INTERPRETATION OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2018
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00430
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 22 MAY 2020
DELIVERED	**:**	MONDAY, 27 JULY 2020
FILE NO.	**:**	APPL 20 OF 2020
BETWEEN	**:**	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS Applicant AND MINISTER FOR CORRECTIVE SERVICES Respondent

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Catchwords	**:**	Industrial law (WA) - Interpretation of dispute resolution clauses of industrial agreement - General principles of interpretation applied - Agreement history and intent considered - Declaration issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 41(9); 44; 46; *Minimum Conditions of Employment Act 1993 (WA)*
Result	**:**	Declaration issued

Representation:

Counsel:

Applicant	**:**	Ms H Harper
Respondent	**:**	Mr D Anderson of counsel

Case(s) referred to in reasons:

Civil Service Association of Western Australia Incorporated v Commissioner, Western Australia Police Department [2019] WAIRC 00142; (2019) 99 WAIG 358

Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Roman Catholic Bishop of Bunbury Chancery Office and Others [2007] WAIRC 00559; (2007) 87 WAIG 1148

L Schuler AG v Wickman Machine Tools Sales Ltd [1974] AC 235

Printing & Kindred Industries Union & Anor v Davies Bros Ltd [1987] AILR 55; (1986) 18 IR 444

Re Security Officers (Waterfront) Award [1988] AILR 431

Seamen's Union of Australia v Adelaide Steamship Co Ltd (1976) 46 FLR 444

Case(s) also cited:

Fedec v Minister for Corrective Services [2017] WAIRC 00828; (2017) 97 WAIG 1595

Lend Lease Real Estate Investments Ltd v GPT Re Ltd [2006] NSWCA 207

Reasons for Decision

Background

1 The applicant and the respondent are parties to the *Department of Justice Prison Officers' Industrial Agreement 2018*. Because of what the applicant says is a change by the respondent to his approach to resolving disputes with the applicant under the Agreement, the parties disagree in relation to the dispute resolution provisions under the Agreement. These matters initially came before the Commission under s 44 of the *Industrial Relations Act 1979* (WA). The dispute could not be resolved by conciliation. As the dispute raises the matter of a bare interpretation of the Agreement, the proper course was for an application to be made for an interpretation of the Agreement under s 46 of the Act: *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Roman Catholic Bishop of Bunbury Chancery Office and Others* [2007] WAIRC 00559; (2007) 87 WAIG 1148.

The question posed

2 The applicant contends that the dispute resolution provisions of the 2018 Agreement should be construed broadly, and the respondent contends the opposite. The issue arising between the parties is whether the dispute resolution provisions of the 2018 Agreement apply to *all* questions or disputes arising between the parties or whether, as the respondent maintains, they are limited to those disputes about the meaning and effect of the Agreement or the *Minimum Conditions of Employment Act 1993* (WA).

The disputed clause

3 The provisions under the 2018 Agreement for dispute resolution are set out in cls 176 - 179. The key provision for present purposes is cl 176 and particularly cl 176.2 which is in these terms:

> 176.2 It is in the interests of all parties to manage the resolution of any issues or disputes in a manner that will not damage the business of the Employer. Any question or dispute that arises between the parties regarding the meaning and effect of this Agreement or the *Minimum Conditions of Employment Act 1993* (WA) will be resolved in accordance with this clause and clause 177 - Dispute Resolution Procedure for Individual Disputes, clause 178 - Dispute Resolution Procedure for Prison/Service Area Disputes and clause 179 - Dispute Resolution Procedure for Corporate Disputes, as applicable.

4 As cl 176.2 says, separate provisions apply to individual disputes, single prison level disputes and corporate disputes, the latter of which involve a dispute at more than one prison or a group of prisons. Each of cls 177, 178 and 179 set out the steps the parties must take in trying to resolve each type of dispute. If they cannot be resolved, then either party may refer the dispute to the Commission. The parties must complete forms, pro formas of which are annexed to the 2018 Agreement, at each stage of the dispute resolution process.

Principles to apply

5 In *Civil Service Association of Western Australia Incorporated v Commissioner, Western Australia Police Department* [2019] WAIRC 00142; (2019) 99 WAIG 358, I set out the principles in relation to interpreting industrial agreements. At pars 10 - 11 I said:

> 10 The relevant principles in relation to the interpretation of industrial instruments are well settled. A recent summary of these principles was set out in a decision of the Full Bench of the Commission in *Fedec v Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595. At pars 21-23 Smith AP and Scott CC observed:
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> **Interpreting an industrial agreement - general principles of interpretation**
>
> 21 The approach that is to be applied when interpreting an industrial agreement is well established. This is:
>
> (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.
>
> (b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: ***City of Wanneroo v Holmes*** [1989] FCA 369; (1989) 30 IR 362.
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> (c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: ***George A Bond & Co Ltd (in liq) v McKenzie*** [1929] AR (NSW) 498; ***City of Wanneroo v Holmes*** (378 - 379) (French J).
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> 22 The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In ***Re Harrison; Ex parte Hames*** [2015] WASC 247, Beech J said [50] - [51]:
>
> The general principles relevant to the proper construction of instruments are well-known. In summary:
>
> (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The

meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;

(3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;

(4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;

(5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and

(6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); ***Kidd v The State of Western Australia*** [2014] WASC 99 [122]; ***Red Hill Iron Ltd v API Management Pty Ltd*** [2012] WASC 323 [106] - [112]; ***Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd*** [2014] WASCA 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).

These general principles apply in the construction of an industrial agreement (***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (***Amcor Ltd v Construction, Forestry, Mining & Energy Applicant*** [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); ***Director General v United Voice*** [81]; see also ***Amcor v CFMEU*** 66 (Kirby J), 129 - 130 (Callinan J)).

23 To these principles, the following observations made by Pullin J in ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1 [18] - [19] should be added:

> The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40]; ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22].
>
> Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 352; ***McCourt v Cranston*** [2012] WASCA 60 [23].

11 The generous rule of construction applies equally to an award, but even more so to an industrial agreement.

6 I adopt and apply this approach to the disposition of the present matter.

Agreement history

7 It was common ground between the parties that the Agreement had its origins in the *Department of Corrective Services Prison Officers' Enterprise Agreement 2010*. The dispute resolution provisions in the 2010 Agreement were carried over into the 2013 Agreement. The intent behind making the 2013 Agreement, as reflected in its cl 6, was to replace "in full" the *Prison Officers' Award*. Despite this, any inconsistency between the industrial agreement and the award, was to be resolved in favour of the industrial agreement. This also reflects the terms of s 41(9) of the Act, which is to the same effect. This intention has also been carried through to the successor industrial agreements, including the 2018 Agreement.

8 This intention was the subject of evidence of Mr Smith, the Secretary of the applicant. In a witness statement filed in these proceedings, Mr Smith outlined the broad history to making the 2013 industrial agreement as underpinned by a principle of "no loss, no gain". He said if the parties ran into difficulty in applying the industrial agreement, then they would refer to the relevant part of the award to assist. Mr Smith said that the respondent has adopted a broad approach to the dispute resolution provisions of the industrial agreements made since 2013, and the recent change, under the 2018 Agreement, is a new development. In relation to this evidence, whilst Mr Smith referred to the principle of "no loss, no gain" as guiding the negotiations for a new industrial agreement, and this did not seem disputed by the respondent, I note that the dispute settlement clause in cl 176 of the 2018 Agreement, was already in existence before 2013, in the 2010 Agreement.

9 In the bundle of documents filed by the applicant, documents headed "Management of Disputes Document - Active Disputes…" over various dates was included. These documents, which appear to have been prepared by the respondent, under both the 2018 Agreement and the 2016 Agreement, are a summary of disputes between the parties lodged and their status. The stated intention of the document is to assist in managing disputes promptly. These disputes range from August 2016 to July 2019. They record the prison or service area, the issue, the "stage" of the dispute i.e. stage 1 or stage 2, and its status. These stages of dispute resolution plainly refer to the staged process as set out in the dispute resolution procedure in the 2018 Agreement and its predecessor. It would appear from the face of the document, that runs to some 26 pages, that very many disputes are recorded. It would also appear that from these documents,

several, including individual types of disputes, do not involve matters about the meaning and effect of the Agreement or staffing level issues.

10 There are also other documents in the applicant's bundle, dealing with various other disputes, such as those over uniforms, requests for long service leave and staff deployment issues, amongst other matters. These disputes appear to have also been dealt with under the dispute resolution provisions in the 2018 Agreement. This material suggests, as contended by the applicant, that a more restrictive view of matters to be dealt with under the dispute resolution provisions of the 2018 Agreement, is a relatively recent change in approach. However, the use that may be made of this material is something that I deal with further below.

Consideration

11 I have carefully considered the written outlines of submissions filed by the parties and the bundle of material submitted by the applicant to support its contention. On a strict interpretative basis, even applying a generous approach, taking the language used in cl 176 (subject to cl 151), the position adopted in the respondent's written outline of submissions is to be preferred. In its ordinary and natural meaning, the words "*Any* question or dispute that arises between the parties regarding the *meaning or effect of this Agreement…will be resolved…*" are narrow in scope and seek to confine matters that may be the subject of formal dispute resolution processes, to only those specified. I do not consider there is any ambiguity in the language of the clause. This provision stands in contrast to the breadth of the preamble to cl 24 - Dispute Resolution Process in the Award, where at cl 24.1 it provides:

> 24.1 Preamble
>
> Subject to the provisions of the *Industrial Relations Act, 1979,* any grievance, complaint or dispute, or any matter raised by the Applicant or the Department and its Officers, shall be settled in accordance with the procedures set out in subclause 24.2 of this clause.
>
> The parties agree that no precipitate action will be taken prior to, or during the time this procedure is being followed.

12 This provision is not limited as is cl 176.2 of the 2018 Agreement. This is despite cl 177.1 of the 2018 Agreement, which refers to individual disputes being a "grievance or an issue which affects only one officer". This does not broaden the key provision in cl 176.2. Given the intended scheme of the dispute resolution provisions, it seems reasonably clear that all disputes, whether they be under cl 177, 178 or 179, are qualified by the terms of cl 176.2.

13 Despite this language, and my view as to the preferred interpretation, what is the effect of the approach of the parties as to how the dispute resolution provision terms of the 2018 Agreement have been applied in practice? Also, whatever may have been the intention of a party to the 2018 Agreement, ultimately, once having agreed, it is the language used in the document itself, as with any other contract or agreement, that must be the manifestation of the parties' common intention and not the subjective intention of one of them: *Printing & Kindred Industries Union & Anor v Davies Bros Ltd* [1987] AILR 55; (1986) 18 IR 444.

14 A lot of the material relied on by the applicant related to how the dispute resolution process clauses have been applied in practice. While not directly put it seems the purpose of this information was directed to the proposition that both parties have applied and interpreted the clause in the broader manner, as contended by the applicant.

15 There are difficulties in seeking to rely on the conduct of parties after an industrial agreement has been made. This stems from the contractual principle that the conduct of parties to a contract, after its making, may not be relied upon to interpret the contract: *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235. Consistent with this principle, similarly, the conduct of the parties to an industrial agreement, subsequent to its making, cannot generally be relied upon in interpreting the industrial agreement: *Printed and Kindred Industries Union*; *Seamen's Union of Australia v Adelaide Steamship Co Ltd* (1976) 46 FLR 444 at 445; *Re Security Officers (Waterfront) Award* [1988] AILR 431. There may be some limited exceptions to this rule, which are not without controversy, where for example, the parties to an award have knowingly historically adopted an interpretation of an award provision over a long time. This can only possibly apply in cases of ambiguity. I do not consider however, that this situation applies in the present circumstances.

16 Whilst the applicant has referred to cl 151 of the 2018 Agreement which deals with staffing shortfalls, and that such disputes are dealt with under the dispute resolution provisions in cl 176, this is an exception. By cl 151.5, it is provided that if the parties cannot agree on the employer's decision in relation to a staffing issue, then any dispute shall be resolved under cl 176. That there is express reference to cl 176 in cl 151.5 of the 2018 Agreement, tends against the broad approach to interpretation contended by the applicant. If, as submitted by the applicant, the dispute resolution procedures in cls 176 - 179 are as broad in scope as submitted, then a provision such as cl 151.5, expressly referring to the ability to have such disputes dealt with in this manner, would not be necessary.

17 My conclusions as to the dispute resolution provisions of the 2018 Agreement are also supported by there being detailed consultative processes set out in cls 171,

172, 173 and 174 of the 2018 Agreement. These are plainly intended to operate in a complementary fashion to the dispute resolution provisions in cls 176 – 179.

18 The approach to interpreting cl 176.2, advanced by the respondent, is correct and I will declare to this effect.