



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT WRIGHT**

C2023/3779

s.604 - Appeal of decisions

**Appeal by Goodwin
(C2023/3779)**

Sydney

2.00 PM, WEDNESDAY, 23 AUGUST 2023

PN1

VICE PRESIDENT ASBURY: Good afternoon. Could I just start by taking the appearances, please. Ms Mitchell, you are for the appellant?

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MS S MITCHELL: Yes, that's correct. He is seated here beside me, as well.

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VICE PRESIDENT ASBURY: Great. Thank you for that. For the respondent?

PN4

MS R PRESTON: Ms Preston for the respondent, may it please the Commission.

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VICE PRESIDENT ASBURY: Thank you. Are you needing to seek permission?

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MS PRESTON: Yes, Deputy President, I do seek permission. Our submissions have been filed and I rely on those.

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VICE PRESIDENT ASBURY: Thank you. Ms Mitchell, does the appellant have any position in relation to the respondent being legally represented?

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MS MITCHELL: The appellant consents to the respondent being legally represented.

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VICE PRESIDENT ASBURY: Thank you. In any event, given that the matter does appear to raise issues of some complexity, we are satisfied that it would enable it to be dealt with more efficiently if the respondent was granted permission to be legally represented, so permission is granted. Ms Mitchell, we have read the material that you've filed.

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MS MITCHELL: Yes.

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VICE PRESIDENT ASBURY: Is there a preliminary matter you wish to raise about some new evidence?

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MS MITCHELL: I did have some further submissions to make.

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VICE PRESIDENT ASBURY: Yes.

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MS MITCHELL: If that's okay. Would it assist if I emailed it through? It is quite lengthy. It's just to refer the Full Bench to some case law and to make some other points in relation to the application for leave to adduce further evidence.

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VICE PRESIDENT ASBURY: If you would like to do that, we could stand the matter down for a minute and look at the document.

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MS MITCHELL: Otherwise, I'm happily to verbally - - -

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VICE PRESIDENT ASBURY: Well, why don't you verbally let us know what the basis upon which you seek to adduce new evidence is.

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MS MITCHELL: Okay. Are you happy for me to read off what I've prepared?

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VICE PRESIDENT ASBURY: Sure.

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MS MITCHELL: Thank you. So this is in relation to what the actual evidence is.

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VICE PRESIDENT ASBURY: Yes.

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MS MITCHELL: The evidence is a report that contains information about who accessed the appellant's GPS records, what type of information was sought by the person accessing those records and the dates and times those records were accessed, with a date range of 1 August 2022 to 9 February 2023. This report was released to the appellant in part by the respondent under a Freedom of Information application.

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VICE PRESIDENT ASBURY: Yes.

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MS MITCHELL: The following information is just to provide some context. On page 536 of the appeal book it contains the third page from the respondent's motor vehicle information GPS policy and has the heading 'Access to data collected'.

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VICE PRESIDENT ASBURY: Yes, just bear with us while we find that.

PN26

MS MITCHELL: Yes.

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VICE PRESIDENT ASBURY: Bear with us while we turn that up. So 536?

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MS MITCHELL: That's correct, yes.

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VICE PRESIDENT ASBURY: Yes.

PN30

MS MITCHELL: I'll just say the policy refers to vehicles and plant, but I'm just going to say vehicles because plant is not relevant. So on this page it provides details such as who is authorised to have what type of access. For example, it states at the second paragraph that:

PN31

Supervisors and staff of the department a vehicle is allocated to can access the real time and historical location data of vehicles, and access to this information is to be for primary purposes only.

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VICE PRESIDENT ASBURY: Yes.

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MS MITCHELL: The primary purposes are listed on the previous page.

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VICE PRESIDENT ASBURY: Yes.

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MS MITCHELL: Which are auditing vehicle performance, including the type and amount of utilisation; work and services allocation planning and reporting; and identifying and addressing staff in vehicle safety and maintenance issues. The policy then details the authority requirements for increased access for both primary and secondary purposes.

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The secondary purposes, which are also listed on page 535, are investigation of complaints relating to vehicles; coaching and development; disciplinary matters; requests from police in accordance with organisational processes. If we just go back to page 36, the third last paragraph states:

PN37

All data access will be monitored by audit trails to maintain data security and detect unauthorised access.

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So the piece of evidence that I'm seeking to adduce is this audit records report; so I'll refer to it as the audit records report. The report did originally have a number of lines that were missing on the top of a lot of the pages, but the respondent provided a second report titled 'Missing parts' which is annexed to the witness statement of the appellant, so that just provides some context as to what the report is.

PN39

VICE PRESIDENT ASBURY: Well, perhaps you can tell us what you think the report is going to establish.

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MS MITCHELL: So the report is going to establish that the respondent accessed the GPS records prior to 15 September in breach of not only the council policy, but in breach of the Surveillance Devices Act 1999 in which it is an offence to use, maintain or install a tracking device on a – you know, that determines the GPS location of a person or an object that is in the control or lawful possession of a person without their consent.

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Although consent is a condition of the use of the vehicle, the consent is only in accordance with their policy, which means that it can't be accessed for secondary purposes without authorisation. The report shows that the access occurred long prior to 15 August when authorisation was provided.

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VICE PRESIDENT ASBURY: 15 August - - -

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MS MITCHELL: Sorry, 15 September. My apologies, 15 September. So the authorisation was given on 15 September, but it was accessed long before that.

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VICE PRESIDENT ASBURY: How do you know that the access was for secondary purposes?

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MS MITCHELL: It details the type of report sought. You have report types, including map tag zone reports, history report, status, driver log-on reports. Those reports are unlikely to be for any primary purposes.

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VICE PRESIDENT ASBURY: On what basis do you say that?

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MS MITCHELL: Because the primary purposes are – sorry, let me just – I just read that. The primary purposes are for – sorry, let me just get my paper back up.

PN48

VICE PRESIDENT ASBURY: Well, don't they include the type and amount of utilisation?

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MS MITCHELL: They do include the type and amount of utilisation, but it seems very odd that a map tag zone report, which is seen whether a vehicle was parked at a particular location, would be relevant to that purpose.

PN50

VICE PRESIDENT ASBURY: If the vehicle is parked at a shopping centre, then it's not being used arguably for work. Why isn't that a purpose, including the type

and amount of utilisation? The assumption is it's not being utilised if it's parked somewhere where it isn't a workplace.

PN51

MS MITCHELL: That would surely fall under a secondary purpose, which would be disciplinary or complaints.

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VICE PRESIDENT ASBURY: Okay. What else do you want to say about this new evidence?

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MS MITCHELL: Okay, so I just wanted to address the availability of the evidence at first instance in which the respondent states it could have been obtained at first instance through the coercive processes of the tribunal, but there are several issues with this statement because the appellant had no reason to believe that the respondent had accessed these reports other than in accordance with their policy, which is, you know, the condition of use of - - -

PN54

VICE PRESIDENT ASBURY: Is that correct? Didn't the appellant at all times say that he disbelieved the veracity of the complaint that had led to the accessing of his records?

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MS MITCHELL: He disbelieved the complaint was made by an anonymous member of the community, that's correct.

PN56

VICE PRESIDENT ASBURY: Yes, so that was what he says gave rise to the access to his reports, so why didn't he disbelieve – and he raised issues of selective listing of the records. It's not correct to say that he didn't have issues with the records at the outset, is it?

PN57

MS MITCHELL: So the issues with the records weren't that they were accessed prior to authorisation. That was an issue that was never raised. The issue in relation to the records were that authorisation was obtained based on a complaint that he alleges was made by a member of the respondent's staff. There was never any belief that the respondent had accessed this information outside the scope of their authority.

PN58

I mean, he gave evidence that he thought that he was potentially being followed, but he never thought that council had breached the policy and accessed his records prior to getting the approval. That was never an argument put - - -

PN59

VICE PRESIDENT ASBURY: But he did think there had been a fraudulent complaint manufactured, as I understand.

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MS MITCHELL: That's correct, that's correct, but he didn't know that the records were accessed prior to 15 September.

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VICE PRESIDENT ASBURY: Okay. I understand your submission.

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MS MITCHELL: On that basis of this information not being available at first instance is that the respondent went to great lengths to emphasise, having only accessed the records after 15 September. There are numerous occasions where they state that the GPS data was accessed only after receiving the complaint. It's in Ms Michail's statement at page 259 of the appeal book, paragraphs 10 and 11.

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VICE PRESIDENT ASBURY: Bear with us for a moment while we turn that up.

PN64

MS MITCHELL: So Ms Michail details that council accessed the GPS data of the appellant over a five-day period as a first step.

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VICE PRESIDENT ASBURY: But it's not declared that that is the only time the data was accessed.

PN66

MS MITCHELL: It's declared – if you're minded to read the document that I've prepared, there are numerous occasions in which – you know, and even in closing submissions at the first instance counsel states at page 142:

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But what is relevant here is the matters uncovered after reviewing the GPS data –

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which they maintain occurred – the authorisation occurred on 15 September.

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VICE PRESIDENT ASBURY: But that doesn't mean that the data was never accessed previously for some other reason, being a primary purpose. It doesn't say, 'The first time we have ever accessed this data was after the complaint of 15 September.'

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MS MITCHELL: It seems unusual that the history reports and everything – map tag's own reports, which were authorised both prior to and after the 15th, it seems that it is related for this purpose and that it was accessed prior to obtaining authorisation.

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VICE PRESIDENT ASBURY: Okay. Do you want us to read your submission or do you want to read it out - - -

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MS MITCHELL: I think it would be a lot easier.

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VICE PRESIDENT ASBURY: All right.

PN74

MS MITCHELL: I think it would be a lot easier if I can email that across now.

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VICE PRESIDENT ASBURY: Sorry, can you also email it to the respondent.

PN76

MS MITCHELL: Of course, yes.

PN77

VICE PRESIDENT ASBURY: Are you able to access an email directly, Ms Preston? Are you able to get an email sent to you directly where you are?

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MS PRESTON: Yes, Deputy President.

PN79

VICE PRESIDENT ASBURY: Okay. So we will stand the matter down for a few minutes and have that email sent through, then we will make sure it gets forwarded or sent to the respondent, as well, and we'll take, say, 10 minutes to have a look at it.

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MS MITCHELL: Thank you.

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MS PRESTON: Could I just ask that that be sent directly to my email address?

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MS MITCHELL: Yes, what is your email address?

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MS PRESTON: (Email address supplied).

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MS MITCHELL: No problem. I will send that directly to you.

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MS PRESTON: Thank you.

PN86

VICE PRESIDENT ASBURY: All right. We will stand the matter down.

SHORT ADJOURNMENT

[2.14 PM]

RESUMED

[2.42 PM]

PN87

VICE PRESIDENT ASBURY: Thanks, Ms Mitchell. We have had an opportunity to read the document that you forwarded, being your submission in relation to why we should allow further evidence to be provided. Ms Preston, do you have a view in relation to this or are you in a position to respond?

PN88

MS PRESTON: Yes, Vice President. In my submission the further evidence should not be allowed. It's not justified on the basis of established principles. At the end of the day maybe the document could potentially support what the appellant says, but maybe it doesn't, and we don't know because we don't have the relevant evidence. It wasn't addressed at first instance and is not addressed now.

PN89

We don't know who accessed the report, we don't know why the report was accessed. We have a GPS policy that provides that there were a number of primary purposes for which the data was accessed. We simply don't know whether stop/start data is now thought to be relevant to those purposes because there is no one to give evidence about those things.

PN90

The only relevant evidence that we do have and which doesn't appear to be impugned or which the appellant doesn't appear to seek to impugn, is that the records were accessed following the complaint; that it was because of the complaint that those records were accessed; that the access at that point in time was authorised in accordance with the policy and evidence was given, cross-examination took place; and the conclusion was reached by the tribunal. It was that access and not any subsequent access that formed the basis of the disciplinary process.

PN91

Further, if the documents don't do what the appellant says they do or they're not in a position to draw the conclusions (indistinct) that the appellant is facing, it simply could not been made out on the current state of the evidence. Secondly, the question is, well, even if it's that's correct and there was this early unauthorised access, how is it relevant? Mr Colliver wasn't involved in the disciplinary process as far as the evidence is concerned. It was the domain of Mr Bell and HR, and HR has informed them in consultation with Mr Bell.

PN92

So, what Mr Colliver did beforehand is really not the real issue and it doesn't make it likely that there would be any alternative result if this evidence were to be admitted. There is no basis for it to be admitted, is the big point.

PN93

VICE PRESIDENT ASBURY: Ms Preston, is fundamentally your argument that at the end of the day the data on the dates that its data was accessed was not data that was used as a basis for the allegations or the disciplinary action? It was only the data that was obtained pursuant to the authorisation that was relied on by the respondent?

PN94

MS PRESTON: Well, that is one limb of the argument, absolutely, and that is consistent with the evidence. The evidence was we had a search completed in relation to those five days, I think it was. That revealed some significant aberrations or matters of interest and so we went back and we got a longer period. Whether that was all at once or whether that was in parts, it doesn't really matter, but Mr Colliver and what he did was just not to the point, so that's the first point.

PN95

The second point is the reasons and the conclusions that are drawn based on this are just not available to be drawn, so the whole basis on which it's sought to have this evidence tendered is – well, if not without foundation cannot, having regard to section 140 of the Evidence Act, be regarded as the purposes and the conclusions that can be drawn on the present state of the evidence.

PN96

The other issue is that we can see in the appeal book itself – and this is really just a side issue because the big points are as I mentioned, but at page 198 of the appeal book - - -

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VICE PRESIDENT ASBURY: Yes.

PN98

MS PRESTON: - - - and at page 218 of the appeal book are two pieces of correspondence that Mr Colliver sent in relation to his concerns. Going first to the 19 August correspondence at page 218 of the appeal book, we can see that Mr Colliver there is saying that he wanted to give Mr Parkinson the heads up about a couple of staff members that he's having issue with over the last couple of weeks and to find out the concerns that he is having.

PN99

Now, what he says is the basis of these concerns are not that he has been tracking the GPS data and this is what it has revealed, but, on the contrary, there are specific events that are giving rise to these concerns, one of which is a report that has been made by the mowing employee, I'll refer to him, which is a fellow employee. Now, this email is on 19 August. At this time we see that Mr Colliver says that – sorry, I'm just trying to – sorry, this isn't the mowing employee, this is earlier concerns. What he says at this time is:

PN100

I'm going to start moving forward. I'll be keeping an eye on them to make sure they're working to their schedule and keeping control of their respective areas. Hopefully splitting them up and giving them control of an area will motivate them to get more done. I'm open to any suggestions how to tackle this situation as it has been hard in the past to motivate Mr Goodwin as he can be difficult.

PN101

Now, we see there Mr Colliver proposing what he is going to do to manage the performance. There is no suggestion of any monitoring in the sense of GPS monitoring. He accepts for the first time here that he is going to start keeping an eye on them. This is on 19 August and yet the data that is relied on in relation to the GPS records shows access on 1 August. We also know that 1 August is only the first date that is provided. We don't have any data that goes further back. We might see what happens further back in time, but considering what the appellant relies on in part is this threat to keep an eye on them. That threat didn't occur until 19 August - was the first instance.

PN102

In relation to the 01/09 email – the 1 September email – at page 198, we can see that – and this is the issue in relation to the mowing employee:

PN103

Paul was seen on Monday this week while working an RDO to be shopping at Coles on the corner of Hogans Road and Tarneit Road with a shopping trolley full of groceries at approximately 2.15 pm. This report came from a member of the mowing crew who was on his day off and told me what had happened.

PN104

The mowing crew member told me that he had noticed a council vehicle when he first got to the shops and that he had done some other shopping, and said he would have been there close to an hour. Apparently this sort of behaviour isn't new to him as it was seen the previous week also.

PN105

Now, this is on 1 September, so apparently one month after this supposed monitoring was happening, and yet what is news to Mr Colliver is these matters apparently should have been seen from the data, but he's relying on what the mowing employee has said. Then we see:

PN106

I'm not sure if we have grounds to check the GPS or not, but I thought I would just let you know what had been told to me.

PN107

So again the employer is really saying, well, this is all about him pressing at this point to have the - Mr Colliver pressing at this point to have the GPS looked into to get that authority. That's not what it is at all. Mr Colliver, if anything, is just passing on the information and leaving it in someone else's hands. It's just not consistent, any of this correspondence, with the (indistinct).

PN108

VICE PRESIDENT ASBURY: What do you say about the assertion that it's a criminal offence to have done this?

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MS PRESTON: To have done what, to monitor - - -

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VICE PRESIDENT ASBURY: To have breached this surveillance legislation that the appellant is citing.

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MS PRESTON: To be honest, I'm not across – I haven't considered – this is the first I'm hearing - - -

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VICE PRESIDENT ASBURY: Yes, I understand.

PN113

MS PRESTON: - - - of the Surveillance Devices Act in this context.

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VICE PRESIDENT ASBURY: All right.

PN115

MS PRESTON: I know that there are (indistinct) under the Act, but I haven't looked at the provisions so I can't respond to that.

PN116

VICE PRESIDENT ASBURY: Okay. All right. Thank you. Ms Mitchell, any of this data that has been obtained, do you say any of it was relied on in the disciplinary process that Mr Goodwin was subjected to? Was any data from the time frames you're now seeking to put before us relied on in the disciplinary proceeding?

PN117

MS MITCHELL: So the argument isn't that it was relied on in the disciplinary proceeding because they relied on data that commenced on 24 August onwards, which was sent with authority by Luke Hunt on 15 September. The overarching sort of argument in relation to this data being accessed is that the entire process was essentially a predetermined, you know, event in which they were aware that Mr Goodwin was taking frequent breaks.

PN118

They didn't follow the policy in relation to performance management in which he would have had a capacity assessment, which I refer to in the documentation. You know, instead of performance managing Mr Goodwin and, you know, making further investigations in relation to any medical issues, the decision was made to instead terminate him. Mr Colliver's opinion of Mr Goodwin, you know, comes through quite obvious just within the emails and Mr Goodwin gave evidence that he wasn't particularly pleasant to him in person.

PN119

VICE PRESIDENT ASBURY: Well, you have got the emails to refer to and while it may not be your argument, it's my question: you're not asserting that any of the data from the GPS that was accessed pursuant to these FOI searches that you obtained - none of that was used in the disciplinary process; is that correct?

PN120

MS MITCHELL: Sorry, I got sidetracked. What we do say is on 30 August in the report that we seek to adduce, a history report and a status report was obtained between 1.38 pm and 1.42 pm. Mr Goodwin arrived at the shopping centre just a few minutes earlier and so we do say as a result of that particular entry on 30 August, that it was something that was already known so it was a time frame in which, you know, the respondent selectively sought permission for from the 24th to the 28th and then subsequently the data, because they knew that he had been there and that - - -

PN121

VICE PRESIDENT ASBURY: But does the evidence you're seeking to adduce show who accessed the data on that particular date and time?

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MS MITCHELL: No, so that information was redacted. You know, the concern is the lengths that the respondent went to to stop this report from being provided to the appellant.

PN123

VICE PRESIDENT ASBURY: That could just be because it wasn't relevant, because what the respondent was relying on was what it put to Mr Goodwin and it didn't need any other data because arguably it had enough on what it had.

PN124

MS MITCHELL: Sorry, that just - - -

PN125

VICE PRESIDENT ASBURY: Arguably the data that the respondent got from the authorised searches or the authorised – yes, the authorised reports from the GPS, was sufficient to be found by the Commissioner as a valid reason for dismissal and it was what the respondent relied on. It didn't rely on anything other than that data, so what - - -

PN126

MS MITCHELL: The respondent relied on – so their policy states that only the CEO can authorise summary dismissal and to obtain the CEO's signature on that recommendation they relied on the respondent having fabricated documents, which was appeal ground 3 - - -

PN127

VICE PRESIDENT ASBURY: I'm sorry, but what we're dealing with is this data.

PN128

MS MITCHELL: Yes.

PN129

VICE PRESIDENT ASBURY: And the CEO, having seen the data that was obtained from the authorised searches, had grounds for summary dismissal. That's really the issue, isn't it? The CEO didn't need this other data that you're alleging was obtained in breach of the policy. He didn't need that data

to make the decision to summarily dismiss because there was sufficient in what was already obtained by the authorised searches.

PN130

MS MITCHELL: The dismissal wasn't based on the data, it was based on the appellant having falsified documents. That's what the termination – that was the reason which was provided by the respondent attached to their statement. The reason given to the CEO was that the appellant had falsified documents and on that basis he was terminated.

PN131

VICE PRESIDENT ASBURY: What has that got to do with the data and the additional evidence you're seeking to adduce? That's a separate point, isn't it, in your appeal grounds?

PN132

MS MITCHELL: That's a different point. Sorry, I was - - -

PN133

VICE PRESIDENT ASBURY: We're discussing why we should allow this data to be put before us and the argument really is that the data was not relied on as a ground for dismissal. There is no information about who accessed it in any event that assists in connecting the two matters.

PN134

MS MITCHELL: So essentially in the GPS policy it states that the data can't be accessed as a result of having previously accessed the data. Does that make sense? It's in the policy.

PN135

VICE PRESIDENT ASBURY: Yes, but the data was accessed as a result of a complaint.

PN136

MS MITCHELL: Which, as alleged from the outset, we believe that it was fabricated in order to be able to comply with the council policy. It wasn't a legitimate community complaint.

PN137

VICE PRESIDENT ASBURY: All that does is cast doubt on the data that was obtained as a result of the authorisation. It says nothing about the data that you're seeking to put before us, because that data was not relied on by the respondent in deciding to dismiss Mr Goodwin. It only relied on the data as part of that process. It only relied on the data that was obtained from the authorised searches.

PN138

MS MITCHELL: I understand what you're saying. I guess it goes to the entire investigation being something that was predetermined and given the appearance of – you know, it supports that ground that it was just an appearance of complying with procedure; an appearance of procedural fairness in that it was something that

was already predetermined and which should have been managed in accordance with the council's performance management policy.

PN139

VICE PRESIDENT ASBURY: At the end of the day the data that was obtained by the authorised searches says what it says. There is no argument that that data doesn't demonstrate what the respondent says it demonstrates.

PN140

MS MITCHELL: No, and it has never been argued that it doesn't say what it says. That hasn't been the argument. The argument to that was that it wasn't wilful conduct by the appellant in relation to having these voiding issues.

PN141

VICE PRESIDENT ASBURY: Okay, which has got nothing to do with the additional data that you're trying to put before us because the respondent's answer to what was put to him in the allegations is those matters, so they can be considered without this new evidence being put before us; because, as I understand it, it doesn't show us who accessed the data.

PN142

MS MITCHELL: No, it doesn't. Only the council knows who accessed the data, but what it shows is that the whole process was improper and potentially unlawful, and therefore the data was accessed improperly.

PN143

VICE PRESIDENT ASBURY: Well, what it shows is the data was accessed on particular dates that were prior to the authorisation. It doesn't show who accessed it and it doesn't show the purpose for which it was accessed, which could have also been a primary purpose rather than a secondary purpose.

PN144

MS MITCHELL: Well, yes, the data isn't – the report isn't complete. It was obviously only released in part, so that is correct.

PN145

VICE PRESIDENT ASBURY: Speaking for myself, if the mower man sent an email at a certain time, that could easily go to a primary purpose; what is the vehicle being used for. So, where was it, when was it there and what is it being used for. For all intents and purposes that could still be a primary purpose for looking at the type of amount of utilisation of the vehicle.

PN146

It is not at all certain that there could be a finding based on this material that it was used for a secondary purpose in any event. We don't know who accessed it, it doesn't show us that. The purpose for which it was accessed could be a primary purpose and the data was not relied on by the respondent in the disciplinary process that it went through. So, no issue of procedural fairness arises because Mr Goodwin had all the allegations put to him, including the raw data.

PN147

MS MITCHELL: And in relation to the raw data, he didn't have anything to compare the data to.

PN148

VICE PRESIDENT ASBURY: Well, the data showed what it showed. Let me put it this way, Ms Mitchell, again for my part: even if the respondent had no authorisation for any data, it could have come to the Commission and said, 'The appellant is no longer employed. We have downloaded the entire history of his GPS in his vehicle and here it is', and tendered it to the Commission, then you would have had an argument about procedural fairness but you wouldn't have had an argument about substantive fairness because the data would show what the data showed.

PN149

So the respondent, after the dismissal, could have relied on other data to say that there was a valid reason for dismissal and then you would have had an argument about procedural fairness, but at the end of the day it didn't do that. It didn't rely on the data that you're seeking to adduce and it's not probative of the things that you're trying to establish, being that it was accessed for a secondary purpose and formed part of the reasons for the appellant's dismissal.

PN150

MS MITCHELL: Well, I guess it goes to, you know, the transparency and the expectations of, you know, how you would expect local government to conduct themselves when making decisions. It could be said that they didn't rely on the data at all to dismiss him because the recommendation was based on falsifying documents.

PN151

VICE PRESIDENT ASBURY: Okay, I understand your submission. Is there anything else you want to say about it?

PN152

MS MITCHELL: No, the only point I would make is that the mowing employee's report was inaccurate. The data establishes that the appellant was only at the complex for 26 minutes and that he only purchased incontinence products. There was no shopping trolley full of shopping - - -

PN153

VICE PRESIDENT ASBURY: Okay, but for the purposes of the complaint it doesn't matter whether it was accurate or not. What matters is, is there a complaint? In any event, I understand your submission. Is there anything else you want to say at this point?

PN154

MS MITCHELL: No, thank you.

PN155

VICE PRESIDENT ASBURY: Ms Preston, anything further you want to say?

PN156

MS PRESTON: No, nothing, thank you, Vice President.

PN157

VICE PRESIDENT ASBURY: All right. We might just stand down for a few minutes and discuss what we intend to do in relation to the tendering of this data. Excuse us for a moment.

SHORT ADJOURNMENT

[3.07 PM]

RESUMED

[3.10 PM]

PN158

VICE PRESIDENT ASBURY: Having considered the submission made on behalf of the appellant in relation to this material and also the witness statement concerning if it has been filed by Mr Goodwin appending the material that is ought to be tendered, we have decided that we will consider whether we will receive that material a part of our decision.

PN159

At this point we will mark the statement of Mr Goodwin for identification. We will mark it as IG1, which means it is not in evidence, it is marked for identification and we are going to consider whether we will receive it, and what we will do with it as part of the decision in relation to this appeal. Is that clear, Ms Mitchell?

PN160

MS MITCHELL: Yes, it is. Thank you.

MFI #IG1 STATEMENT OF APPELLANT

PN161

VICE PRESIDENT ASBURY: Perhaps if you would like to continue speaking to your grounds of appeal.

PN162

MS MITCHELL: Okay.

PN163

VICE PRESIDENT ASBURY: You can take it that we have read the submission.

PN164

MS MITCHELL: Yes. I guess other than apologising for the case law, that I hadn't sent the entirety of the copy to you – and I can send that across if you would like, a full copy of the case law.

PN165

VICE PRESIDENT ASBURY: We can locate that, Ms Mitchell. I think you have done very well with your submissions to get them to the point that you have, so we're quite happy to locate the case law because we're familiar with it.

PN166

MS MITCHELL: Thank you. Other than what is contained in the submissions, I don't really have anything to add, but, yes, just thank you for, yes, understanding that, yes, I didn't locate that document and accommodating me in that regard, so thank you.

PN167

VICE PRESIDENT ASBURY: Okay. Can you confirm that the outcome the appellant is seeking from this appeal, as I understand it, he wants the decision quashed?

PN168

MS MITCHELL: Yes, that's correct, so he was seeking for the decision to be quashed. I did explain the various options, maybe that you remit it back to the Commissioner or just the various options, but essentially he was wanting the decision quashed, yes, ultimately, so the answer is yes to that question.

PN169

VICE PRESIDENT ASBURY: He is seeking instead that there is a finding that he was unfairly dismissed and that he should be reinstated?

PN170

MS MITCHELL: That's correct, yes.

PN171

VICE PRESIDENT ASBURY: Okay. Thank you. Ms Preston?

PN172

MS PRESTON: Just quickly I'll summarise the main contentions and then go to the details of the appeal grounds and where the Full Bench can find evidence in support of the matters raised. The respondent first contention is that there is no arguable case of legal error.

PN173

Firstly, underlined in a number of the appeal grounds is the claim that the Commission failed to consider particular matters, but the reality, however, is that those matters were either matters that the Commission did consider and the appellant just doesn't agree with the conclusions reached or that the matters were matters that the Commission was not required to consider or could not give rise to appealable error within the meaning of *House v The King* either because the matters had not been raised at first instance or were not relevant or sufficiently material.

PN174

Secondly, the appellant then erroneously claims that the Commission at first instance did not arrive at the decision that the appellant considers that it should have. That is not a proper appeal ground, in my submission, at least not unless the appellant meets the result of unreasonableness applied by *House v The King*. It's certainly not expressed that unreasonable is a feature of the appeal ground so that even if a claim of unreasonableness were to be assumed, it's not made out.

PN175

Thirdly, the appellant variously criticises the Commissioner insofar as the weight that the Commissioner afforded to particular matters. It's not established that issues of weight do not give rise to appellable error unless evidence is available to the Commission to perform a statutory task and the appellant is not able to show any such deficiency.

PN176

The respondent's next contention is that even if the Commission finds that there is an arguable case of error, it cannot be satisfied that it is in the public interest to grant permission to appeal, which it must necessarily find pursuant to section 400 of the Act. The matters raised that are supportive of the public interest are properly still regarded as matters particular to the appellant and not to any broader public concern.

PN177

In the event that the Commission should exercise its discretion not to allow the appeal in circumstances – sorry, the Commission should exercise its discretion, so whether or not the Full Bench grants permission to appeal is ultimately at the discretion that must be exercised judicially, but the tribunal should not exercise that discretion in any circumstances having regard to all of the matters that form the context of this proceeding, including the fact that the grounds don't support a finding of legal error; that the appeal grounds don't give rise to any finding of substantial injustice.

PN178

The concern, that of including new evidence, that should have been actioned and raised a long time earlier, not only before the Full Bench but also in the disciplinary process itself. Instead the appellant elected to be evasive and noncommittal in his responses. He didn't attack the (indistinct) and now he comes to the Full Bench having failed at first instance and asks that the whole thing be overturned. In my submission, that itself is a ground that permission to appeal should be refused.

PN179

Finally, it's the respondent's position obviously – as I've already addressed – that the Commission should not allow the further evidence. I have already given my primary submissions on that. Even if the Full Bench does not accept what I have said ultimately, the question of whether to accept their evidence is a matter of discretion. So even if the Commission were satisfied that there was relevant impropriety or illegality, it is a discretion as to whether that should be excluded or not and in the circumstances the evidence should not be excluded.

PN180

VICE PRESIDENT ASBURY: Ms Preston, sorry to interrupt you but given there was a quite, you know, relatively lengthy submission provided with not a great amount of time to consider it, would you like an opportunity to put something in writing in relation to it or are you satisfied to press on with your submissions?

PN181

MS PRESTON: I'll just take instructions very briefly.

PN182

VICE PRESIDENT ASBURY: Thanks.

PN183

MS PRESTON: I am wary of the costs, Vice President, and thankful for the opportunity, but I don't think it's necessary in the circumstances because I think it is very apparent in relation to the further evidence that it's not something on the non-established principles that can be admitted and can be admitted as further evidence.

PN184

The GPS data, while it was available at first instance, has been contentious, so that's the first point. What the appellant further says is that he couldn't get his hands on the data, but when did he ask for it? He asked for it in March. That's when the first FOI request was made. He didn't ask for it during the disciplinary process. He was union-represented throughout that process. It was only three months after that he requested that, leaving aside there are a number of other ways in which documents can come to the attention of the tribunal, including the use of coercive processes such as a notice to produce.

PN185

Instead, the appellant chose this process and also did not seek a stay of the proceeding below while awaiting the delivery of those documents. I think it's a point that the Commissioner made in her decision, that there was no suggestion that the Commission should wait for the actual documents sought to come before the tribunal. At the end of the day the GPS data was integral to the disciplinary process, not only in relation to the applicant but another two employees who ended up being disciplined in relation to that data, both of whom are subjected to disciplinary processes.

PN186

The applicant did not provide any real response to that data despite having had multiple opportunities to do so throughout a lengthy disciplinary process over the course of some two months. He raised suspicions about the data at first instance to put a doubt on its veracity and it was not just about the complaint, it was actually about the veracity of the data and it's recorded in the first instance decision. He did not object to the data being tendered into evidence at that time.

PN187

At the end of the day if it's integral to the proceeding, including because there was no objection – real objection – made, so there was some objection and I'll come to the detail of this, but it wasn't an objection to the tendering of that evidence. The report adds nothing; that two-page report adds nothing that will change those circumstances.

PN188

The Commission has now dealt with all these issues, including the allegations of (indistinct) complaint, it has been subject to cross-examination - regarded as being subject to cross-examination. There were other bases on which the appellant could have been disciplined. There was the report of the mowing employee, there

were other allegations that were not pursued for whatever reason. There were reasons that were given about that.

PN189

All of that needs to be viewed in the context that there was quite straightforward evidence that appeared on the face of the GPS data and the preference was to pursue to that to the end, and to rely on that, including for the purposes of the unfair dismissal proceeding. In these circumstances it's entirely inappropriate and indeed unreasonable for the appellant to seek to unwind everything that has gone before, particularly having regard to the inexact (indistinct) on which he now seeks to rely.

PN190

In terms of the discretion in relation to the exclusion of evidence, the appellant has filed a number of cases. I'm just pulling up the reference to one; at page 43 of the further evidence bundle of cases, which is a decision of *Levin v Douglas and Mann Pty Ltd*. Those principles are set out. Now, I don't intend to take the tribunal to the detail of those cases, but at the end of the day the tribunal is not governed by the Rules of Evidence.

PN191

It is a relevant thing that there are these provisions in section 138 of the Evidence Act and even section 138 of the Evidence Act itself enables particular evidence to be admitted, even in accordance to its strict terms, and a number of the conditions including the fundamental nature of the evidence weigh in favour of allowing the GPS data.

PN192

Now, in terms of the relevant principles, I take the Full Bench to the decision in *Qantas*, the first authority relied on by the respondent. Again I don't intend to take the tribunal to the detail of that, but what is relevant there is just section 400 and the meaning of 'public interest'. At paragraph 23, *Coal & Allied* is referred to and the need to establish error. Because what is being challenged is a discretionary decision, the decision-maker –

PN193

has some latitude as to the decision to be made, the correctness of the decision may only be challenged by showing error in the decision-making process.

PN194

These are principles that obviously will be familiar to the Full Bench as currently constituted. In the respondent's authority number 4, which is *William* (indistinct) at paragraph 24 it's made clear that:

PN195

It will rarely be appropriate to grant permission unless there is an arguable case of appealable error.

PN196

In my submission, there is no such arguable case here. Turning to the particular grounds of error in the notice of appeal, the first appeal ground is that the

Commissioner erred in her approach to determining under section 387 whether the dismissal of Mr Goodwin was harsh, unjust or unreasonable. Pursuant to that section it was mandatory for the Commissioner to take into account the matters prescribed in subparagraphs (a) to (h).

PN197

Now, if the Full Bench turns to paragraphs 109 to 127 of the decision itself, what can be seen is that in considering whether the dismissal was harsh, unjust or unreasonable the Commission very pointedly under headings considered each of the matters it was required to consider having regard to section 387. Again, I don't intend to take the tribunal to each of those and what was considered.

PN198

In relation to those matters and particularly to any other matters, there is a number of circumstances that are also set out elsewhere in the decision that were considered. For example, differential treatment is considered in paragraph 137 and Mr Goodwin's personal circumstances considered from paragraph 139. The appeal ground does not point to any particular matter to which regard was not properly had, but instead it asks the tribunal as presently constituted to make findings on the basis of the tribunal's conclusions at paragraphs 135 and 144 of the decision. At 135 of the decision the tribunal says:

PN199

In this case I need to weigh some factors which may militate against a finding of serious misconduct. This is a finely balanced judgement to make.

PN200

Now, what the tribunal is considering there is not actually whether there was a valid reason. The tribunal was considering whether there was serious misconduct and what the Commissioner is indicating is it's not an easy decision. It's a finely balanced decision in which a number of things need to be considered. We can see in paragraph 136 that very deliberate consideration is given to all the circumstances, including the matters that Mr Goodwin had raised. So what the Commissioner says is:

PN201

Had his absences from the workplace been the two incidents raised on the complaint and maybe a few more, an argument could be mounted that, in conjunction with all of the other matters Mr Goodwin was dealing with, his conduct was not deliberate or wilful.

PN202

So we can see there the tribunal has considered whether the conduct was deliberate or wilful, but it seems to me that Mr Goodwin treated work as a convenience to allow him to do whatever else he was doing in those times he was at the work site or other authorised location. There are just too many occasions when Mr Goodwin was not at a work site to excuse.

PN203

Now, the appellant doesn't seek to impugn that, but the data shows those things, the evidence shows those things; namely, the occasions that he was not on a work

site and there were many of them. It was fully within the Commissioner's discretion in those circumstances to make the findings that she did as to serious misconduct. Paragraph 144 is the conclusion and what the Commissioner says is:

PN204

I have carefully weighed all of the matters before me including the valid reason for dismissal, that this conduct amounts to serious misconduct and Mr Goodwin's personal circumstances. Having done so I do find that the dismissal was not harsh, unjust or unreasonable.

PN205

Now, firstly it says 'including', so it's an inclusive definition. The matters that the Commission has considered as set out in the decision, not only under the heading of section 387 but it's clear there are a number of other matters, have inputted into that through the expressing of these contentions. Having regard to all these factors, the conclusion that the Commissioner reached was that it was not harsh, unjust or unreasonable. That is precisely the statutory task that the Commissioner was required to perform and did perform.

PN206

What the appellant contends is that the key phrase in the passage at 144 demonstrates that the Commissioner misapplied section 387 of the Act by first determining whether there was a valid reason for the dismissal and, thereafter, having answered such a question (indistinct) only then considered whether the remainder of the matters prescribed in section 387 were sufficient to displace her initial finding. That demonstrates an erroneous application of section 387 of the Fair Work Act.

PN207

Now, the respondent turns to the (indistinct) which appears at item number 4 of the list of authorities, at paragraphs 48 to 50. This is a decision of the Full Bench constituted by four Members, where the Full Bench said that:

PN208

We do not accept that the Commissioner failed to consider the factors contained in section 387. On a fair reading of the decision the Commissioner has clearly given due consideration to the criteria described in the Act. In particular, at paragraphs 102 to 108 the Commissioner outlines the various factors which she took into consideration in determining whether the applicant's dismissal was harsh, unjust or unreasonable before she makes her final determination at paragraph 109.

PN209

Given the above, it is not open to the appellant to contend that the Commissioner failed to take into account the relevant considerations she was required to by the Act. The appellant may disagree with the weight placed on those considerations and the conclusion that the Commissioner reached from a consideration of all the factors, but this does not amount to appealable error –

PN210

and the same applies now. The Commissioner has fairly performed the statutory task. The appellant disagrees with the conclusions reached, but that does not constitute appealable error. Furthermore, the fact that the Commissioner considered the valid reason first does not indicate any error. It's the first matter on the list that falls to be considered. It's paragraph 8, so it's entirely consistent with that when we can see that the Commissioner has addressed it in order that she would consider whether there was a valid reason first.

PN211

Also that was a hotly contended issue, whether there was a valid reason for dismissal. That was really the key issue in the proceedings. It's what all the evidence went to and the Commissioner needed to be persuaded about that, that there was a valid reason for dismissal. What we can see, she doesn't consider whether there was a valid reason for dismissal and then that's the end of it, the Commissioner goes on and considers all the other factors.

PN212

There is nothing under paragraph (a) that suggests that that's the end of the matter now that valid reason is established. On the contrary, the decision read as a whole clearly shows proper consideration being given to all the other factors. Appeal ground 1 does not demonstrate any arguable error.

PN213

Appeal ground 2 is essentially, when viewed as a whole, a complaint that the Commissioner at first instance did not arrive at a conclusion that the applicant considers that it ought to have done; namely, that the formal complaints made through the council systems on 5 September 2022 had been fabricated or concocted by the appellant's manager, Luke Colliver, so this is what it's all about. We can see it's apparent at appeal ground 2:

PN214

The Commissioner failed to have regard or, alternatively, sufficient regard concerning the anonymous complaint being concocted by Luke Colliver, the direct manager of Mr Goodwin and not an anonymous member of the community by failing to make a detailed and careful analysis of the evidence, including –

PN215

and then the appellant goes on to say –

PN216

these are the matters that point to the fact that it was concocted.

PN217

That's what the appeal ground is. When you look at all this, this is what you did. You didn't look at all of that. If you had looked at that, you would have come to a different conclusion. Now, again that's just not sustainable on the materials, much like the materials that are sought to be included as further evidence before the tribunal as presented constituted.

PN218

There is a lot of suspicion, a lot of conclusions, a lot of holding onto particular aspects that might support the appellant's contention there is a very firm view that those matters must necessarily support the contention that this has all been concocted by Luke Colliver. The Commission performed the task that it needed to. The conclusion sought to be impugned by this appeal ground is at paragraph 98 of the decision. Paragraph 98 is the conclusion that:

PN219

On the basis of the limited evidence before me I cannot conclude that Mr Colliver fabricated the complaint. I am therefore satisfied that the investigation arising from the complaint was validly undertaken.

PN220

If the evidence that is the subject of paragraphs (a) to (n) of appeal ground 2 – if it is such that the Commissioner simply could not reach the conclusion that she did - and that's the question that needs to be asked and did she consider those matters. Turning then to what the Commissioner did consider, firstly it's not entirely clear what the applicant means by this use of the words 'fabricated' or 'concocted'.

PN221

It's not clear whether what is suggested is that the allegations were entirely concocted, whether they were partially concocted, whether it was just that it was Mr Colliver who put in the complaint, whether he got someone else to put in the complaint. We're really not sure exactly what the issue is, but what the appellant did is he raised particular arguments in support of this proposition of fabrication and concoction, and those the issues that the Commissioner addressed.

PN222

Now, what the applicant meant is informed by his submissions which can be found at appeal book page 152. These are the submissions at first instance, paragraph 40. There the appellant, then applicant, says that:

PN223

Despite allegedly being the catalyst for the entire investigation the alleged anonymous complaint by a member of the community was not mentioned in the allegations notice, the show cause notice or the termination of employment letter. The applicant was not afforded the opportunity to respond to those allegations. The applicant requested a copy of the alleged anonymous complaint. That copy was sent in a screenshot. The anonymous complaint –

PN224

at paragraph 43 of the submissions –

PN225

was allegedly received on 5 September at 1.54, in which the council identified the applicant as the employee referred to in the complaint.

PN226

Then we see that there are the particulars and at paragraph (d):

PN227

The applicant does not dispute the photographs are of the council vehicle driven by him. The council alleges that as a result of this anonymous complaint they accessed the applicant's council vehicle over a period of five days to ascertain whether the complaint had any merit.

PN228

Then we see it continues and it goes into what the GPS went on to show. What appears is that this appeal ground and the matters raised at first instance are based on contentions or an assumption that there somehow needed to be a formal complaint in order for this GPS data to be accessed by a community member and for this reason Mr Colliver fabricated or concocted the complaint. That is at appeal book page 272 (audio malfunction) complaint.

PN229

We can see that Richard Maugueret received the complaint from a customer on 5 September relating to a vehicle assigned to the horticulture team.

PN230

Given it's an anonymous complaint I will close it off in the system. Should you require further support, please liaise with Luke as appropriate –

PN231

and then we see the content of the complaint on that page. The question is then because of this, because the complaint was necessary in order to access the data and it was the basis on which the data was accessed, the data itself was therefore improperly or illegally obtained. Now, these are all matters that were before the tribunal at first instance and the tribunal considered it, and reached her conclusions that she did.

PN232

At paragraphs 16 to 20 of the decision of the tribunal you can see that the Commissioner sets out the matters relied on by Mr Goodwin. It can be taken that these are matters that the Commissioner has had regard to in the scheme of things. At paragraph 16:

PN233

Mr Goodwin said that the response of Council to his application for unfair dismissal was the first time details of the anonymous complaint were provided to him despite that complaint being the catalyst for the entire investigation.

PN234

He said he was not given an opportunity to respond to the anonymous complaint.

PN235

Mr Goodwin questioned the integrity of the investigation and the authenticity of the complaint on the basis that it was made two business days after Mr Colliver sent an email to Mr Parkinson laying out a range of issues in relation to Mr Goodwin's conduct and performance, and asking if it was possible to check the GPS in Mr Goodwin's car.

PN236

Coincidentally, the anonymous complaint, made two days after Mr Colliver's email, would allow management to access the vehicle GPS data under the terms of the Council.

PN237

So it's implicitly accepted that there was an overlap between the issues that were raised by Mr Goodwin and the complaint that was made through the council. At paragraph 18:

PN238

Mr Goodwin suggested that, given that coincidence in timing, the complaint was fabricated. Mr Goodwin opined that it is implausible that a member of the public would go to the effort of making a complaint about a council vehicle parked in a shopping centre ... he said that he noticed that Council vehicles were in the vicinity at the time the complaint said he was at the shopping centre. Further to this coincidence, Mr Goodwin suggested that the similarity in language between the –

PN239

wording of the –

PN240

complaint and Mr Colliver's email –

PN241

and that is the email of 1 September that I took you to earlier.

PN242

In particular, Mr Goodwin submitted that it is usual for the abbreviation of the word 'road' to be spelt with a capital 'r'-'Rd', however, in both the complaint and Mr Colliver's email 'road' is written with a small 'rd'. Mr Goodwin does not dispute that he was at the shopping centre on 24 and 30 August ... Mr Goodwin explained in cross-examination that, while he was provided with the stop data ... he went through some of that data, but did not go through all of it.

PN243

So we see there that those are matters that the tribunal is well cognisant of in making the decision in this matter. At paragraphs 35 to 36 of the decision, the council's case is set out; namely, that an anonymous complaint was received. On receipt of that complaint, the internal investigation was commenced and revealed particular things. Then at paragraphs 87 to 98, the Commissioner specifically addresses the first of (indistinct) so this is the concocted or fabricated allegation that is the subject of this appeal ground.

PN244

Now, detailed consideration is given to the evidence and I don't need to take the tribunal to every aspect of it, but it runs from paragraphs 87 through to 98. It explains what the Commission had regard to in particular; the particular matters of

relevance to which the Commission had regard. In terms of paragraph (a) to appeal ground 2, it is alleged that:

PN245

The Commissioner failed to take into account or understand the method in how anonymous complaints are made using a function on the Wyndham City Council's web site that incorrectly relied on irrelevant information relating to an external email chain about how the complaint was assigned.

PN246

It's not clear (a) what the appellant was referring to here and (b) what is also not clear is how that is relevant to the conclusion that the Commissioner reached in paragraph 98. It appears that the emails referred to in paragraph (a) were considered. Paragraph 93 shows – and the paragraphs before that are addressing the different emails in relation to these matters, but at 93 the Commissioner concludes:

PN247

I accept the evidence of Mr Bell that he became aware of Mr Colliver's emails during the investigation into Mr Goodwin's conduct.

PN248

The email chains relied upon are looking at when different people became involved and whether Mr Goodwin was involved in that complaint process.

PN249

The evidence does not establish that he was aware of the emails before the investigation commenced.

PN250

So that is Mr Colliver's emails.

PN251

In any event, the point in time at which Mr Bell became aware of Mr Colliver's emails does not resolve Mr Goodwin's claim as to fabrication of the complaint.

PN252

So those emails aren't even relevant to the ultimate conclusion at paragraph 98 as to whether the complaint was fabricated or not. It's also not clear how paragraph (a) informs the finding that is evidenced by appeal ground 2. Under subparagraph (b) to appeal ground 2 it's alleged that the Commissioner –

PN253

failed to consider that an email sent on 1 September 2022 by Mr Goodwin's direct manager contained almost identical information about Mr Goodwin that was coincidentally written in the anonymous complaint made only four days afterwards on 5 September.

PN254

Now, as I've said, at 198 you will find the 1 September email and that includes the allegations made by the mowing employee. What is clear is that the

Commissioner considered both of these documents – that is, the complaint and the message of 1 September – and that is at paragraph 94. The Commissioner says:

PN255

I have reviewed the emails between Mr Colliver and Mr Parkinson and the complaint made by a member of the community. On the fairest reading of Mr Goodwin's claim, the only similarity between them is that both use 'rd' ... as an abbreviation for 'road'.

PN256

Obviously there are other similarities because they are addressing the same subject matter in general terms. The Commissioner's views in 94 shouldn't be read as saying that there were no similarities, but the point that the Commissioner is making that the only notable similarity that was raised by the appellant is that use of the 'road' and the capital – the small 'r' for 'road' (indistinct) and the conclusion that was drawn was that that wasn't a reason to find that these allegations of concoction were substantiated.

PN257

As to paragraph (ii), this is addressed at paragraph 94 of the decision, so it was a matter that was considered. I just refer again the Full Bench to the tribunal – so it can't be said that it wasn't considered because the Commissioner expressly did consider it at 94. As to (iii), it's alleged that the email sent by Luke Colliver detailed two dates that Mr Goodwin's council vehicle was seen by another council employee parked at the shopping centre and the anonymous complaint detailed the same two dates, and what is alleged is that the Commissioner did not consider that.

PN258

The first one is (indistinct) to correct, the dates that were set out in the anonymous complaint was different to the mowing employee. The mowing employee said that the correct date was the 29th and that is what is reproduced in the email of 1 September, whereas the council employee said it was 30 August, so there is no alignment so that is based on a false premise at (iii).

PN259

That distinction can be seen at appeal book page 58, paragraph number 92, which is the transcript where – I don't need to take – I understand that we're short of time. I don't need to take the Commission to that reference, but essentially that reference is there. The appellant makes clear that there was a distinction in what the mowing employee said and what was recorded at council.

PN260

As to (iv), again these matters, (iv) and (v), they're all just going to overlap – the circumstantial overlap in the subject matter. These matters, they have not necessarily been considered by the Commissioner despite the fact she doesn't reference them, as is apparent from the rest of the decision and the fact that she has specifically read the two documents.

PN261

As to (vi), Mr Colliver asked Mr Parkinson whether the report was grounds to obtain access to Mr Goodwin's council vehicle GPS data, essentially indirectly suggested that the council should grant the employee (indistinct) this is addressed at paragraph 95 of the decision which shows that the Commissioner considered this and specifically said that it does not assist her in resolving the claim of (indistinct) so these are all matters that the Commissioner has considered, but just didn't reach a conclusion for it.

PN262

Now, at paragraph (c) - again I will just give the Full Bench the reference. It's at paragraph 17 of the decision and there we see that:

PN263

Mr Goodwin questioned the integrity of the investigation and the authenticity of the complaint on the basis that it was made two business days after –

PN264

and had this coincidental factual scenario, so that is a matter that has been considered. In terms of the failure to consider the limited scope under the GPS policy in which records of an employee were able to be accessed, in terms of this matter, well, the policy just doesn't establish what the appellant says that it does establish, which is that there were no grounds other than if this complaint was made to access the policy.

PN265

What the mowing employee has alleged, those allegations were in and of itself sufficient. Nothing that is in these appeal grounds could be viewed as necessarily overturning the conclusion that the Commissioner could not be satisfied on the evidence before her that the complaint was concocted by Mr Colliver. As to subparagraph (d) about:

PN266

The Commissioner failed to consider the mowing crew employee having seen Mr Goodwin's council vehicle and then seeing him at the shopping centre was the same employee Mr Goodwin gave evidence of having seen and to who Mr Goodwin said hello –

PN267

again it's not clear how that supports the appellant's case at all. The fact that the appellant was seen at the shopping centre at that time is actually supportive of the council's case, not the appellant's case. Again, at paragraph (e) we see the failure to take into account other similarities in writing style. These are not matters that were raised before the tribunal, they are matters that are raised now. At the end of the day the tribunal looked at both documents and didn't see any notably differences or similarities other than the capitalised or non-capitalised word 'road'.

PN268

Paragraph (f) is just a repeat of the matters that I have already failed to take into account, but the anonymous complaint stated that they took several pictures of the ute. Again, this is a matter that has been considered by the tribunal. It wasn't

relevant to the ultimate conclusion reached and so on and so forth. As to paragraph (g):

PN269

The Commissioner failed to consider that Luke Colliver detailed several past instances in which he took issue with Paul Goodwin and that Luke Colliver was seeking to obtain Mr Goodwin's GPS report. The Commissioner failed to consider that after Luke Colliver's hearsay report to Matthew Parkinson of human resources, that didn't appear to meet the requirements to enable him to obtain the GPS activity.

PN270

So again the basis on which that is – that just doesn't arise. There is no suggestion in any event in relation to that email of 1 September that Mr Colliver understood that the complaint itself wasn't enough. He should have said, 'I don't know whether it is enough', and he did pursue it further. Again, in the context of the allegations of fabrication, this is not a matter that was specifically raised in support of that at first instance.

PN271

As to paragraph (h), that is addressed at reasons paragraph 18. The same goes for paragraph (i), it's addressed at reasons paragraph 18, which is the fact that this alignment of circumstances is obviously within the mind of the Commission. As to paragraph (j), what is alleged is that:

PN272

The Commissioner failed to consider the possibility that the blatant lie in the anonymous complaint about the frequency and duration (indistinct) for approval of the GPS records being accessed.

PN273

Again, this is imbedded in a number of assumptions which are not made out on the evidence. For example, the Commission was not in a position to determine whether the complaint contained a blatant lie or whether it might have been a misconception. In any event, the fact that the Commission didn't speculate about the reasons for the complaint having been made is not a basis to allege any *House v The King* error.

PN274

Now, as to paragraph (k), these matters were considered at reasons paragraphs 17, 18, 87 and 88 - are relevant to this. At paragraph (l), reasons paragraph 96, again I'm not going to take your Honour to the detail of that in relation to paragraph (l). What is said at paragraph 96, that's addressing the work ute issue and it says:

PN275

Mr Goodwin cross-examined Mr Bell and Ms Michail on the use of the term 'work ute' in the complaint but, ultimately, Mr Goodwin's view as to whether a community member would use such a term does not assist in resolving his claim of fabrication.

PN276

So all these matters have been considered and, in any event, wouldn't be relevant to the ultimate outcome. As to paragraph (m):

PN277

The Commissioner failed to consider the lack of response from the respondent in relation to this serious allegation that the respondent did not call Mr Colliver to give evidence despite him being Mr Goodwin's direct manager and in response to the extremely serious allegations of a concocted and fabricated complaint.

PN278

Essentially it seems that the appellant is seeking to draw a *Jones v Dunkel* inference against the council in relation to that. As to that, my first submission is that Mr Colliver had fabricated a complaint and the council complaint was not an issue – first of all, the *Jones v Dunkel* inference was not an issue that was raised at first instance. It's something that is only raised on appeal. It's also unclear what allegations were to be, or were expected to be, addressed by the respondent.

PN279

The applicant's evidence-in-chief was, in effect, set out in his outline of submissions and that is apparent from paragraph 5 of the reasons where the Commissioner says that. What can be seen from that in his outline of submissions – I'm just going to the relevant paragraph – at page 152 of the appeal book, this is the evidence that was led in-chief in relation to the anonymous complaint. That runs through to the next page. In the interests of time I'll just let the Full Bench have a look at that itself.

PN280

Now, the point is that there are no allegations there about Mr Colliver and that he fabricated a complaint. At paragraph 51, at appeal book page 155, it's said that:

PN281

The facts that support the decision of the respondent was not based on actual conduct, but that they decided to fabricated or at the very least grossly exaggerate the basis on which the applicant's employment was terminated. The respondent was dishonest in stating the GPS data supported an anonymous allegation that the applicant had parked for upwards of two hours at a time at the Tarneit West shopping centre for several weeks.

PN282

Extremely serious allegations of falsifying documents are weighed against the applicant without foundation or basis to justify the prejudicial investigative conduct of the respondent.

PN283

Firstly, those were abandoned. Those allegations about falsifying documents were not matters that were pressed. Secondly, based on the matters in this document there was no reason for the council to call Mr Colliver who, on no take of the evidence, was involved in the disciplinary process itself.

PN284

Now, in the reply materials – so as you can see from the decision – the applicant was given the opportunity to provide a witness statement in reply in advance of the hearing. At appeal book page 193, paragraph 50, we see for the first time – so this is already after the council's witnesses have been - and the witness statements have been prepared, but at paragraph 50 we see:

PN285

On the face of it, Luke Colliver seems to have fabricated an anonymous complaint -

PN286

so this is the first time we see that it's Mr Colliver who is to blame -

PN287

using the council web site anonymous complaints function to ultimately have me terminated.

PN288

So, 'on the face of it'. It's essentially just speculation based on the evidence that is given above and that the appellant refers to.

PN289

The complaint provided a false basis in which to obtain approval for my GPS records to be accessed and, despite the GPS policy stating that the records could not be accessed further if it arose from the GPS data, it was accessed regardless. These are the types of tactics I have witnessed on numerous times during my employment.

PN290

So again that is just a speculation. It's not something that needs to be addressed by calling Mr Colliver to give evidence and Mr Colliver's absence was not raised as a relevant consideration at first instance. The oral submissions can be seen at appeal book pages 136 to 139 and also page 196 at paragraphs 63 to 65. The fact that Mr Colliver was not called to give evidence was not a relevant consideration that the Commissioner was required to consider.

PN291

At the end of the day the *Jones v Dunkel* inference, which the appellant urges the Commission to draw, is not an inference that enables the tribunal to fill the gap in evidence. The relevant principles can be found in the decision – it's not in our bundle, but it's *CEPU – Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia – v Australian Postal Corporation* [2017] FCA 1091 at 261 to 271. I don't need to take the tribunal to that, but it very succinctly explains what the *Jones v Dunkel* inference actually is and what it isn't.

PN292

In terms of appeal ground 2, it's alleged that the Commission should not have regard to the GPS data because it was improperly obtained on the basis of concocted evidence in the form of a made-up complaint. Now, there has been a

number of limbs to the respondent's response to this. The first is that there was no appealable error arising from the Commissioner's conclusion at paragraph 98 that it was not satisfied on the evidence before it that Mr Colliver fabricated the complaint.

PN293

Secondly, if that conclusion were affected by legal error the Full Bench would need to determine for itself, firstly, whether the GPS data was improperly obtained and, second, if so, whether or not that evidence should be excluded in the Commission's discretion. The respondent's position is that the Commission's conclusion was not affected by legal error in circumstances where the Commission was not satisfied that Mr Colliver had fabricated the complaint. There was no basis to exclude the evidence.

PN294

In any event, there was no obligation to exclude the evidence. At the highest, if there was impropriety it was relevant to the exercise of the discretion and it could not be said that the consideration of the GPS data was erroneous in the circumstances. All the more so when there was no objection to the tendering of the GPS data at the time of tendering even though concerns were raised, at paragraphs 50 and 51 at appeal book 193.

PN295

This is in relation to the relevant matters and it can hardly be said that the admission of the evidence was erroneous in all of the circumstances. Even if the Commission is satisfied that Mr Colliver had fabricated the complaint, at its highest it appears that the allegation is that he exaggerated the circumstances and himself made the complaint. This did not mean that the GPS data was improperly obtained.

PN296

In terms of the proper construction of section 138, Branson J in *Employment Advocate v Williamson* concluded that there was improperly and impropriety – an extensive amount of evidence obtained by 'unfair' as well as 'unlawful' means. The authority for that is *Hail Creek Coal Pty Ltd v CFMEU* [2004] 143 IR 354 at 56. It would not be unfair to admit the evidence in the circumstances. Specifically the complaint was not necessarily to obtain GPS data. It could have been sought prior on the basis of the mowing employee allegation and it could have been sought subsequently.

PN297

The point was made earlier by the Vice President that there can't be an absolute bar on the use by the employer of this GPS data and bringing that data to the attention of the tribunal. It's also not clear why it's improper. Even if there was evidence, and there isn't, and it is not accepted by the tribunal and there is no reason to impugn that – but even if it was the case that Mr Colliver made the complaint or got someone else to make the complaint, it's not clear why that would be improper in the circumstances.

PN298

There is nothing to suggest that the applicant was visiting a shopping centre. In fact the evidence is that the applicant was visiting shopping centres, that he did visit shopping centres for long periods of time. Mr Colliver, like other people, could make a complaint about that, but it would be a bit of a strange thing for Mr Colliver to do, that's certain, and it certainly doesn't appear to be the case that it was him who made the complaint and certainly it was not accepted to be the case by the Commission.

PN299

In any event, in considering the section 138 factors under the Evidence Act, it is not appropriate (a) to revisit this issue on appeal and (b) those factors point in favour of impugning the evidence, particularly given how important they are to the way the case was run at first instance. As to appeal ground 3 it is :

PN300

The Commissioner erred in failing to have sufficient regard to the personal circumstances of Mr Goodwin and erred in finding that Mr Goodwin's conduct was wilful and therefore constituted serious misconduct –

PN301

and how, because:

PN302

The commissioner gave insufficient regard to the extensive redocumented toilet issues and the urgency and frequency in which he required the use of the toilet facilities. The Commissioner incorrectly found that Mr Goodwin did not attempt to particularise those demands in any way and erred in finding that the alleged misconduct was deliberate or wilful.

PN303

The Commissioner failed to have regard to the evidence that the stop data showed each stop being a place where the toilet facilities were located and failed to have regard to no other evidence being put forward by the respondent as to what else Mr Goodwin was alleged to have been doing instead of using these toilet facilities.

PN304

Now, these are not matters that would change the outcome. Certainly the Commissioner did have regard to the toilet issues. It was fundamental to her reasons. It was fundamental to her consideration and overall balance. What the Commissioner found is that she didn't accept that that was the cause and Mr Goodwin had not explained why he was having such long absences, up to an hour or sometimes more, at shopping strips and at shopping centres. On the evidence the Commissioner was not satisfied.

PN305

Really again what this appeal ground is, is a complaint about the conclusion reached. These are matters to which the Commissioner had regard and which weighed into her ultimate conclusion, as is clear from the decision itself. At paragraphs 133 to 136 of the decision we see that the Commissioner says:

PN306

While Mr Goodwin's nonattendance has likely been exacerbated by both his medical condition ... and his son's injury this provides no acceptable reason or excuse for such a limited attendance to work as shown in the data.

PN307

So we can see there express consideration. Again we see there at paragraph 136:

PN308

There are just too many occasions when Mr Goodwin was not at a work site to excuse.

PN309

In other words, she did not accept that that was a proper justification for his absence. It was his choice not to be there. Also relevant are paragraphs 74 to 86 of the decision, which I won't take the Bench to, and 99 to 108. All those paragraphs really go to the depth of the consideration of these issues. What I will take the Commission to is paragraph 100 of the decision, because among those paragraphs I've just referred to it says that:

PN310

While Mr Goodwin has provided evidence of his medical condition that evidence does not assist in the determination of the effect of that condition on his ability to carry out his job, nor does it explain the work patterns shown in the stop data.

PN311

So what the Commissioner is saying there is the – sorry, I should also say at paragraph 101:

PN312

To the extent that Mr Goodwin's medical condition is severe and does require him to leave work sites for periods of time and on various occasions during the day, the evidence does not support that he raised this with management at any level of Council. I acknowledge that Mr Goodwin was embarrassed by his condition but that does not give him license to leave work as he may need and expect no repercussion when his absences are identified.

PN313

Based on the evidence before me, I am satisfied that only some of Mr Goodwin's stops ... could be explained by his medical needs.

PN314

Critically:

PN315

Unfortunately Mr Goodwin did not attempt to particularise the extent of these demands in any way. I am therefore not convinced that his medical condition explains the substantial portion, let alone the totality, of his time away from work site.

PN316

So not only did he not particularise, he didn't call any medical witnesses and the evidence just was not robust enough for the Commissioner to be satisfied of any of those things and there is no error in that, and it doesn't point to any error in that. The point we say in the respondent's written submissions is that all the evidence bar one document the day before he was dismissed points to urgency being an issue and needing to go to the toilet on multiple times of the day.

PN317

Nowhere in any of the (indistinct) evidence or the other medical evidence that had been provided to the tribunal, or even subsequently to this Full Bench, points to any need for a prolonged absence from work, yet that final certificate refers to a prolonged absence. Mr Goodwin needs not only to explain the fact that he had multiple visits, but the fact that he was away for such long periods of time at shopping centres and the evidence just didn't do that.

PN318

Now, at page 100 of the appeal book – and this is relevant to a number of things including the reception of the GPS evidence – there is an admission by Mr Goodwin as to his conduct, because at PN529 it's put to him that:

PN319

We have established that you had spent many hours at shopping centres, petrol stations, residential addresses, your home address and various other non-work-related sites while being paid by council, haven't we?

PN320

Mr Goodwin flat out accepted that:

PN321

Yes, I've got toilet issues.

PN322

So not only did he accept that, he blamed it on his toilet issues. Not on needing to run the car battery, not on the rain, but on his toilet issues, and it just can't be justified; the admission is there. Appeal ground 4, just again very briefly, is the allegation that this is about performance management and not about conduct issues. This is addressed in my written submissions. I'm not going to waste the tribunal's time. The issue is one of conduct, as is made clear by the Commissioner's findings in relation to serious misconduct. As to appeal ground 5:

PN323

The Commissioner failed to properly weigh and assess the factors set out in section 387, particularly subparagraph (c), and unjustly found that Mr Goodwin was afforded procedural fairness and a genuine opportunity to respond. The Commissioner found it was acceptable for the respondent not to act swiftly and stand Mr Goodwin down, and for the respondent to take in excess of 10 weeks.

PN324

The finding that because Mr Goodwin had the raw data for a month, being from the date he was stood down on 25 November to termination on 21 December, this was (indistinct) not prevented from (indistinct) of his movements or an ability to respond to the allegations arising from the GPS data despite not having daily sheets or other documentation to review the data again.

PN325

At appeal book page 118 we see Mr Bell's evidence. Mr Bell was involved in this disciplinary process and at PN737 the question is put to Mr Bell:

PN326

Are the daily run sheets kept and, if so, why haven't they been provided as a part of this process under the Freedom of Information request?

PN327

The response is:

PN328

I wasn't aware of any FOI request and we provided the daily safety sheets that you populated and signed off on, so in theory they should match up if you're the one filling them out.

PN329

Then the cross-examination goes on about the Freedom of Information request. Mr Bell makes clear at PN739:

PN330

I provided everything that we were asked by yourself at any point.

PN331

Then the next paragraph, PN740:

PN332

What was that, sorry?---I said I provided everything that was asked at any point along the way through that disciplinary process.

PN333

Now, what the documents reveal, including all the allegations, response to allegations documents - and I don't want to take the tribunal over all of this because it's in my written submissions, but what can be seen from all these documents is that as things come to light the appellant raises different issues.

PN334

Initially he couldn't respond to the GPS data in full so he needed the raw data, so immediately the respondent provided that. Then he said that he couldn't respond to the data properly because he couldn't measure it and by reference - taken by reference to his own records and he needed his diary to do that; so he was provided his diary. He then complains that he didn't have enough time to respond by reference to his diary because his diary was only given to him quite late in the piece.

PN335

So throughout that process what the documents show is it wasn't those safety sheets that he was after, it was his diary. That was what he said he could base in conclusions on. He never provided those conclusions on the basis of the diary, nor did he request the safety sheets. These became an issue once the tribunal – the actual hearing started and by that time the safety sheets had been provided and were in evidence. The procedural fairness was substantial and there is no error in any of the Commission's findings in the subject of appeal ground 5.

PN336

The public interest considerations, I have already addressed in summary. I don't need to deal with that in any further detail. That concludes the oral submissions, may it please the Commission.

PN337

VICE PRESIDENT ASBURY: Thank you. Ms Mitchell, did you have anything you wanted to say in reply?

PN338

MS MITCHELL: Sorry, I'll be super brief.

PN339

VICE PRESIDENT ASBURY: That's okay. Take your time.

PN340

MS MITCHELL: I just wanted to raise the issue in relation to the GPS data was not the accuracy of the raw data as such, it was essentially that in the stoppage data a particular location was referred to at one point as a work site, another point as a potential work site and a further point as a shopping centre, so that was the issue there in relation to what the actual location was categorised as.

PN341

Just in relation to the point made about the fabricated complaint not being contained in the submissions, the submissions were dated 3 March 2023 but the email of which the appellant says has similarities to the complaint, that wasn't received by the respondent until 24 March, so that's why that allegation wasn't raised in those submissions because we didn't have anything to compare it to.

PN342

The last thing I wanted to raise was just the fact that in the notice of appeal – and I apologise – ground 3 wasn't adequately articulated. I'm not a lawyer, I don't have experience in Fair Work Commission hearings. I have worked at the Magistrates Court for some time. Basically just requesting that the information contained within the written submissions that were dated 28 July 2023, the 10-page submissions as per the directions, that that's relied upon in relation to ground 3. That was the point I would like to make in relation to that. Thank you.

PN343

VICE PRESIDENT ASBURY: Thank you for that. We will indicate that we will reserve our decision and issue it in due course. On that basis, we will adjourn.

ADJOURNED INDEFINITELY

[4.30 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

MFI #IG1 STATEMENT OF APPELLANTPN160