibility of assigned technical resources and for the purpose of allowing for more efficient scheduling of technical consultants (technicians) to ensure improved customer satisfaction and improved compliance with SLA levels*".
>
> The grievance and dispute matters are as follows:
>
> 1. Clause 6(b) of the Agreement provides that it:
>
> > "*...covers all matters or claims which could otherwise be subject to protected action by employees under the Fair Work Act 2009*".
> >
> > Employees are aggrieved by the proposed Policy and dispute its introduction.
> >
> > The introduction of the Policy and the requirements proposed to be imposed on technical consultants by the Policy (e.g. "Using the GPS Tracking capability appropriately each working day") are intrusive and oppressive.

2. Clause 8(c) of the Agreement records a commitment by Canon to

"*minimising any adverse impact to the extent practicable" of its business decisions that impact on employee's personal or working lives*".

A dispute or grievance has arisen about the observance by Canon of that commitment and whether any adverse impact of the business decision to introduce GPS tracking has been minimised to the extent that it is practicable. A very wide range of matters can be identified that could minimise the adverse impact of the policy on employees. (e.g. limit use to real time without recording; prohibit use for any disciplinary purposes; address issues about consent (see below); not provide customer access, restrict required periods of usage, permit genuine/restricted consents (see below))

3. Clause 9 of the Agreement records that the implementation of new technologies as an aid to business improvements is not intended by Canon to be used as "*the primary trigger for disciplinary action*".

The GPS Policy does not reflect that position. Rather, the Policy refers to "*the primary purpose of GPS tracking is not for undertaking disciplinary action*".

The difference between the Agreement provision and the Policy is of significance.

There is dispute and grievance has arisen about the use of the technology for disciplinary action at all, and as expressed in the Policy itself.

4. Clause 23 Overtime and clause 22 Start of Day make provision, as their names suggests, for the commencement of work at a customer's premises and for overtime. Clause 22 refers to travel from an employee's principle place of residence to a job at a customer's premises. The Policy allows for "*customer visibility*" of the location of assigned technicians. The question of what are the relevant working hours under the policy given the terms of Clause 22 during which the GPS device is to be activated is the subject of grievance and dispute. This includes the potential for customer access to employee's personal information (e.g. residence location). The relationship between the Policy and Clause 22 and the application of Clause 22 in respect of the Policy requirements is the subject of dispute and grievance under the Agreement.

5. Clause 26 provides for standby and call out. The clause specifies minimum payment periods and a requirement to be available to work when called out. The relationship between the GPS tracking Policy and the commencement and ending of work under clause 26 is the subject of a dispute and grievance. The question of the application of Clause 26 in the context of the Policy is a matter arising under the Agreement.

6. Clause 10 of the Agreement provides that in respect of questions of privacy Canon is "*subject to statutory privacy obligations*". There is a dispute and grievance about the extent and observance of those obligations. The subject matter of the grievance and disputes includes whether the operation of the

proposed Policy involves the giving of genuine consent under the relevant surveillance devices legislation. This is because the Policy provides for the imposition of onerous and punitive working conditions on employees in the event they decline to give their consent to the tracking arrangements under the relevant Surveillance Devices legislation. In the circumstances the consent provided under coercion is no consent at all and accordingly Canon would not be meeting its statutory privacy obligations by deploying the GPS tracking device.

Further, the question of Canon observing its statutory privacy obligations as referred to in clause 10 gives rise to further dispute and grievance. For example an employee may give a qualified or limited consent under the Surveillance Devices Act (Vic) (or similar legislation) such that the consent does not extend to the recording of location information but is limited to access to real time location data (see the definition of "*use*" in the Act). An employee may also give a consent subject to the data not being provided to customers. A use inconsistent with that restriction may expose both Canon and the customer to action for an offence.

7. The GPS Consent Form to be utilised in conjunction with the proposed policy for the purpose of the consent required by the *Surveillance Devices Act(s)* is a matter of dispute and grievance in that:

    (a) It purports to restrict an employee withdrawing consent once given under the provision of the relevant *Surveillances Devices Act*;

    (b) It purports to severely restrict the rights of an employee to raise concerns about the operation of the policy, and this in the context of the restriction on an employee withdrawing consent; and

    (c) It provides for employees to agree to operate in accordance with Canon's policies and procedures, regardless of changes.

8. The uncertainty of the policy around its reference to operating during working hours is also a matter of dispute and grievance arising under the Agreement given the Agreement references to ordinary hours (Clause 21) and thus working hours.

9. There is also a dispute and grievance about the introduction of the Policy under clause 8 and clause 9 of the Agreement in respect of employees formerly employed under the Oce-Australia Limited Technical Service Enterprise Agreement 2012 who were advised:

"no GPS tracking will be installed in any company equipment regularly in your possession without your prior consent".

That contractual commitment was made to employees it States both with and without the *Surveillance Devices Act* provisions requiring consent. Employees are aggrieved and in dispute in relation to the Policy under the Agreement.

10. Clause 9 provides for Cannon to "*implement new technologies as an aid to business improvements*". The GPS Tracking Policy involves the introduction of such a technology. There is a dispute and grievance about that Policy and the disproportionate impact on employees."[6]

[11] The Commission is accordingly now required to determine whether some or all of the matters raised by the ASU in the application concern a dispute/grievance arising under the Agreement that covers the parties.

The Submissions by Canon

[12] Canon submits at the outset that the Commission does not have jurisdiction to deal with the application because it does not concern "a dispute/grievance arising under this Agreement or the National Employment Standards,"[7] as required by the dispute resolution clause in the Agreement.[8] It submits instead that it is implementing a policy regarding the use of GPS tracking devices, which does not contravene any of the provisions in the Agreement. The ASU is simply seeking to have the Commission revamp the policy because some of its members are unhappy about what it contains. It continues to submit that while the application refers to various provisions in the Agreement the ASU's concerns do not actually go to the substance of those matters. The various clauses in the Agreement have simply been referenced in an endeavour to invoke the jurisdiction of the Commission. It also submits that the "true character of the dispute"[9] is about "the introduction of the policy itself, not the specific terms."[10] It continues to provide the following submissions about each of the matters referred to by the ASU in its Form F10 application:

- **Point 1** – Canon submits that clause 6 in the Agreement is a no extra claims provision, and it is not pursuing an "extra claim" in terms of what it now proposes. Clause 9 instead permits it to introduce new technologies, and the fact that some employees might not be happy about what is being proposed does not, of itself, give the Commission power to deal with the matter.

- **Point 2** – Canon submits that clause 8(c) of the Agreement needs to be read in conjunction with the remainder of the clause which states, "The process described below aims to assist in this process."[11] In its submission the clause is about a process of consultation and the ASU has not claimed Canon has failed to consult. Therefore, there is no dispute arising in relation to this sub clause.

- **Point 3** – Canon submits that the ASU is not claiming that the dispute arising under clause 9 of the Agreement relates to the introduction of new technology. It refers instead to the extent to which the technology triggers, or can be used in disciplinary matters or processes. However, the policy simply repeats the relevant words in the Agreement and there is no dispute in relation to these provisions.

- **Point 4** – Canon submits that the GPS policy has no impact on the "START OF DAY" or "OVERTIME" provisions in clauses 22 and 23 of the Agreement, and the

ASU has again failed to establish a valid basis for a dispute arising under these clauses.

- **Point 5** – Canon makes the same submission as above about the reference to an alleged dispute under clause 26, "STAND-BY AND CALL-OUT."

- **Point 6** – Canon submits that the provisions in clause 10(e) simply represent a statement of fact and there can be no dispute about the application of this sub clause. It continues to submit that the Commission can have no role in determining whether it has complied with its obligations under existing privacy legislation.

- **Point 7** – Canon reiterates the above submission.

- **Point 8** – Canon submits that the GPS policy has no bearing or impact upon clause 21 "HOURS OF WORK," despite the claim by the ASU about the "uncertainty of the policy around its reference to operating during working hours."[12] It again submits the ASU has not made out a valid basis to establish a dispute arising under this clause.

- **Point 9** – Canon submits that the claim it has breached a contractual commitment regarding a group of employees, who were previously employed by a business that Canon acquired, cannot constitute a dispute under the Agreement, regardless of the merits or otherwise of their claim.

- **Point 10** – This matter again deals with clause 9 of the Agreement, and the claim that the policy has a disproportionate impact on some employees. Canon again submits that the ASU takes issue with the introduction of the policy, rather than with the impact of the introduction of the GPS tracking technology. It continues to submit that the introduction of the policy, as opposed to the introduction of the technology, is not a matter arising under the clause. It also rejects the claim that the policy has a disproportionate impact on some employees, and submits that the ASU has not been able to demonstrate how this occurs. It continues to submit that, in any case, it is not a matter that is capable of forming the basis of a dispute.

The Submissions by the ASU

[13] The ASU submits that the Commission has a broad discretion under the Act to involve itself in dealing with disputes that arise in the workplace, and it is not necessarily constrained by "black letter law" in the way that a Court might be. It continues to submit that the issues in dispute are not minor or incidental matters, but instead involve fundamental issues that concern the level of trust that exists between Canon and its employees, and have the potential to impact broadly on the working lives of the technicians.

[14] The ASU also refers to clause 39 "DISPUTES AND GRIEVANCES" in the Agreement and the words in sub clause 39(a):

> "All parties agree to abide by the following procedure in the resolution of any dispute/grievance arising under this Agreement or the National Employment Standards."[13]

[15] It also refers to the decision in *Construction, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Thiess Pty Ltd*[14] which concerned a dispute resolution clause in an enterprise agreement which referred to procedures to "settle disputes and grievances relating to any and all matters arising out of or in connection with the application or interpretation of this Agreement or the National Employment Standards ("NES")."[15] It makes particular reference to the following paragraphs from that decision:

> "[44] In *Amcor* Kirby J, speaking of a certified agreement, said (at 270) that:
>
> > "The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combine to suggest that the construction to be given to cl 55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement."
>
> The need to have regard to the language of an agreement "understood in the light of its industrial context and purpose" was also emphasised by Gleeson CJ and McHugh J (at 246) and by Gummow, Hayne and Heydon JJ (at 253).
>
> …
>
> [47] Attention must, however, first be directed to the language of Clause 15.1. The Clause is plainly intended to have operation in a wide range of circumstances. It prescribes procedures which are designed (relevantly) "to settle disputes and grievances relating to any and all matters arising out of or in connection with the application or interpretation of this Agreement…": see Clause 15.1(a)(i). The Agreement contemplates that during its life, disputes and grievances will arise between the parties which will need to be resolved. Not all disputes and grievances which might conceivably occur on the project will be subject to the dispute settling procedure. The operation of Clause 15.1 will only be attracted if they can be linked to "the application or interpretation" of the Agreement.
>
> …
>
> [49] All parties accepted that the phrases "relating to", "arising out of" and "in connection with" were of wide import. They were correct to do so.
>
> …
>
> [51] The phrase "arising out of" implies "a sense of consequence": see *Government Insurance Office (NSW) v RJ Green & Lloyd Pty Ltd* (1966) 114 CLR 437 at 447 (per Windeyer J). It refers to a less immediate association than a direct causal relationship between the dispute or grievance on the one hand and the application and interpretation of the Agreement on the other.
>
> …
>
> [64] In my view the ordinary and natural meaning of the word "application" extends to a decision by the respondents, made under Clause 1.3, to terminate the

operation of the 4 on 4 off rostering arrangement. In doing so they have made use of or applied the provision to bring about a change for which the Agreement provides."[16]

[16] It submits that the Federal Court decision makes clear that a broad interpretation should be applied to the word "application," and the phrases "relating to," "arising out of," and "in connection with" were of "wide import."[17]

[17] The ASU continues to submit that the use of the word "any" in the dispute resolution clause in this matter also requires that a broad interpretation be given to the words in the clause, and to the scope of matters that can be brought under clause 39.

[18] It also makes reference to the Full Bench decision in *Shop, Distributive and Allied Employees Association v Big W Discount Department Stores* ("*Big W*"),[18] and its conclusions about whether the dispute in question was over the application of the Agreement. It refers, in particular, to paragraph [23] of the decision when the Full Bench stated:

> "Although the referral of the dispute over the application of the agreement is narrower than the referral considered in *Heyman v Darwin*, what comprises a dispute over the application of the agreement should not be narrowly construed; to do so would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement."[19]

[19] It also refers to paragraph [30] where the Full Bench concluded:

> "The agreement plainly commits the parties to working towards and maintaining a healthy and safe work environment. A dispute about how that is to be achieved is a dispute over the application of the agreement. The Commissioner erred in finding to the contrary."[20]

[20] The ASU continues to submit that the dispute in the present matter is clearly one that arises under the Agreement. It concerns the application of certain clauses of the Agreement, and Canon's adherence to those obligations as a consequence of its intention to introduce the GPS tracking system. It also submits that it is not merely a dispute that is simply about the terms of the policy.

[21] The ASU continues to provide the following submissions about each of the matters raised in Canon's submissions concerning the matters set out in the application:

- **Point 1** – the ASU submits that its reference to clause 6(b) of the Agreement merely confirms that it is intended to cover all matters or claims which could otherwise be subject to "protected action" by employees, which includes the subject matter of clause 8(c). In its submission the introduction of the GPS policy is both "intrusive and oppressive"[21] in terms of its impact on the technicians, and is therefore directly relevant in the context of clause 8(c) which states:

  > "Canon acknowledges that some business decisions will impact on employees personal and working lives and is committed to minimising any adverse impact to the extent that is practicable. The process described below aims to assist in this process."[22]

- **Point 2** – The ASU again makes specific reference to clause 8(c) in the Agreement and submits that a dispute exists about Canon's observance of and its commitment to this obligation and, in particular, whether any adverse impact of the decision to introduce the GPS tracking system has been minimised to the extent practicable. It submits that there are a number of things that can and should have been done to minimise the adverse impact of what Canon is proposing.

- **Point 3** – the ASU next refers to clause 9 "NEW TECHNOLOGIES" which states:

> "From time to time Canon may implement new technologies as an aid to business improvements. It is not Canon's intention to use these new technologies (being new technologies introduced after the commencement of operation of this agreement) as the primary trigger for disciplinary action; however Canon reserves the right to use all technology as part of an investigation."[23]

It submits that there is a significant difference between what clause 9 permits and what the policy document now proposes. It refers, in particular, to the following words in the document:

> "[H]owever Canon reserves the right to use all technologies as part of an investigation. Accordingly, the information obtained through GPS Tracking may be used by Canon as part of an investigation into workplace matters including disciplinary purposes and as evidence during interview and as evidence during any interviews and disciplinary procedures in compliance with the Disciplinary Procedures set-out in the Canon Australia Technical Consultants Enterprise Agreement."[24]

In its submission a dispute exists about the extent to which the new GPS tracking technology is to have a role in any exercise of disciplinary action.

- **Point 4** – the ASU next makes reference to clause 22 "START OF DAY" which deals with travel from home to a customer's premises. It makes clear that an employee may be required to finish a work cycle at a customer's premises, and these and other factors necessitate an acceptance of scheduling flexibility. However, the GPS policy document requires technicians to provide regular updates about their location. It also enables enhanced customer visibility of their locations. In addition, it foreshadows that technicians can be required to log in prior to leaving home and prior to actually commencing work. Therefore, in its submission a dispute exists about what constitutes the actual working hours of the technicians, and whether the policy conflicts with clause 22. The issues about what are ordinary working hours could also impact in terms of clause 23 "OVERTIME."

- **Point 5** – the ASU next refers to clause 26 "STAND-BY AND CALL-OUT," which specifies minimum payments when employees are on standby or are called out. It submits these provisions could be impacted by the requirements in the policy to provide consent before tracking, and for technicians to update their current locations during working hours.

- **Point 6** – the ASU submits that Canon is subject to statutory privacy obligations which are primarily derived from State-based legislation. These extend to the use of surveillance, and the collection of privacy information. It continues to submit that a dispute accordingly exists about the extent to which Canon is complying with these obligations, given paragraph (e) in clause 10 of the Agreement.

- **Point 7** – the ASU next submits that there is a dispute about the use of the GPS consent form relied upon by Canon, and its interaction with relevant legislative requirements. The consent form purports to restrict an employee from withdrawing consent once given. It also restricts the rights of an employee to raise concerns about the operation of the policy, and commits them to agree to operate in accordance with the system, regardless of any changes made in the future. A dispute accordingly exists about whether Canon has complied with the relevant legislative requirements regarding its statutory privacy and surveillance obligations in terms of the use of the consent form.

- **Point 8** – This matter concerns hours of work and raises the same issues referred to in regard to clauses 22 "START OF DAY" and 23 "OVERTIME."

- The ASU finally indicated that it no longer relies on the additional grounds set out in points 9 and 10 of its application.

Consideration

[22] The parties clearly have divergent views about the impact of what Canon is now proposing. It contends that the introduction of GPS tracking devices will enable it to provide an enhanced service to its customers in what is an extremely competitive market. It also claims it will be able to provide greater support to its technicians in the field. However, the ASU and its members have a different view. They claim the changes constitute an unreasonable intrusion into their existing working arrangements, and go to the heart of the relationship with their employer.

[23] However, the Commission is not concerned at this time with the respective merits of what Canon now proposes. It is instead required to deal with the threshold issue of whether it has jurisdiction to deal with the dispute notified by the ASU. It is appropriate at the outset to have regard to the approach that should be adopted in determining the nature and extent of the Commission's powers in this context.

[24] The ASU refers to the decision of Tracey J in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Thiess Pty Ltd*.[25] His Honour makes reference in that decision to the often quoted extract from the decision of Madgwick J in *Kucks v CSR Limited* (1996) 66 IR 182 at 184:

> "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context,

despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."[26]

[25] Tracey J continued to state:

"[46] The construction issues in the present case do not turn on jargon or Industrial usage. It is, however, necessary to have regard to the context in which clause 15.1 is to be found and to the purposes which it and the Agreement as a whole are designed to serve. It is also necessary to take into account the fact that the Agreement is a greenfields agreement with multi union parties which is designed to regulate the terms and conditions of hundreds of workers on a unique project located in a remote part of Victoria.

[47] Attention must, however, first be directed to the language of Clause 15.1. The Clause is plainly intended to have operation in a wide range of circumstances. It prescribes procedures which are designed (relevantly) "to settle disputes and grievances relating to any and all matters arising out of or in connection with the application or interpretation of this Agreement …": see Clause 15.1(a)(i). The Agreement contemplates that during its life, disputes and grievances will arise between the parties which will need to be resolved. Not all disputes and grievances which might conceivably occur on the project will be subject to the dispute settling procedure. The operation of Clause 15.1 will only be attracted if they can be linked to "the application or interpretation" of the Agreement.

[48] The draftsman has employed very broad language in forging the link between relevant disputes and grievances and the Agreement. The link will be established if the disputes and grievances can be said to relate to "any and all matters arising out of or in connection with" the application or interpretation of the Agreement.

[49] All parties accepted that the phrases "relating to", "arising out of" and "in connection with" were of wide import. They were correct to do so."[27]

[26] However, after further consideration he concluded:

"[63] Resort to such broader considerations has been of limited assistance to me in resolving the conflicting construction arguments. In the end I have concluded that the issue is to be resolved, principally, by reference to the language employed by the parties in framing their agreement. I consider that language to be clear."[28]

[27] The ASU also made reference to the decision of the Full Bench in *Big W*. It was dealing with a dispute resolution clause that was worded differently to that in the present matter. However, the Full Bench came to the following conclusions:

"[23] Although the referral of a dispute over the application of the agreement is narrower than the referral considered in *Heyman v Darwins*, what comprises a dispute over the application of the agreement should not be narrowly construed; to do so

> would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement.
>
> [24] *Heyman v Darwins* was followed by the High Court of Australia in *Codelfa Construction Pty. Ltd. v State Rail Authority of New South Wales* (1981-1982) CLR. 337. A liberal approach to the width to be accorded to an arbitration clause may also be gleaned from *QH Tours Limited v Ship Design Management (Aust) Pty Limited* (1991) 33 FCR 227.
>
> [25] We think the Commissioner erred in construing the dispute narrowly as "*the alleged refusal of Big W, to provide anti-fatigue matting for SDA members, engaged as door greeters at the Broadmeadows and Forest Hill stores*". In our view it was a dispute, more broadly, about occupational health and safety and the provision of safe and healthy working conditions. In the notification of the dispute that initiated the proceedings the steps taken to resolve the dispute that had been taken were set out. It clearly disclosed that a member of staff, a door greeter, had been experiencing discomfort, that she had supplied her own anti-fatigue matting, that she had been told by management to remove it and that she had received a doctor's certificate advising her to use anti-fatigue matting."[29]

[28] I am satisfied after having regard to these authorities that the scope of a dispute resolution term in an enterprise agreement must be determined principally by reference to the language used by the parties to the agreement. However, that language should not be narrowly construed. I have sought to deal with the present matter on the basis of these authorities.

[29] As indicated at the outset the dispute resolution clause relevantly states that it is intended to enable "…. the resolution of any dispute/grievance arising under the Agreement or the National Employment Standards."[30] The Commission is accordingly now required to consider the character of the disputes notified by the ASU, and whether they can be said to arise under the Agreement.

[30] However, one matter also needs to be dealt with at the outset. Canon submits that a distinction should be drawn between the introduction of GPS tracking technology on the one hand, and the introduction of a GPS tracking policy on the other. It submits that it is simply proposing to introduce a GPS policy at this time and, therefore, there is no dispute arising at this point about the terms in the Agreement in the context of the development of that policy document. The ASU rejects this submission and submits that the dispute is not simply about the development of a policy document, but is instead about the proposed implementation of the GPS tracking system, and Canon's consequent failure to abide by various clauses in the Agreement in the context of these changes.

[31] I am not persuaded by Canon's submissions in this regard. The so-called GPS Tracking Policy document policy is not simply a statement of policy, but is instead a document that details how the introduction of the GPS tracking system is to be implemented. For example, it states at the outset "This policy sets out how Canon will implement GPS tracking in hand-held tool of trade mobile devices and how it will use data gathered by those devices."[31] It continues to provide relatively detailed instruction about what is to apply, both for those technicians who consent to use the GPS tracking system and those who do not, including what can potentially result from "Failure to Comply with this Policy."[32] It also details how the technicians are to interact with the GPS technology, and how information

gathered from the tracking devices is to be used. In summary, while Canon describes it as a policy document I am satisfied that it can be more accurately described as a guide to the implementation of the changes associated with the introduction of the GPS tracking system. I am also satisfied as a consequence that the Commission is entitled to consider whether the character of the dispute now raised by the ASU in response to these proposed changes concerns a dispute or grievance arising under the Agreement.

[32] The Commission is next required to categorise the different matters referred to by the ASU in its dispute notification in order to determine whether any or all of them concern a dispute or grievance arising under the Agreement.

[33] The ASU first refers to sub clause 6(b) of the Agreement which provides, "Up to the nominal expiry date, this Agreement covers all matters or claims which could otherwise be subject to protected action by employees under the Fair Work Act 2009."[33] The ASU continues to submit that its members are aggrieved by the proposed policy and its introduction, and a dispute accordingly arises in the context of that sub clause. I do not accept this submission. The sub clause is simply a statement about the existing scope of the Agreement. It does not permit or enable any additional matters that might have been pursued by means of protected industrial action, prior to the approval of the Agreement, to now be the subject of a dispute notification.

[34] The ASU next makes reference to sub clause 8(c) of the Agreement which states, "Canon acknowledges that some business decisions will impact on employees' personal and working lives and is committed to minimising any adverse impact to the extent that is practicable. The process described below aims to assist in this process."[34] It continues to submit that a dispute exists about whether Canon has had sufficient regard to this commitment to minimise any adverse impact of its business decisions, to the extent practicable, on its employees' personal and/or working lives.

[35] Canon submits in response that the sub clause needs to be read in conjunction with the remainder of the wording in the clause which continues to state, "The process described below aims to assist in this process."[35] The clause then sets out the steps involved in a process of consultation. Canon accordingly submits that the sub clause is about the process of consultation, and the dispute notification does not suggest it has failed to consult. Therefore, no dispute arises.

[36] These circumstances are similar to those considered by the Full Bench in *Big W*. It was dealing with a term in an Agreement concerned with occupational health and safety, which stated at the outset, "BIG W, its Associates and the SDA are committed to achieving and maintaining healthy and safe working conditions in all BIG W workplaces by abiding by all relevant Occupational Health & Safety legislation."[36] The Full Bench indicated in response at [30]:

> "The agreement plainly commits the parties to working towards and maintaining a healthy and safe work environment. A dispute about how that is to be achieved is a dispute over the application of the agreement."[37]

[37] I am satisfied that a similar conclusion can be reached in this matter. The Agreement commits Canon to working to minimise "any adverse impact"[38] of its business decisions on its

"employees' personal and working lives"[39] to the extent practicable. A dispute about how that is to be achieved is accordingly a dispute over the application of the Agreement.

[38] However, it should also be emphasised that in coming to this conclusion the Commission is obviously not expressing any concluded view about whether Canon is, in fact, in breach of its obligations under the Agreement. It has instead simply concluded that a dispute exists about whether this is the case. It can also be noted that this same qualification exists in regard to each of the Commission's subsequent findings in this matter.

[39] The dispute notification next makes reference to clause 9 of the Agreement which deals with the introduction of "NEW TECHNOLOGIES." It refers, in particular, to the reference to new technology not being used "as the primary trigger for disciplinary action."[40] The ASU then refers to an extract from the policy document which states, "It is not Canon's intention is to use new technologies as the primary trigger for disciplinary action; however Canon reserves the right to use all technology as part of an investigation."[41] The ASU submits in response that there is a significant difference between what the clause in the Agreement permits, and what is now proposed in the policy. A dispute accordingly exists about what role the new GPS tracking technology can have in any disciplinary action taken in regard to an employee or employees.

[40] Canon submits in response that the policy simply restates what is contained in the Agreement and therefore no dispute exists.

[41] It is noted in response that the wording in the policy does reflect the terms in the Agreement, which indicate that new technology is not intended to be used as the primary trigger for disciplinary action, although it may be used as part of any investigation. However, the policy contains some additional words about what this might involve, namely that it may be used "as part of an investigation for workplace matters including disciplinary purposes and as evidence during any disciplinary interviews and procedures in compliance with the Disciplinary Procedures set-out in the Canon Australia Pty Technical Consultants Enterprise Agreement."[42]

[42] I am again satisfied that the ASU has raised a dispute about a matter arising under the Agreement. In this case the dispute concerns the extent to which the new GPS technology can be used in any disciplinary action taken in regard to an employee or employees.

[43] The ASU next makes reference to clauses 22, 23 and 26 of the Agreement, which deal with "START OF DAY," "OVERTIME," and "STAND-BY AND CALL-OUT." It notes in this context that clause 22 provides that an employee's work cycle may start and finish at a customer's premises. It also sets out other circumstances that can constitute being at "work." It also refers to the references in the policy document to improved "customer visibility of assigned technical resources,"[43] and the requirements regarding reporting of locations at different times for both the technicians who consent to the use of the tracking devices and those who do not. It submits these proposals raise issues in terms of Canon's compliance with clauses 22 and 23. Canon simply submits in response that what is now proposed has no impact in terms of these clauses.

[44] In reviewing the policy document it refers in the main to arrangements that apply during working hours. However, it also refers to arrangements which, for example, "enable technicians to log in to the application prior to commencing travel to their first job of the

day…"[44] I am again satisfied as a consequence that a dispute exists about a matter arising under the Agreement, namely in this case to do with the "START OF DAY", "OVERTIME" and "STAND-BY AND CALL-OUT" provisions in the Agreement.

[45] The ASU next makes reference in the dispute notification to clause 10 in the Agreement dealing with "ACCESS TO RECORDS AND PRIVACY." It refers, in particular, to sub clause 10(e) which states, "The Canon Australia group of companies is subject to statutory privacy obligations."[45] The dispute notification raises issues about Canon's compliance with this requirement and the nature of the consent that employees are required to give before tracking devices can be used. It refers, in particular, to the Consent Form that Canon proposes to use in order to comply with the relevant legislative requirements. Canon submits in response that the sub clause is simply a statement of fact and no dispute arises as a consequence.

[46] Clause 10 is headed "ACCESS TO RECORDS AND PRIVACY." It essentially appears to deal with four different matters. Paragraphs (a) and (b) concern the requirement for employees to be provided with access to the Agreement. Paragraph (c) is concerned with employee access to their personal files, and paragraph (d) with employee appraisals. Paragraph (e) then contains the following statement. "The Canon Australia group of companies is subject to statutory privacy obligations."[46]

[47] The principles concerning the interpretation of an instrument, such as an enterprise agreement, make clear that the relevant words should be given their plain and ordinary meaning, as far as possible, and it is not for the Commission to be recasting the terms agreed to by the parties. The relevant words in this matter clearly have a plain and ordinary meaning. The only possible qualification in terms of that understanding is whether they can be said to relate to the other matters listed in clause 10 of the Agreement, or whether paragraph (e) stands alone.

[48] Given that each of the sub clauses in clause 10 deals with separate matters under the broad heading of "ACCESS TO RECORDS AND PRIVACY" I am satisfied that a plain and ordinary meaning also suggests that sub clause (e) is also a stand-alone term under that broad heading. It is therefore a term which relates to Canon only and can be described as being more in the nature of a statement of fact, rather than a term which creates an obligation on one or other of the parties.

[49] It can be contrasted with the circumstances in *Big W* where the relevant term created a joint obligation on both parties, and then set out a series of steps in regard to how that outcome was to be achieved. A dispute about the nature of that process was accordingly found by the Full Bench to be a dispute over the application of the Agreement. Clause 10(e) in this matter is of a very different character. It does not involve a joint obligation imposed on both parties, and arguably creates no obligation at all. It can be described instead as essentially being a statement of fact when it simply states that Canon is subject to statutory privacy obligations. Whether in fact Canon actually complies with its statutory privacy obligations, whatever they might be, will be a matter to be dealt with elsewhere.

[50] By way of further elaboration the extent to which a dispute might arise in regard to clause 10(e) is perhaps limited to a situation where Canon states that it is not subject to statutory privacy obligations. It would then appear to be in breach of what is stated in the sub clause. However, that is not what the nature of the dispute now claimed by the ASU is about.

[51] In summary, I am not satisfied that a dispute exists in regard to sub clause 10(e) of the Agreement based on the matters referred to in paragraphs 6 and 7 of the ASU's dispute notification. In other words the issues raised in the application about alleged breaches of privacy laws are not a dispute over the application of the Agreement. However, if the ASU or its members have concerns about compliance with privacy obligations then they are obviously free to pursue those concerns in whatever forums might be appropriate.

Conclusion

[52] The Commission finds, in conclusion, that a dispute exists as a consequence of the application by the ASU in regard to those terms in the Agreement that have been identified in this decision. As indicated, the relevant terms in the Agreement have been highlighted in the decision and are not restated now.

[53] The Commission also reiterates that this is the extent of its findings at this time, and emphasises that in the context of this decision it has not come to any concluded view about whether or not Canon is, in fact, in breach of its obligations under the Agreement.

COMMISSIONER

Appearances:

M Rizzo for the Applicant.

G Trestrail for the Respondent.

Hearing Details:

2017.
Melbourne:
February 28.

Printed by authority of the Commonwealth Government Printer

<PR607065>

[1] AE417507.

[2] *Fair Work Act 2009* (Cth) s 595.

[3] Ibid s 738.

[4] Ibid s 739.

[5] AE417507 cl 39(a).

[6] Form F10, lodged by Applicant 21 June 2017, question 2.1.

[7] AE417507, cl 39(a).

[8] Respondent's submissions re jurisdictional objection, received 16 February 2018, p 2.

[9] Ibid, p 7.

[10] Ibid.

[11] AE417507, cl 8(c).

[12] Respondent's submissions re jurisdictional objection, received 16 February 2018, p 6.

[13] AE417507, cl 39(a).

[14] [2011] FCA 1020.

[15] *Thiess Degremont ("TD") and AMWU, AWU, CEPU, and CFMEU Victorian Desalination Project Greenfields Agreement 2009* [AE873094].

[16] *Construction, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Thiess Pty Ltd* [2011] FCA 1020 (31 August 2011) [44], [47], [49], [51] and 64.

[17] Ibid at [49].

[18] *Shop, Distributive and Allied Employees Association v Big W Discount Department Stores* (PR924554, AIRC, Watson SDP, Kaufman SDP and Foggo C, 12 November 2002).

[19] Ibid, [23].

[20] Ibid, [30].

[21] Applicant's submissions re jurisdictional objection, dated 23 February 2018, [18].

[22] AE417507, cl 8(c).

[23] AE417507, cl 9.

[24] Attachment to email correspondence from Respondent to Fair Work Commission, received 7 February 2018, "GPS Tracking Policy".

[25] [2011] FCA 1020 (31 August 2011).

[26] *Kucks v CSR Limited* (1996) 66 IR 182, 184

[27] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Thiess Pty Ltd* [2011] FCA 1020 (31 August 2011) [46]-[49].

[28] Ibid, [63].

[29] *Shop, Distributive and Allied Employees Association v Big W Discount Department Stores* (PR924554, AIRC, Watson SDP, Kaufman SDP and Foggo C, 12 November 2002) [23]-[25].

[30] AE417507, cl 39(a).

[31] Attachment to email correspondence from Respondent to Fair Work Commission, received 7 February 2018, "GPS Tracking Policy", p 1.

[32] Ibid, p 3.

[33] AE417507, cl 6(b).

[34] AE417507 cl 8(c).

[35]Ibid.

[36] *Big W Certified Agreement 2000*, cl 2.6(a), AG772004.

[37] *Shop, Distributive and Allied Employees Association v Big W Discount Department Stores* (PR924554, AIRC, Watson SDP, Kaufman SDP and Foggo C, 12 November 2002) [30].

[38] AE417507, cl 8(c).

[39] Ibid.

[40] Ibid, cl 9.

[41] Ibid.

[42] Attachment to email correspondence from Respondent to Fair Work Commission, received 7 February 2018, "GPS Tracking Policy", p 3.

[43] Ibid, p 1.

[44] Ibid, p 2.

[45] AE417507, cl 10(e).

[46] Ibid.