

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA

v

CHIEF EXECUTIVE, DEPARTMENT OF PREMIER AND CABINET (FOR
CHIEF EXECUTIVE, DEPARTMENT FOR CORRECTIONAL SERVICES)

No 4971 of 2018

Deputy President Judge Hannon

Orders 8 May 2019

- 1 In a decision delivered 30 April 2019,¹ having found that the Chief Executive, Department of Premier and Cabinet (“the respondent”), as the declared employer, was in ongoing breach of the consultation obligation under clause 34 of the *South Australian Modern Public Sector Enterprise Agreement: Salaried 2017* (“the EA”), I set out orders at [184] that I proposed to make to require that the respondent take steps to remedy the contraventions or to refrain from further contraventions.
- 2 Having heard from the parties today, **I order** under s 12(1)(a) of the *Fair Work Act 1994* (“the Act”) that from 20 May 2019 the respondent take steps to remedy the contravention by engaging in appropriate consultation with the Public Service Association of South Australia (“the PSA”) with respect to the following matters:
 - (1) processes to address the concerns of prisoners regarding the transfer of management of the operations of Serco in so far as they may affect employees at the ARC or other DCS locations;
 - (2) provisions to ensure the safety and security of prisoners at the ARC and for assessment by Serco of prisoners upon entry to the ARC in so far as they may affect employees at the ARC or other DCS locations;

¹ *Public Service Association of South Australia v Chief Executive, Department of Premier and Cabinet (for Chief Executive, Department for Correctional Services) (No 4)* [2019] SAET 72

- (3) the employment conditions, the staffing model and any employment protections of employees to which Serco has been or may be required to commit;
 - (4) the terms of the transition plans and arrangements which have been or are to be agreed or negotiated with Serco or otherwise being considered by the respondent in so far as they affect current employees at the ARC or employees at other DCS locations;
 - (5) industrial arrangements to which Serco has been or may be required to commit for coverage of its employees at the ARC; and
 - (6) any requirements to be made of employees employed at the ARC in respect of facilitating the transfer of the management of the operations of the ARC to Serco.
- 3 At [185] of the decision of 30 April 2019, I ordered that the respondent disclose, and subject to any objection to production, produce documents in its possession which were directly relevant to the above topics.
- 4 On 2 May 2019, the solicitors for the PSA advised the solicitors for the respondent that it sought disclosure and production of documents in the following categories:
1. Schedule 1, Schedule 8 and the Transition Plan attached to the Contract with Serco.
 2. The transition plan being developed by the Department including related internal documents of the Department.
 3. Correspondence and communications with Serco concerning the transition process.
 4. The current Standard Operating Procedures relating to the assessment and handling of prisoners entering the ARC.
 5. Any transition documentation produced by the Department for the movement or transition of prisoners at the ARC to or from any other prison site.
 6. All internal documentation of the Department concerning the induction of prisoners into the prison system, including amendments to policies and procedures and the involvement of Serco in its capacity as having responsibility for the ARC as the admitting prison.
 7. All internal documents of the Department concerning the impact of the transfer of the management of the operations of the ARC on prisoners.
 8. All documents relating to procedures for the assessment and classification of prisoners and remandees. All documents which show the Government's requirements for Serco to make assessments and classify prisoners and how these processes would be implemented.
 9. All internal documents of the Department relating to Serco's involvement in the transfer of prisoners to other prisons.

10. All documents relating to how the PSA will be consulted on any changes which Serco may propose to those assessment and classification procedures in the future.
 11. All documentation on existing or proposed processes to address concerns of prisoners and to mitigate any potential prisoner concerns, that may affect the employees of the ARC or other prisons.
 12. All documents relating to the employment conditions, the staffing model and any employment protections of employees to which Serco has been or may be required to commit, including staffing models contained in the Contract and any proposal documents.
 13. All documents dealing with industrial arrangements and coverage to which Serco has been or may be required to commit in relation to the employment of staff.
- 5 On 7 May 2019, the solicitors for the PSA sought disclosure of additional documents as follows:
14. “Contractor’s Tender” – clause 3.1.2
 15. “Chief Executive’s Rules – clause 6.1.2(d)
- 6 By letter dated 7 May 2019, the respondent stated that it was ready and willing to consult about the topics referred to in orders (1) and (2) above, but otherwise listed a number of potential objections to disclosure or production. The grounds of objection included whether the documents sought were within the power, custody or control of the respondent, whether if so such documents were “directly relevant” to the topics set out in the orders, or concerned or affected any of the employees of the Department for Correctional Services (“DCS”), and whether any of the documents were privileged and exempt from production on grounds of public interest immunity.
- 7 At a hearing today, the respondent sought an adjournment of the disclosure request on two grounds. First, that the Tribunal, having made final orders, had no power to order any further disclosure of documents. Second, given the recent delivery of the decision on 30 April 2019, it needed more time to have an appropriate opportunity to determine which documents in the categories named ought to be disclosed.
- 8 As to the first point, it is arguable that, as findings of breach of the EA and consequential orders have been made under s 12 of the Act, there is no power to order further disclosure in accordance with the rules relating to pre-trial disclosure. However, even if that is the case, which I do not now decide, I consider I have power under s 12 of the Act to order that steps be taken to remedy the breach of the consultation obligation, steps which include the provision of information, including documentation, in relation to topics which should have been the subject of consultation. The references below to “disclosure” and “production” of

“directly relevant” documents should be understood with this alternative power in mind.

- 9 The respondent sought until 5 pm Wednesday 15 May 2019 to consider its response to the disclosure request.
- 10 I note that I have made it clear in previous decisions, more than once, that the respondent must be taken to be the statutory employer which stands in the place of the DCS, and that actions of the DCS must be taken to be actions of the respondent with respect to matters arising under the EA, and that the matters arising under the EA appropriate for consultation include the topics in the nature of those finally set out in the orders referred to in para 2 above. I note that on 9 April 2019 the respondent made disclosure on this basis in a Fifth List of Documents, whilst claiming privilege from production on various grounds. The need for consideration of the issues outlined by the respondent should have come as no surprise upon the delivery of the decision on 30 April 2019.
- 11 However, despite these matters, and the pressure of time which means that as each day goes by there is a diminishing period during which the appropriate consultation as ordered can take place before the transfer of the operations of the Adelaide Remand Centre (“ARC”), I consider it is appropriate that the respondent be given further time to consider its position. This is particularly so given the breadth of the material now sought, and the express limitation in a number of the orders to the effect that consultation should take place in so far as the matters referred to may affect employees at the ARC or other DCS locations. This requires careful consideration of documents directly relevant to the workplace change in terms of its immediate impact on employees and its potential for a wider effect on DCS and public sector wide terms and conditions as described,² and consideration of disclosure that may affect the rights of third parties and involve sensitive and confidential information.
- 12 I note that the respondent is seeking instructions on whether to appeal against the decision made on 30 April 2019 and the further orders for disclosure, and that if so instructed, it is anticipated that a stay of the orders made will be sought. However, the findings and orders made will remain operative unless and until a stay order is made following lodgement of any appeal. I expect the order made below to be complied with unless a stay order has been made beforehand.
- 13 **I order that by 5 pm on Tuesday 14 May 2019** the respondent make disclosure of directly relevant documents in its possession³ which fall within the 15 categories of documents described by the PSA above.
- 14 Any documents over which privilege from production is claimed on grounds of confidentiality or public interest immunity must be identified, so that the claim for

² For example, at para [123] of [2019] SAET 72.

³ Possession being understood in the terms described in [2019] SAET 60 at paras [50]-[52], and [73] subparagraphs (5) to (8) inclusive.

privilege can be evaluated and determined, and a decision made as to whether limited production is required and if so on what terms.

- 15 I list the matter for further hearing for these purposes **at 2 pm on Thursday 16 May 2019**. I will hear at the same time from Serco Limited as an intervener to the extent its interests are affected.
- 16 I was invited by the PSA to make the orders in para 2 above effective from a date following determination of further disclosure issues. I have done so but will hear further from the parties as to the effective date of those orders on 16 May 2019. There is no reason the parties cannot agree to commence the further consultation process as ordered forthwith on some topics at least despite continuing issues over disclosure and production of documents.

Presidential Member	Deputy President Judge Hannon
Signature	

