DECISION

Fair Work Act 2009
s.739—Dispute resolution

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

COMMISSIONER GREGORY MELBOURNE, 13 JULY 2018

Alleged dispute about any matters arising under the enterprise Agreement – application of GPS Tracking Policy.

Introduction

[1] Canon Australia Pty Ltd ("Canon") wants to enable its Technical Consultants or Field Services Technicians ("Technicians"), who are involved in the installation, repair and servicing of photocopy machines, to have GPS tracking devices installed on their mobile phones. It claims this will enable it to provide an enhanced service to its customers by 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 locations at any point in time. It has compiled a policy document setting out how the system is intended to operate, 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 notified a dispute under s.739 of the *Fair Work Act 2009* (Cth) ("the Act") in response to what Canon is proposing. It claims that Canon is in breach of various provisions in the enterprise agreement that covers the Technicians, being the *Canon Australia Pty Ltd (Technical Consultants) Enterprise Agreement 2015*[1] ("the Agreement").

[3] The application has been dealt with in conference before the Commission on several occasions. The Commission also issued a Recommendation in July last year that was intended to assist the parties to reach an agreed resolution of the matters in dispute. However, these processes have not enabled the dispute to be resolved.

[4] Canon also foreshadowed that if the dispute was not able to be resolved on an agreed basis then it would press various jurisdictional objections, as some or all of the matters raised by the ASU in the dispute notification did not concern a dispute/grievance arising under the Agreement. Those jurisdictional objections were dealt with in a hearing earlier this year, and a decision handed down on 18 May.[2] It is not necessary to go to that decision in any detail at this point, however, the Commission did find that a number of the matters in the ASU's application were concerned with a dispute over the application of the Agreement. However, it

also found that those matters dealing with alleged breaches of privacy laws were not a dispute over the application of the Agreement and if the ASU, or its members, had concerns about compliance with privacy obligations they were obviously free to pursue those concerns in the appropriate forums.

[5] The ASU now seeks to have the matters in dispute dealt with by way of arbitration. This decision deals with those matters. Mr Michael Rizzo, National Industrial Officer, appeared on behalf of the ASU. Mr Glenn Trestrail, Senior General Manager, appeared on behalf of Canon.

The Applicant's Evidence and Submissions

Mr Christopher Roberts

[6] Mr Chris Roberts has worked as a Field Services Technician with Canon since 1980 and installs and carries out general repairs and maintenance of Canon's equipment at its client's premises.

[7] He indicated in his witness statement that he could not see how the GPS tracking system could enhance customer visibility or the efficient scheduling of the Technicians, given he already routinely reports the status of particular jobs and his location on a regular basis to his Supervisor, his Task Manager, and the clients. There are also procedures in place already in regard to health and safety, and he did not believe the GPS tracking system would assist in this regard. He said, "My work is also predominantly based in metropolitan areas which means I can readily access telephone coverage or other assistance and so I do not believe that tracking of my location would improve my health and safety in any way."[3]

[8] Mr Roberts already provides estimates to clients, through personal contact, about when he will arrive at their premises. He was concerned that they would now use the GPS tracking system to estimate the time of arrival of the Technician in circumstances where they were not aware of other factors, such as the traffic conditions, that might impact on the arrival time. He also indicated in cross-examination that he believed the current system, whereby Technicians informed their Supervisors and Task Managers by phone and email about their current locations, operated effectively.

[9] He was also concerned that the system would enable tracking of personal information, such as the location of his residence or other personal circumstances. This could be an issue, in particular, in the morning as the Technicians generally travel from home to the client's premises at the start of the day. He also indicated that if he was required by law to provide his consent for the use and implementation of the GPS tracking system then "I would elect not to provide my consent."[4] The consequence of this decision would mean he would be required by the GPS policy to update his current location at specified times, which would act to delay the delivery of services to clients. For example, if he was driving he would be required to stop in order to update his current location.

[10] He was also concerned that the GPS policy could be changed at any time without the agreement of the Technicians necessarily being required and said, "This would reduce the certainty I have in my employment conditions and lead to insecurity at work."[5] However, he also acknowledged in cross-examination that other policies Canon had in place could be changed without agreement. However, he still considered that the GPS policy should remain

in place for a period of time before it was changed, and any changes should be discussed between the parties before being implemented.

The ASU's Submissions

[11] The ASU submits at the outset that the principles to be applied when interpreting an enterprise agreement have been comprehensively dealt with by the Full Bench in the decision in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Limited* (*'Berri'*)[6] and those principles should be applied, where relevant, in the present context.

[12] Its' submissions next refer 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."[7]

[13] It submits that this requires the Commission to determine whether the introduction of the GPS tracking policy will have any adverse impact on the employees' personal and working lives and, if so, whether it is capable of being minimised where practicable.

[14] In its submission the term "any adverse impact" is one of broad application and relates to both the personal and working lives of the employees. It submits the proposed changes in this case will have an adverse impact on the Technicians in the following ways:

> "a. It will impinge upon their privacy both in their personal and working lives;
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> b. It will impose new and additional obligations upon employees;
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> c. It will expose employees to new avenues for discipline in their work lives;
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> d. It will expose employees to onerous additional reporting obligations in their work lives, should they elect not to provide consent to the installation of the device; and
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> e. It subjects employees to further undefined and unidentified adverse impact in the event that Canon amend the GPS Tracking Policy." [8]

[15] In regard to the privacy issues it makes reference to the variety of data to be obtained and stored by Canon, and submits the policy says little about how this data will actually be used. It also fails to adequately prevent data about the location of a Technician being transmitted and recorded outside of work hours and, for example, data about a Technician's home address may be disclosed to a client if the Technician is still at home after 8.30 a.m.. Further issues may arise if the Technician does not turn off or disable the GPS tracking device outside of work hours. Additional concerns arise from the fact that Canon has now indicated that the data will be transmitted and processed by employees in the Philippines.

[16] The Technician's concerns are also accentuated by the fact the GPS tracking policy imposes a number of new obligations upon them, and makes clear that failure to comply with the policy is a disciplinary matter, which could result in disciplinary action up to and

including termination of employment. In addition, the new technology can be used as part of any disciplinary investigation. These are both additional adverse impacts that are being imposed upon the Technicians.

[17] The ASU continues to submit that it has proposed a number of examples in its application about how the adverse impacts of the policy might be minimised, and Canon has the ability to introduce each of these measures. They include:

> "a. Limit to use of real time without recording or storage of information or data;
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> b. Prohibit use of any disciplinary purposes;
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> c. Address issues about consent;
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> d. Not provide customers access;
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> e. Restrict required periods of usage; and
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> f. Permit genuine/restricted consents."[9]

[18] It continues to submit that the requirement to minimise the adverse impact on the Technicians, to the extent practicable, obliges Canon to implement these measures where it is practical to do so.

[19] In terms of what is "practicable" the ASU submits that this requires, on the one hand, balancing Canon's need to implement change in order to remain competitive, with the commitment to minimise the impact on the employees' personal and working lives on the other hand. The ASU continues to submit that it has not been shown any business case or other evidence to support Canon's view that the introduction of the GPS tracking policy is necessary to provide customers with improved visibility of assigned technical resources, or to allow more efficient scheduling of the Technicians, or to improve its work health and safety systems. It points to the evidence of Mr Roberts in this context.

[20] It continues to submit, "[a]ccordingly, the Commission should not accept there to be any underlying requirement for the proposed changes to Canon's business operations by the introduction of the GPS Tracking Policy,"[10] and "[i]n any event, the proposed measures to minimise the impact of the policy identified by the ASU are each practicable, having regard to Canon's stated objectives."[11]

[21] It next makes reference to Clause 9 in the Agreement, which deals with "New Technologies," and submits it should be read in the context of the other provisions in the Agreement, including Clause 8 and Clause 38, which concern the relevant disciplinary procedures, as well as Canon's affirmation of its statutory privacy obligations in Clause 10. It continues to submit that in this context new technologies may only be used as part of an investigation where it is incidental to the primary purpose of the technology. Where collection of the data cannot be said to support any of the primary aims that Canon has identified then it is difficult to avoid the conclusion that it intends to use the GPS tracking system as a primary trigger for disciplinary action. The policy is accordingly inconsistent with Clause 9.

[22] It also submits that the wording in the policy, which provides that "… the information obtained through GPS Tracking may be used by Canon 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 Procedure set-out in the … Agreement,"[12] does not appear in the Agreement, and instead reflects an intention by Canon to use the data for purposes other than for the three primary reasons it has identified.

[23] It finally submits that elements of the policy are inconsistent with the flexible and non-routine work patterns of the Technicians and this makes it difficult for the implementation of the GPS tracking policy to be confined to working hours. Similar concerns exist in regard to stand-by and call-out arrangements.

[24] The ASU also indicated in response to a question from the Commission that the policy could be considerably improved by removing the reference to disciplinary procedure and termination. It would also assist if the references to "during working hours" was more specifically defined so it was made clear what would happen during periods of overtime and stand – by, for example.[13] The ASU was also concerned that the policy could be changed in the future at any time, without a requirement for broader consultation with the Union and Canon's employees. It also submits that the policy is of particular importance because it goes to the heart of the employees working and personal lives, given the extensive nature of the tracking system. It is also concerned that the policy lacks specific detail in a number of areas. This lack of clarity creates potential compliance issues for the Technicians.

[25] The ASU submits, in conclusion, that the Commission should determine that the GPS tracking policy not be implemented to the extent that:

> "a. Data from the tracking device may be used for disciplinary purposes;
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> b. It permits or allows customer access (customer visibility) to employee locations or to any data generated by or from the device;
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> c. It restricts the form or extent of the consent that may be provided by employees to the use of the tracking device for the purposes of relevant Surveillance Devices legislation applying in any State or Territory;
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> d. It requires employees to activate the tracking device prior to the first call of the day;
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> e. Data generated from the tracking device is recorded or stored in any form (for the avoidance of doubt this does not restrict the use of real time information sourced from the device);
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> f. The policy is to be changed without opportunity for employees to withdraw or revise any consent given to the use of a tracking device and
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> g. The policy in referring to "working hours" is liable to create uncertainty and/or anxiety amongst Technicians in relation to the operation of clause 22 (Start of Day); clause 23 (Overtime) and clause 26 (Stand by and Call Out), or is otherwise inconsistent with the operation of these clauses."[14]

The Respondent's Evidence and Submissions

Mr Clifford Hole

[26] Mr Hole is the Manager, Business Process at Canon and has been in this position since February 2005. He is responsible for managing the "development of the GPS Tracking/Location in the Mobile Field Service Application (MFS App),"[15] which is to be installed on the Technicians' mobile phones. His evidence provided detail about the operation of the system. It also described the features built into the system in response to concerns that have been raised by the Technicians about the collection and use of data. He also detailed the limitations that will apply in terms of the visibility customers will have.

[27] He also indicated in cross-examination that he had seen an earlier draft of the GPS tracking policy, but was not aware of the precise detail of the current policy.[16] However, he had been working with other parts of the business in developing the operation of the system to ensure it dealt with and responded to issues that were being raised, including the need to adequately protect the privacy of the Technicians.

[28] He also said that when the policy referred to the data being accessed by the Task Manager, Business Budgeting and Planning, Canon Marketing, Canon Supervisors and Canon Managers there were probably 40 to 50 people who fell into this category. He also indicated that there were ongoing negotiations taking place about how long the data would be stored for. There would also be some delays in the data that customers were accessing, and the information they were receiving would likely update every 15 minutes.

Mr Paul Gravina

[29] Mr Gravina is the Senior Manager Direct Services (National) at Canon and has responsibility for managing the Technicians on a national basis. He indicated that the primary business purposes of the GPS tracking system was market differentiation through improved customer visibility of the Technicians, and improved scheduling by assisting Task Managers to select the most appropriate Technician for a job. The data obtained would also assist in dealing with customer enquiries and complaints, and enhance Canon's duty of care obligations to its employees.

[30] He also indicated that it was not the intention to use the stored data as a primary trigger for disciplinary action or "… to monitor it to catch out techs."[17] He indicated in this context that GPS systems have been installed in the Technician's vehicles in some States since 2012, and that facility has never been used to discipline a Technician.

[31] He stated in regard to the use of the system, "As per the Operating Procedures issued on the 14/03/2018 all techs were advised that they should utilise the Automatic mode, in instances where technicians in WA have elected not to sign a written consent form those individuals may use manual mode to provide location updates. Technicians are expected to activate tracking or report their location (if in manual mode) during their paid working times. This would normally be between 8:30am to 5pm on the days they work but could be different under flexible arrangements, they are not expected to activate if on standby."[18]

[32] He also indicated that there have been numerous meetings with the Technicians about what is proposed, and in the most recent meetings they were shown the task management

screens. He had also sent various emails to all Technicians, which set out the Standard Operating Procedures. There have also been a number of consultation meetings to discuss how the App was intended to operate after the proposed changes were first raised with the National Consultative Committee in a meeting on 8 March 2017.

[33] He also indicated in cross-examination that while the policy was not specific in terms of referring precisely to what were "working hours," the individual Technicians know what their start time for each day is, and what hours they are to be working on that day.[19] They would also know if they have been requested to work overtime. He also indicated in cross-examination that the Technicians would not necessarily be going to a customer's premises on their first call each day and they may, for example, be required to collect parts before attending a client's premises. They could also be attending other meetings, or be involved in training. The Technicians would be aware in these circumstances, by means of the policy and the Standard Operating Procedures, whether they were required to have the tracking system switched on at these times. It would also be required to be switched on during standby or callout times if they were actually working at the time. He continued to indicate that he did not believe these were significant issues, and the Technicians "… know exactly when their working hours are and what's requested of them."[20]

Canon's Submissions

[34] Canon submits at the outset that the dispute is without merit, and the ASU has failed to show it has contravened the Agreement. It submits instead that the ASU, on behalf of the Technicians, is simply attempting to resist business initiatives that it does not accept the rationale for, and does not like. It also submits that it has the right to conduct and manage its business in accordance with the general principle of management prerogative, and it is not for the Commission to interfere with its right to manage. It also acknowledges that the principles in the Full Bench decision in *Berri* are to be applied in interpreting the Agreement.

[35] It next refers to sub clause 8(c) of the Agreement, and submits that it sets out a general commitment by Canon. That commitment exists in the context of the words in sub clause (a), which acknowledge that the parties "recognise that there may be required changes to business operations."[21]

[36] Sub clause 8(c) then states in the second sentence that "[t]he process described below aims to assist this process."[22] This intends that the consultation process set out in the remainder of Clause 8 is intended to describe how the commitment to minimise "… any adverse impact to the extent that is practicable"[23] is to be discharged. For example, sub clause 8(d) provides guidance on when consultation is required; sub clause 8(e) provides guidance on what is a significant effect; and sub clause 8(f) sets out the obligations imposed on Canon, which include providing information about the changes, the effect the changes are likely to have on staff and, where possible, the measures to avert or mitigate the adverse effects of such changes on staff. It also requires Canon to give "consideration to changes to matters raised by employees,"[24] and to "give reasons for its decisions."[25]

[37] It also submits that sub clause 8(c) needs to be read in conjunction with the Agreement as a whole, and cannot override other specific terms in the Agreement, such as those dealing with the introduction of new technology, disciplinary measures, and privacy. It relies on the decision in Berri in this context. It continues to reject the suggestion by the ASU that the

intention to minimise the adverse impact on employees requires Canon to not pursue such changes in the face of employee or Union opposition.

[38] The obligation in Clause 8 and the "true nature" of the Clause is accordingly about the establishment of a consultation procedure, and a consequent obligation that requires Canon to follow that procedure in relation to certain business decisions. However, it does not entitle the ASU to seek changes to what is proposed by simply claiming that the proposed initiatives are having an adverse impact on the employees involved. It submits, in response, that it has followed the appropriate consultation processes, and this is demonstrated by the changes made to both the proposed implementation of the system, and the policy, in response to feedback received as part of that consultation process.

[39] It next deals with the concerns raised about privacy and submits in response that the Commission, in dealing with the jurisdictional objections raised by Canon, has already concluded that alleged disputes about breaches of privacy laws are not a dispute about the application of the Agreement. However, it continues to indicate that it has taken steps to minimise, as far as possible, any privacy related concerns to the extent practicable via the various safeguards built into the MFS App and the customer portal.

[40] It also submits that it is not imposing any new or additional obligations on the Technicians in terms of compliance with the policy and, like any policy Canon has in place, disciplinary action can result in circumstances where an employee fails to adhere to those policies. There are also protections available in the disputes procedure in the Agreement, and within the *Fair Work Act 2009* (Cth), in circumstances where employees are concerned about action taken in regard to them. However, it also submits that the concerns of the Technicians are being exaggerated in this context, and relies on the evidence of Mr Gravina when he indicated that in those States where GPS tracking has been in place for several years it has not been used as a primary trigger for disciplinary action, and there was nothing in the current proposals to suggest the situation would be any different now.

[41] It also submits that the possibility that Canon may change the policy at some point in the future is again no different to its ability to make changes from time to time to other policies it has in place. Any such changes would likely be made in conjunction with employees, however, Canon was not required to be bound by a commitment that it would only make changes in the future if the consent of employees was first had and obtained.

[42] Canon next deals with the provisions in Clause 9 of the Agreement dealing with "NEW TECHNOLOGIES."[26] It submits that the evidence makes clear that its intention is not to use the GPS tracking technology as the primary trigger for disciplinary action. It has instead been made clear that the rationale for the introduction of the system is primarily based around providing an enhanced service to customers and better scheduling of the Technicians. This is emphasised in the evidence of Mr Hole and Mr Gravina. The wording in the policy also reinforces the fact that it is not Canon's intention to use the tracking technology as a primary trigger for disciplinary action. It also points to the evidence, which indicates that other forms of GPS tracking have been introduced in some States, and there is no indication that the primary use of that technology has been directed at disciplinary action.

[43] It finally submits that the issues raised by the ASU in respect of the Start of Day, Overtime and the Stand – By and Call – Out clauses in the Agreement are unclear, and no evidence has been provided about any possible or potential breach of these provisions. It also

submits that the GPS tracking policy, and the implementation of the GPS tracking system, does not seek to do anything to vary or change these arrangements. In summary, the policy only requires that the tracking system be turned on during normal working hours, whether those hours are flexible or regular hours, and it is not required to be turned on during any unpaid time or during any breaks from work. The Technicians are also clearly aware of when they are at work. Therefore, there is no inconsistency with the Agreement.

[44] Canon submits, in conclusion that it has complied with the Agreement in terms of the changes to be introduced in that it has complied with its consultation obligations in Clause 8. The policy document is also consistent with Clause 9, New Technologies, and there is no inconsistency between the policy and Clauses 22, 23 and 26 in the Agreement.

Consideration

[45] The Commission has had a significant degree of involvement in this dispute since the application was first made. It has participated in a series of conferences with the parties in an endeavour to reach an agreed outcome. It also met on one occasion with a group of ASU delegates from each State to gain a better understanding of their issues and concerns. This meeting occurred with Canon's assistance. On another occasion the Commission issued a Recommendation in an effort to progress discussions between the parties that might lead to an agreed outcome. Unfortunately, an agreed resolution was not able to be achieved. This is not intended to be a criticism of anyone involved. As indicated, the Commission also dealt with the jurisdictional objection by Canon to the present application and a decision in regard to that matter was handed down earlier this year.[27]

[46] This involvement has emphasised that the views of the Technicians in different States do vary, given their experience with different systems and processes in place in different locations. This has also been impacted by the different privacy legislation that exists in some States, which requires in some cases that an individual employee's consent must first be obtained before tracking systems can be utilised.

[47] However, it is also evident that there are other reasons why some Technicians do not support what is now being proposed. As the evidence of Mr Roberts makes clear some of the Technicians are not necessarily "on board" with the business case for what Canon now proposes. His evidence indicates that he now keeps his Supervisor and Task Manager informed about his whereabouts from time to time by phone and email. He also maintains personal contact with clients by mobile phone, and cannot understand why these processes need to be changed. He also points to what he considers to be some shortcomings in terms of what Canon now intends.

[48] It is also evident that some Technicians are reluctant to accept what is being proposed because they see increasing surveillance of them and their whereabouts as reflecting a lack of trust in them, in circumstances where they consider they have been long-standing and loyal employees. In addition, performance issues do not appear to loom large in recent experience, and examples of poor performance are very much the exception rather than the rule. The Technicians accordingly question why the policy needs to make specific reference to failure to comply with the policy potentially resulting in disciplinary action, including the possibility of termination. It can be understood why some Technicians feel this way, particularly in circumstances where they are and have been long-standing and loyal employees who generally appear to be held in high regard.

[49] However, these considerations are not necessarily directly relevant to the Commission's deliberations. That task instead requires the Commission to have regard to what Canon is now proposing, and whether it can be said to be in breach of any of the terms in the Agreement. I am satisfied that this does not involve the Commission making an assessment about the business case, or the rationale for the changes Canon now wants to introduce. This is, of course, subject to the proviso that those changes, and the process of implementation, are not in breach of the Agreement or any other legislative provisions that the Commission is required to have regard to.

[50] Canon has made reference in its submissions to the principle of managerial prerogative, and it is accepted in response that as a general rule the Commission is not in the business of "second-guessing" or questioning the rationale behind what an employer intends by way of changes year to existing practices.

[51] Before dealing with those terms in the Agreement that are at issue in this matter it is appropriate to briefly review the principles to be applied to the interpretation of an enterprise agreement. This is one matter where both parties are in agreement. They have each acknowledged in their submissions that the principles enunciated by the Full Bench in *Berri* are to be applied and it is worthwhile to briefly revisit those principles. The Full Bench in *Berri* commenced its review of those principles by noting, "The construction of an enterprise agreement, like that of a statute or a contract, begins with a consideration of the ordinary meaning of the relevant words. The disputed words must be construed in the context of the agreement as a whole."[28] In continued to refer to the decision in *Amcor Limited v CFMEU*.[29]

[52] It also noted that, as a general principle, all of the words contained in an enterprise agreement must, prima facie, be given some meaning and effect. It continued to note:

> "Such an approach accords with the principles of statutory construction, and, as a general proposition, the principles developed in the general law in the context of the interpretation of statutes are applicable to the interpretation of enterprise agreements."[30]

[53] It also noted that:

> "There is a long line of authority in support of the proposition that a 'narrow or pedantic' approach to the interpretation of industrial instruments (such as enterprise agreements) is to be avoided, and that 'fractured and illogical prose may be met by a generous and liberal approach to construction."[31]

[54] It continued to note,

> "A consequence of such an approach may be that some principles of statutory construction have less force in the context of construing an enterprise agreement."[32]

[55] In this context it referred to the decision in *Shop, Distributive and Allied Employees' Association v Woolworths Limited*,[33] which observed that the processes of bargaining and agreement making can mean that consistency of wording is often absent, and the same words can be used in different provisions with different meanings.

[56] The Full Bench finally decided to confirm the principles that should be applied in such circumstances. It accordingly concluded:

> "[114] The principles relevant to the task of construing a single enterprise agreement may be summarised as follows:
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> 1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:
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> (i) the text of the agreement viewed as a whole;
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> (ii) the disputed provision's place and arrangement in the agreement;
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> (iii) the legislative context under which the agreement was made and in which it operates.
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> 2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.
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> 3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.
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> 4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.
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> 5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.
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> 6. Enterprise agreements are not instruments to which the Acts Interpretation Act 1901 (Cth) applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some

general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

> (i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
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> (ii) notorious facts of which knowledge is to be presumed; and
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> (iii) evidence of matters in common contemplation and constituting a common assumption.

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.

14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.

> 15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-Agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-Agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding."[34]

[57] I turn now to consider the relevant provisions in the Agreement based on the principles enunciated by the Full Bench in *Berri*. The first requirement is obviously to determine whether the relevant terms, and their place in the overall structure of the Agreement, can be said to have a plain and ordinary meaning and are to be applied in that way, or whether they evidence ambiguity.

[58] I turn first to deal with the provisions contained in Clause 8. It is appropriate at this point to set out the Clause in full.

> "**8. INTRODUCTION OF CHANGE**
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> a) All parties recognise that we work in a competitive and changing industry. As such, all recognise that there may be required changes to business operations, both by way of structural enhancements and skill development.
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> b) With this in mind, Canon is committed to providing secure employment for employees in a manner consistent with prudent management.
>
> c) 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.
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> d) Canon will consult with the employees and their union where Canon proposes to introduce:
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> (i) significant business initiatives or major changes, which is likely to have a significant effect on employees (including Canon policy which affects employment conditions); or
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> (ii) a change to their regular roster or ordinary hours of work, unless specifically contemplated by this Agreement,
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> managers will consult with the employees who may be effected by the proposed changes as early as practicable.
>
> e) A significant effect on staff members will arise in circumstances such as major change in technology, outsourcing, or the composition, operation or size of Canon's workforce or in the skills required, the elimination or diminution of job opportunities.
>
> f) Canon will consult with employees affected and their union on the introduction of the changes referred to at subclause 8 d), by providing information about the

changes, the effect the changes are likely to have on staff, and where possible the measures to avert or mitigate the adverse effects of such changes on staff. Canon will give an opportu1ity for the relevant employees affected to provide their views on the impact of the changes (including any impact of a change to their regular roster or ordinary hours of work in relation to their family or caring responsibilities). Further, Canon will give consideration to matters raised by employees about the impact of the changes and give reasons for its decisions.

g) The relevant employees affected by major changes or changes to their regular roster or ordinary hours of work may appoint a representative for the purposes of this process."[35]

[59] The ASU in its submissions makes particular reference to sub clause 8(c) and submits that it should be considered on a standalone basis. It imposes an obligation on Canon to minimise any adverse impact of its business decisions on its employees' personal and working lives to the extent practicable. It continues to submit that this then enables a debate to be effectively opened up about what might potentially be considered in the context of this obligation. It also requires Canon to demonstrate that it has in fact minimised any adverse impact to the extent practicable. The ASU submits that in this case it has not done so.

[60] Canon has a very different view of the intent of Clause 8. It refers, firstly, to sub clause 8(a), which makes reference to the acknowledgement by the parties that they "…. work in a competitive and changing industry"[36] and as a consequence "…all recognise that there may be required changes to business operations, both by way of structural enhancements and skill development."[37] It continues to submit that the remaining sub clauses in Clause 8 must have regard to this overriding acknowledgement and be interpreted accordingly.

[61] Canon then makes particular reference to the second sentence in sub clause 8(c) being, "The process described below aims to assist in this process."[38] In its submission the sub clauses that follow then set out that intended process. They deal, firstly, in sub clause (d) with consultation, and then in sub clause (f) with what is required of Canon as part of this consultation process. They also indicate in sub clause (g) that the employees may appoint a representative to participate in these processes.

[62] I am satisfied in response that the terms contained in Clause 8 can be said to have a plain and ordinary meaning and as such should be applied in the way that Canon contends. Clause 8 begins in sub clause (a) with an acknowledgement by the parties that changes to business operations may be required from time to time. Sub clauses (b) and (c) then set out some broad commitments, without necessarily being specific about how they are to be met. However, sub clause (c) then makes specific reference to the process that is intended to be followed in order to assist in meeting these commitments.

[63] It is also difficult to contemplate how the commitment in sub clause 8(c) can be satisfied if the sub clause is applied in the way that the ASU contends. As the Commission referred to during the course of the proceedings in an exchange with the ASU it is difficult to know how the Commission could ever come to a conclusion that Canon has done all it could to minimise "any adverse impact"[39] of its business decisions on its employees' personal and working lives "to the extent that is practicable."[40] The exploration of these possibilities could potentially involve a seemingly infinite range of potential options. However, it is not

necessary at this point to speculate further about these matters. I am satisfied instead, for the reasons indicated, that sub clause 8(c) has a plain and ordinary meaning and should be read in accordance with that plain and ordinary meaning in the way that Canon contends. In summary, sub clause (c) sets out the process to be followed when Canon proposes to introduce "… required changes to business operations."[41] That process is intended to minimise any adverse impact of those changes on employees' personal and working lives to the extent practicable. The sub clauses that then follow in Clause 8 sets out that process.

[64] The Commission is next required to have regard to the terms in Clause 9. It is again appropriate to set out that clause in full:

> "9. NEW TECHNOLOGIES
>
> 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. For the avoidance of doubt A-Fusion (Microsoft Dynamics AX & CDSS) is not considered a new technology except to the extent that it has capability over and above the Oracle system it replaces, in which case the additional capability (only) will be considered a new technology."[42]

[65] The ASU makes various submissions about the policy and the provisions in Clause 9, and submits the policy is not consistent with the Agreement when it states that it is not the intention to use new technologies "as the primary trigger for disciplinary action."[43] It also submits that because, in its view, the GPS tracking system and the associated collection of data does not support the primary objectives that Canon has identified for introducing these changes, then it follows that its primary intention is to instead use the GPS tracking system for disciplinary purposes. Canon dismisses this suggestion and submits in response that the wording in the policy is entirely consistent with the wording in the Agreement.

[66] I am not satisfied that the wording in the policy can be said to be inconsistent with the terms in the Agreement. It is accepted that the wording in the policy, under the heading "Failure to Comply with this Policy,"[44] is somewhat provocative when it states, "all employees should be clear that failure to comply with this policy is a disciplinary matter, which could result in disciplinary action up to and including, termination of employment."[45] However, the policy also states under the subheading, "Use of the data,"[46] that it is not Canon's intention 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. The policy also states at the outset under the heading, "Purpose"[47] what the intention of introducing the GPS tracking system is, and it makes no reference to disciplinary action being a primary reason for its introduction. The evidence of Mr Hole and Mr Gravina also rejects the suggestion that disciplinary reasons are the primary or principal reason why the changes are being made.

[67] The concerns of the Technicians about increased surveillance are acknowledged, and the potential for this to intrude into their lives away from work can be understood. However, I am not satisfied that it can be concluded, based on the evidence or the content of the policy document, that disciplinary reasons are a principal or a primary motivation for the changes

Canon now intends to introduce. I am accordingly not satisfied that it can be concluded that Canon is acting in a way that is inconsistent with the terms of the Agreement.

[68] The final matter concerns whether the policy can be said to be in breach of any or all of Clause 22, Start of Day, Clause 23, Overtime, or Clause 26, Stand-By and Call-Out. These Clauses are set out below.

> "22. START OF DAY
>
> a) It is an inherent condition of employment that an employee may be required to start and finish their work cycle at the customer's premises. It is acknowledged that for most employees, the variability in daily travel time from their principal place of residence to their first job requires due recognition to ensure scheduling flexibility is maintained without excessive periods of unpaid travel time being imposed on the employee. Acknowledging this, employees are expected to start work by their scheduled starting time (normally 8.30 am).Examples of work include;
>
> (i) at customer's premises (after picking up parts if the additional travel time to the warehouse, drop point or storage lock up is less than or equal to fifteen (15) minutes);
>
> (ii) picking up parts from warehouse, drop point or storage lock up if picking up parts would extend travel time to the customer premises by more than fifteen (15) minutes;
>
> (iii) in office;
>
> (iv) attending meetings;
>
> (v) attending training; or
>
> (vi) as directed by a Supervisor.
>
> 23. OVERTIME
>
> a) Overtime is all time worked in excess of an employee's work cycle as defined in Clause 21.
>
> b) Before requiring an employee to work overtime Canon must take into consideration the amount of overtime already worked in the period and the employee family responsibilities.
>
> c) Overtime shall be calculated to the nearest fifteen (15) minutes of the total overtime worked in the work cycle.
>
> d) All overtime worked Monday to Saturday shall be paid for at the rate of 150% of the employee's ordinary hourly rate.

e) All overtime worked on Sunday shall be paid for at the rate of 200% of the employee's ordinary hourly rate.

f) Subject to Clause 44, all overtime worked on public holiday shall be paid for at the rate of 200% of the employee's ordinary hourly rate.

g) An employee (other than a casual or part-time employee) who works so much overtime between the end of their daily work cycle and the commencement of their next work cycle, that they have not had at least ten (1 0) consecutive hours off duty between those times, shall be released after the completion of such overtime until they have had ten (1 0) consecutive hours off duty, without loss of pay for all ordinary working time occurring during the ten (10) hour break.

h) If, on the instruction of Canon, such employees resume or continue work without having had ten (10) hours off duty, they shall be paid at double time until released from duty for such period and then be entitled to be absent until they have had ten (10) consecutive hours off duty without loss of pay.

i) All overtime must be approved prior to it being worked.

j) For the avoidance of doubt, where an employee is entitled to the allowance under clause 21.b)(v) or any other shift allowance, overtime will not apply for the hours during which the allowance is applicable.

26. STAND-BY AND CALL-OUT

a) Employees who are rostered on to stand-by shall be paid a stand-by allowance of $11.21 for each hour for which they are rostered on to stand-by.

The stand-by allowance will increase to:

g). $11.43 per hour effective from 1 March 2016;

h). $11.66 per hour effective from 1 March 2017; and

i). $11.90 per hour, effective from 1 March 2018.

b) Employees who are on stand-by must be available and able to work when they are called.

c) If an employee is called to work while on stand-by they shall be paid a minimum of three (3) hours.

d) Employees on stand-by who are called out shall be paid at the overtime rate. While receiving the appropriate overtime rate, the stand-by allowance will not be paid.

e) In the event that an employee on standby:

(i) Is called out and completes the work before midnight (including travelling time) they will be required to commence work by 8:30 am the following morning, provided that they have already had at least one and a half (1.5) hours break prior to being called out, otherwise the employee will commence work by 10 am the following morning.

(ii) Is called out and completes the work after midnight, then the employee is required to take a minimum break of ten (1 0) hours without loss of pay for the ordinary working time occurring during the ten (10) hour break;

(iii) Is called out after 5.00 am, they wil1 continue to work until such time as they have completed their ordinary work cycle. However, they must take a thirty (30) minute meal break (on full pay) on the completion of the first five (5) hours worked.

f) Employees who are not on stand-by that are called out after having completed their normal daily work cycle will be paid for a minimum of four (4) hours at the overtime rate."[48]

[69] The ASU submits that the policy is inconsistent with some aspects of these Clauses and refers, in particular, to those occasions when the Technicians are involved in flexible or non-routine work arrangements, which can occur from time to time in an emergency or other unexpected circumstances. Issues can also arise when Technicians are required to be on stand-by and/or are subsequently called out. The ASU is particularly concerned with the references in the policy to "during work hours,"[49] and submits that these references do not specifically state what those times are. The Technicians could accordingly fall foul of the policy by not being clear about when they were considered to be "at work" and required to have the tracking system turned on. It is also emphasised that the Technicians generally travel from home to their first job each day and this also blurs the lines in regard to when they are actually considered to be at work.

[70] Canon submits, in response, that the ASU's concerns in this regard are unclear and it has not established how Canon is acting in breach of the Agreement. It also points to the evidence of Mr Gravina, in particular, who indicated that the Technicians are clearly aware of when they are at work and when they are not.

[71] Clause 22 acknowledges that employees may be required to start and/or finish work each day at a client's premises. It expects that work will accordingly be scheduled to avoid excessive travel time to and from home as a consequence. It also provides examples of what "work" includes, and indicates that the normal start time is 8.30 a.m., although this may vary.

[72] Clause 23 can be considered to be a typical overtime term, and Clause 26 then continues to set out the arrangements that are to apply when employees are rostered on stand-by, and what occurs if they are then called out during the stand-by period. This again appears to be a relatively standard provision in this context.

[73] It is accepted that Canon will need to make clear to the Technicians in each of these circumstances when they are expected to have the tracking system operative. The relevant parts of the policy that make reference to working times appear to be as follows. Firstly, under

the heading "Using the device"[50] the policy states "It is the responsibility of each individual Technician to ensure they are using the GPS Tracking capability appropriately each working day."[51]

[74] It then states under the heading "Privacy",[52] "[o]utside of ordinary working hours and during unpaid/lunch breaks, Technicians may take the following steps to ensure that their privacy is maintained."[53] It then sets out what can occur during these times. It then continues to state, "During ordinary working hours GPS Tracking must remain on and operational, unless prior approval has been granted to turn it off by Canon …In circumstances where the Technician is visiting a site that does not allow the carrying of mobile devices or that requires mobile devices to be turned off, the Technician's supervisor must be informed, customer site requirements followed, and normal use resumed when departing the site." [54]

[75] Mr Gravina's evidence indicated that the policy, and the standard operating procedures that have been developed, remove any doubt about when the tracking system is required to be turned on and when it can be turned off. He also indicated that there is no confusion about when Technicians are considered to be at work and when they are not working. The Commission is not in a position to make any judgements at this time about these matters based on the existing evidence. It may also be that issues emerge when the new arrangements are in place. However, I am not satisfied at this point in time that the ASU has been able to establish that the terms of the policy are in breach of the relevant terms in the Agreement, being Clauses 22, 23 and 26.

Conclusion

[76] I have had regard to each of the matters raised by the ASU about the GPS tracking policy and the claims that certain aspect of the policy are in breach of the relevant provisions in the Agreement. The Commission has also acknowledged that some Technicians are clearly apprehensive about the introduction of the tracking system, and question why changes to the current processes are required. Others are concerned about its use in disciplinary matters, and believe its introduction demonstrates a lack of trust and confidence in the Technicians.

[77] However, I am not satisfied for the reasons indicated that the ASU has been able to establish that the content of the policy, or indeed the intended implementation of the changes proposed, are in breach of the Agreement that covers the parties. The application is accordingly dismissed.

COMMISSIONER

Appearances:

M Rizzo for the Australian Municipal, Administrative, Clerical and Services Union.

G Trestrail for the Respondent.

Hearing details:

2018.
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[1] AE417507.

[2] Australian Municipal, Administrative, Clerical and Services Union v Canon Australia Pty Ltd T/A Canon [2018] FWC 2695.

[3] Exhibit ASU1, [14].

[4] Exhibit ASU1, [18].

[5] Exhibit ASU1, [19].

[6] [2017] FWCFB 3005.

[7] *Canon Australia Pty Ltd (Technical Consultants) Enterprise Agreement 2015*, cl 8(c).

[8] Submissions of Applicant, dated 18 June 2018, [15].

[9] Submissions of Applicant, dated 18 June 2018, [35].

[10] Submissions of Applicant, dated 18 June 2018, [46].

[11] Ibid.

[12] Exhibit ASU1, Attachment A, p 3.

[13] Transcript, 28 June 2018, PN 654.

[14] Submissions of Applicant, dated 18 June 2018, [58].

[15] Exhibit C1, [3].

[16] Transcript, 28 June 2018, PN 164.

[17] Exhibit C2, [8].

[18] Exhibit C2, [10].

[19] Transcript, 28 June 2018, PN 450.

[20] Transcript, 28 June 2018, PN 498.

[21] *Canon Australia Pty Ltd (Technical Consultants) Enterprise Agreement 2015*, cl 8(a).

[22] Ibid, cl 8(c).

[23] Ibid.

[24] Ibid, cl 8(f).

[25] Ibid.

[26] Respondent's submissions, received 25 June 2018, [46] – [52].

[27] *Australian Municipal, Administrative, Clerical and Services Union v Canon Australia Pty Ltd T/A Canon* [2018] FWC 2695.

[28] *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Limited* [2017] FWCFB 3005, [41].

[29] (2005) 222 CLR 241.

[30] Ibid [44].
[31] Ibid [46].
[32] Ibid.
[33] [2006] FCA 616.
[34] Ibid [114].
[35] *Canon Australia Pty Ltd (Technical Consultants) Enterprise Agreement 2015*, cl 8.
[36] Ibid, cl 8 (a)
[37] Ibid.
[38] Ibid, cl 8(c).
[39] Transcript, 28 June 2018, PN 652.
[40] Ibid.
[41] *Canon Australia Pty Ltd (Technical Consultants) Enterprise Agreement 2015*, cl 8(a).
[42] *Canon Australia Pty Ltd (Technical Consultants) Enterprise Agreement 2015*, cl 9.
[43] Exhibit ASU1, Attachment A, p 3.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid, p 1.
[48] *Canon Australia Pty Ltd (Technical Consultants) Enterprise Agreement 2015*, cl 22-23, 26.
[49] Transcript, 28 June 2018, PN 654.
[50] Exhibit ASU1, Attachment A, p 2.
[51] Ibid.
[52] Ibid
[53] Ibid.
[54] Ibid.