



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Tom Colella

v

Aroona P&T Pty Ltd T/A Aroona Alliance

(U2016/12172)

COMMISSIONER RIORDAN

PERTH, 16 NOVEMBER 2017

Application for relief from unfair dismissal.

[1] This matter has been referred by the Full Bench to me for determination as a result of a successful appeal in Matter C2017/1544.

[2] Mr Colella has claimed that he was unfairly dismissed by Aroona P&T Pty Ltd t/a Aroona Alliance (Aroona) on 20 September 2016. Mr Colella was an Instrument Electrical Tradesperson with 20 years' experience at Aroona. Mr Colella was a delegate for the Electrical Trades Union, WA Branch (registered under the Fair Work Act, 2009 as the CEPU, Electrical Division, WA Branch) and is 60 years of age.

Background

[3] Mr Colella typically worked 38 hours per week between the hours of 6.30am – 3.30pm on Monday, Tuesday, Thursday and Friday. Mr Colella worked between 6.30am – 10.30am on Wednesdays. This allowed Mr Colella to play golf every Wednesday. Mr Colella was the Captain of the Lakelands Golf Club. Mr Colella's annual wage was approximately \$111,000.00.

[4] An anonymous letter was sent to Aroona claiming that Mr Colella had been playing golf when he was supposed to be working. Aroona investigated this accusation. Whilst it could not substantiate the allegations contained in the anonymous correspondence, Aroona's investigation uncovered a large number of workplace attendance irregularities. Further investigation of the issues resulted in Mr Colella's termination.

[5] Mr Colella was provided with correspondence on 5 September 2016 inviting him to attend a "Performance and Conduct Meeting" on 9 September 2016. Specifically, the correspondence said:

"Dear Tom

RE PERFORMANCE & CONDUCT MEETING

The Company has received written allegation that you have been absent from work when you were expected to be carrying out work.

...

- Due to this report, it prompted us to further investigate; you claimed you were completing work, submitting work orders on your PDA of which you were paid. As part of this review a comparison of your work order management data was conducted and a number of anomalies were identified. On the dates listed below your work order feedback data indicates that you undertook work at the Neerabup GWTP however your ID / Access card was not used at site on any of the dates. This suggests that you did not enter site.
- Therefore it is alleged that you have made fraudulent work claims on the following dates:

• 28/01/2016	• 8/04/2016
• 1/03/2016	• 11/04/2016
• 2/03/2016	• 12/04/2016
• 3/03/2016	• 18/04/2016
• 4/03/2016	• 20/04/2016
• 30/03/2016	• 22/04/2016
• 1/04/2016	• 26/04/2016
• 4/04/2016	• 27/04/2016
• 5/04/2016	• 18/05/2016
• 6/04/2016	• 8/06/2016
• 7/04/2016	

It is therefore alleged you have conducted yourself in a fraudulent manner and breached the Aroona Code of Conduct and your employment contract, by behaving in a manner inconsistent with the following.”¹

[6] All maintenance and operations employees of Aroona are required to carry and use a Personal Digital Assistant (PDA). This device is approximately the size of a smart phone. The device shows all of the work tasks that an employee has to complete during a day. The employee has to click on the “select” button twice to show that he is performing the task. The device also has a GPS location function which operates automatically when the device is operational.

[7] On the identified dates (set out in PN5 above), Mr Colella’s PDA GPS co-ordinates identified him being at home rather than at the appropriate worksite for the task that he claims he was undertaking.

[8] Mr Colella regularly works at the Neerabup Water Treatment Plant (NWTP).The NWTP is a fenced facility with an electronic gate. The gate logs at NWTP did not identify Mr Colella entering or leaving that facility on any of the identified days.

[9] Aroona also investigated the Company provided mobile phone records of Mr Colella. Aroona concluded that this evidence was inconclusive due to the coverage of the local towers

including NWTP and Mr Colella's home within their possible coverage area. As a result Aroona did not rely on the mobile phone tower information.

[10] Aroona claimed that the Chlorine Analyser Records at NWTP show that Mr Colella did not perform the necessary tests and calibrations on the chlorine analysers. Aroona claim that Mr Colella's actions resulted in a significant health hazard for the residents of Perth.

[11] All of the submissions, evidence and transcript from the earlier proceeding were accepted into evidence in this proceeding.

[12] The hearing on 4 and 5 September 2017 was primarily focused on the functionality of the PDA. Expert evidence was received from:

- Mr Chris Earls, who is a Specialist Consultant in measurement science and spatial measurement;
- Mr Scott Musgrove, who is the Business Support Manager, Business and Technology Solutions for the Water Corporation; and
- Professor Ahmed El-Mowafy who is an Associate Professor in the Department of Spatial Sciences at Curtin University.

[13] Apart from the 3 expert witnesses, further evidence was attested by:

- Mr Tom Colella;
- Mr Gavin Varis, Instrument Electrical Team Leader employed by Aroona;
- Mr Dean Rayner², Instrument Electrical Field Supervisor employed by Aroona;
- Mr Jeremy Douziech³, Manager of Operations and Maintenance at Aroona;
- Mr Peter Van Der Vaart⁴, Manager of Ground Water Operations at Aroona; and
- Mr Adam Gelfe, Operations Manager, Law Enforcement, Telstra.

Submissions

[14] On behalf of Mr Colella, Mr Heathcote submitted that:

- a) Aroona was required to prove that Mr Colella was not at work on the days for which he has been paid. Further, that the evidence in this case can be broken down into five categories – GPS data, gate logs, phone records, emails and analyser logs;
- b) the gate log information from NWTP was unreliable on the basis that there were any number of ways that employees could enter the site without swiping their access card;
- c) the phone records, Telstra document and emails prove that Mr Colella was active on every single day that is questioned by Aroona. In particular, the mobile phone information shows that Mr Colella was not only at work, but that his phone calls were being transmitted through the appropriately located phone tower;
- d) the analyser logs provided by Mr Colella to Aroona on 16 September 2016 prove that Mr Colella was working on those days. Mr Heathcote highlighted the evidence of Mr Rayner who testified that he had never had to ask Mr Colella to do any "re-work" on the basis that the faults that Mr Colella was asked to fix – he fixed;

e) the evidence surrounding the GPS co-ordinates from the PDA in Mr Colella's possession was inconclusive on the basis that the results were basically impossible to achieve from a properly functioning device. Mr Heathcote highlighted the scenario surrounding the PDA identifying a "current best location" and a "last known location". Mr Heathcote identified the implausibility of Mr Colella being able to log 80 jobs on his PDA whilst being able to shield its current location and charge its battery all over a 28 consecutive day period;

f) there was a real possibility that Mr Colella's PDA device suffered an intermittent technological "glitch". Unfortunately, this glitch could not be repeated by the subsequent field testing undertaken by Aroona but one which may have been subsequently rectified by simply rebooting the PDA, all the while being unbeknown to Mr Colella;

g) the minutes of the prestart toolbox meetings also indicate that Mr Colella was in attendance at the NWTP on days that Aroona allege Mr Colella did not attend for work. Further, that reviewing a small sample of these minutes does not constitute a full or thorough investigation on the part of Aroona;

h) Mr Colella was denied procedural fairness due to Aroona's refusal to provide him with a copy of the PDA information when it was requested; and

i) it was basically harsh and unfair to dismiss an employee with 20 years' service based on information that it did not understand and has subsequently been proven to be incorrect.

[15] Mr Ellery, on behalf of Aroona submitted that:

a) Aroona had a valid reason to terminate Mr Colella's employment based on the overwhelming balance of the evidence;

b) Aroona undertook a proper, diligent and thorough investigation, gave Mr Colella numerous opportunities to respond to the allegations and subsequently made a decision to terminate Mr Colella after considering all of the available evidence;

c) Mr Colella should not be considered as a witness of credit on the basis that during the meeting on 16 September 2016, Mr Colella signed the minutes of the meeting of 9 September 2016, agreeing that they were a true and accurate record of the meeting which recorded that Mr Colella stated that he doesn't always fill out the analyser logs. Mr Colella then contradicted these minutes later in the meeting by saying that he always completes the analyser logs and then handing over pristine copies of these logs;

d) there is no evidence or history of any fault in the system or on Mr Colella's PDA. Further, that there is no evidence of any other employee suffering from a mysterious "glitch" and that the evidence from the experts is that the device, when tested, was in perfect working order;

e) the variety of options that were provided by Mr Colella to avoid using his swipe card at the NWTP are simply not credible. That, based on the relevant test, ie, the balance of probabilities, it is hard to believe that Mr Colella avoided using his swipe card on every single occasion (of which there may be multiple times a day) that Mr Colella had to enter or exit NWTP on those days;

f) the phone records from Telstra are not conclusive on the basis that the phone calls can bounce around off a multitude of different towers depending upon which tower provides the strongest signal. Further, because Mr Colella's house is only 3.5 - 4kms away from NWTP, it is impossible to be certain of any proposition associated with the mobile phone towers;

g) the sudden production by Mr Colella of the analyser logs in contradiction of his earlier statement identifies an employee who knows that he is in trouble and who has invented and falsified evidence in an attempt to build a persuasive story;

h) Mr Colella's previous disciplinary record is quite poor on the basis that he has been subjected to a number of recent warnings in relation to speeding but, importantly, he was given a final written warning in 2002 for very similar behaviour. Nevertheless, the current behaviour is so serious that it warrants termination, whether or not Mr Colella has an exemplary workplace record, which he does not. The company is also relying on the provisions of the 2002 final warning when it said:

“if there is a reoccurrence of these actions it will have no alternative but to terminate your contact of employment.”

i) Aroona is relying on hard data to show that, based on the balance of probabilities, Mr Colella was not performing work when he said that he was compared to speculative theories and the unconvincing evidence of Mr Colella; and

j) Mr Colella's actions were so serious that they provided Aroona with a valid reason to terminate Mr Colella, that it afforded Mr Colella procedural fairness throughout the investigation and that following careful consideration and peer review, a decision was taken to terminate Mr Colella's employment.

Relevant Section of the Fair Work Act

[16] The relevant sections of the Act are:

Section 381

Object of this Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:

(i) the needs of business (including small business); and

(ii) the needs of employees; and

- (b) to establish procedures for dealing with unfair dismissal that:
 - (i) are quick, flexible and informal; and
 - (ii) address the needs of employers and employees; and
 - (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

Section 382

When a person is protected from unfair dismissal

A person is *protected from unfair dismissal* at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

Section 385

What is an unfair dismissal

A person has been *unfairly dismissed* if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Section 387
Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person-- whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

[17] It is not in dispute that Mr Colella was protected from unfair dismissal on the basis that his employment was covered by an enterprise agreement.

Judicial Precedent

[18] In *Byrne v Australia Airlines*⁵, the High Court held:

“128. It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”

[19] In *Australia Meat Holdings* a Full Bench of the AIRC held, when referring to the extract from *Byrne*:

“The above extract is authority for the proposition that a termination of employment may be:

- unjust, because the employee was not guilty of the misconduct on which the employer acted;
- unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or
- harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct.”⁶

Consideration

[20] I have taken into account all of the submissions and evidence that has been submitted by the parties from both the earlier and current hearings.

Section 387(a) valid reason

[21] In *Selvachandran v Peterson Plastics Pty Ltd*⁷ it was held:

“In its context in s.170DE(1), the adjective “valid” should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee’s capacity or conduct or based upon the operational requirements of the employer’s business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must ‘be applied in a practical, common sense way to ensure that the employer and employee are treated fairly.’”

[22] I do not accept the inference drawn by Aroona in relation to the gate logs at NWTP. In my view, the email from Mr Stephen McCarthy to Allan Dermont has been taken out of context and misapplied in this circumstance. Mr McCarthy’s email states:

“From: Steve MacCarthy
Date: 1 September 2016 at 11:30:56 AM AWST
To: Allan Derwort
CC: Jock Gellatly
Subject: STAFF IN CONFIDENCE – Security request

IN CONFIDENCE

Hello Allan,

As discussed regarding the recent request for access to security system information for personnel management purposes, the following context and response is provided.

Systems background: The security systems are designed for security access, and as such are neither time/motion driven systems, nor systems which are maintained nor configured to ensure close management of specific team members access.

- Security access cards are issued to individuals however when a card is presented to the system, that does not confirm that the individual to whom the card was issued, actually presented the card at the time.
- ‘Tail Gating’ and other strategies used by individuals will subvert the integrity of the systems.

Evidentiary Context: **In order to accurately identify whether an individual has actually entered or existed at specific time or even date, as a minimum the following would be required:**

- **Coordinated and validated time/date stamped security access systems**
- **Independent systems or human visual verification of the access/egress event, with a coordinated time/date stamp**
- **Verification that the systems used have been maintained to the appropriate standards, and were performing to those standards.**

(my emphasis)

Request for information: The request for information is acknowledged and the following is offered:

1. There are no records available for 2015 – as these records do not exist due to system changes
2. 2016 records for the nominated site – do not indicate any system events for the nominated individual on the dates requested.

We trust that this context and information assists your processes – thank you for the professional patience and understanding.

Best Regards
Stephen MacCarthy
Security Program Manager⁸

[23] I have drawn the same conclusion as Mr McCarthy that the Water Corporation’s information cannot accurately identify whether Mr Colella attended this site on the identified dates.

[24] During the investigation, Aroona advised Mr Colella that they would not rely on the information contained in the mobile phone bill for Mr Colella’s company telephone due to the proximity of Mr Colella’s house to the Neerabup plant and the location of the mobile phone towers. At the termination meeting on 20 September 2016, Mr Van Der Vaart is minuted as saying;

“ ...

PV: I believe the phone towers to not be reliable, when one has a lot of usage, it is diverted to another tower, I believe the GPS data to be more accurate. After checking the phone records they do not substantiate your claim.”⁹

[25] Mr Adam Gelfe, from Telstra, provided a report which identified every call that had been made by Mr Colella's phone on the identified days. This report identified the time of the call, the actual cell tower that was used to connect the call and the last tower used when the call was disconnected. The report also provides the latitude and longitude of these towers.

[26] In accordance with section 590 of the Act, I have used these co-ordinates to identify the location of these towers using the ACMA website. I can advise the parties that:

- The Tamala tower is located at Marmion Ave, Tamala Park WA 6030.
- The Joondalup tower is located at Moondarra Way, Joondalup WA 6027.
- The Ocean Reef tower is located at Shoran Ct, Ocean Reef WA 6030.

[27] Mr Gelfe testified that the tower that is identified in his report or on the phone bill is:

“...not necessarily the closest tower. It is the tower that had the strongest signal at that particular time. To give you an example, if you drove into an underground car park and it's all concrete, there could potentially be a cell on top of the building that you're in. However, there's no direct line of sight between your handset and the roof. However, there's a cell tower 200 metres away pointing directly into the car park and so therefore that particular tower that's 200 metres away would have a stronger signal than the tower directly above you.”¹⁰

“PN47

THE COMMISSIONER: Perhaps I could ask a question. In relation to this cluster of towers, in document AA5, as you say, it has a latitude and longitude identification of the precise tower that would be used. From what I can gather, the tower at Tamala, which all these phone calls are made from, all appear to be the exact same latitude and longitude. That being the case, would it be fair to say that that tower is the closest tower to where the call was made?---It certainly has the strongest signal, so the least amount of interference. **Look, proximity certainly plays a role**, but, as I said earlier, it can be - the call can be moved to another cell in the event of interference.

PN65

In the normal course of things, one would expect, assuming that there are other towers in the vicinity, generally proximity to the tower is going to determine - when I say "generally" I take your point about the car park example - but as a general rule, in the outside in open space, **the nearer tower is likely to produce the strongest signal?---In general conditions.** It's not - - -

PN66

I am content - sorry, I didn't mean to interrupt your answer?---**I was going to say it's not definitive but it's certainly a considerable factor.**”¹¹
(my emphasis)

[28] As a result of Mr Gelfe's evidence, I am satisfied that Mr Colella was working on the majority of days that were regarded as being suspicious by Aroona.

[29] Mr Varis’ testimony confirmed Mr Colella’s statement at the termination meeting that a number of jobs required the technician to call the Operator to advise of their attendance due to a security switch/alarm being activated. Mr Colella claimed that work performed on equipment known as Q10, Q40 and Q60 satisfied this requirement. From my analysis of the PDA and Telstra data, Mr Colella claims to have undertaken the following work on the identified days:

“1.4.16 -	4.39.09pm	Q40
12.4.16 -	12.04pm	Q10
21.4.16 -	1.59pm	Q60” ¹²

[30] After reviewing the information provided by Mr Gelfe, I cannot find any evidence of Mr Colella making the required phone call to the relevant Operator on any of these dates. On 1.4.16, Mr Colella only made 1 phone call which was commenced through the Two Rocks Water Tank tower at 11.34am. On 12.4.16, Mr Colella made no phone calls for the whole day. On 21.4.16, Mr Colella made no phone calls for the whole day. I have taken this into account.

[31] I have taken into account that Aroona were required to undertake a “full” investigation into the allegations against Mr Colella. Whilst not agreeing with Mr Heathcote’s description of the investigation being “half baked”, I do accept that the level of enquiry was suboptimal. Mr Van Der Vaart should have undertaken a thorough investigation of all of the PDA information task by task, not simply rely on the GPS. Further, Mr Van Der Vaart should have investigated more than just a sample of the minutes of the pre start meetings. Mr Van Der Vaart should have interviewed Mr Colella’s colleagues to assess their recollection of the toolbox meetings and Mr Colella’s attendance. The investigation into the analyser records and trends also appears to be inadequate. Most importantly, Mr Van Der Vaart should have sought expert advice in relation to the actual PDA GPS data. I have taken this into account.

[32] I have taken into account that Mr Colella’s signed the minutes of the investigation meeting on 9 September 2016 which report that Mr Colella said:

“Performance and Conduct Record of Interview

Employee name: Tom Colella
Date/Time: 9 September 2016, 10:30am – 11:45am

...

PV: we need to further satisfy the need, I will look at the analyser service log, this should demonstrate that the job was being conducted.

TC: that’s not always valid also; I check the analyser, its fine, so I don’t do the log...”¹³

[33] Later in the meeting on 16 September 2016, Mr Colella handed over a completed list of the analyser logs. The following discussions allegedly occurred:

“Performance and Conduct Record of Interview

Employee name: Tom Colella

Date/Time: 16 September 2016, 10:30am – 12:30pm

...

PV: At our last meeting you clearly stated you don't always do the log?

TC: no I always do, it's really important

PV: I was under the impression you don't always do the log, that's what you said.

TC: I am pretty thorough; it's really important, part of the history, I'm confident Two Rocks and Yanchep are also done really well..."¹⁴

[34] Mr Van Der Vaart claimed that the analyser logs that were handed to him by Mr Colella on 16 September 2016, were in an unusually pristine condition. Mr Colella claims that he provided coloured photocopies of the logs. The documents in exhibit AA6 are original documents. I have made this assessment on the basis that you can feel the indent of the numbers made by Mr Colella's pen on the reverse side of the page. Mr Colella claims that he did not provide Mr Van Der Vaart with these documents. I do not accept Mr Colella's evidence. The number "2016" that is on exhibit AA6 for Tag C/W OUTLET with the first entry of 29/1, is exactly the same as the document that is attached to Mr Van Der Vaart's original witness statement in the first proceedings at Annexure PV27, page 345 of the Appeal Book, Exhibit C1. I accept Mr Van Der Vaart's evidence that Mr Colella handed over pristine original analyser logs which were unable to be located one week earlier. Further, that it would be extremely unlikely that these logs could be maintained in this condition based on Mr Colella's workplace environment.

[35] I do not accept Mr Colella's explanation in relation to the sudden appearance of these analyser logs. I accept the evidence that Mr Colella originally admitted that he did not fill out the logs. For Mr Colella to suddenly appear with brand new documents one week later and change his story to one where he "always fills out the logs" lacks credibility.

[36] I have taken into account that Mr Colella, as the senior delegate of the ETU, raised his concerns about privacy when the PDA technology was first introduced. Mr Colella expressed a concern that Aroona may use the PDA GPS information to discipline employees. I note that Aroona gave no commitment not to use this information for any purpose.

[37] I have taken into account that Mr Colella openly stored his PDA device in an empty foil "Twisties" bag. As an experienced electrician, Mr Colella knew that this bag would work as a farady cage, thereby preventing the PDA from working properly – especially the provision of regular GPS co-ordinate updates. I note that Mr Colella's supervisors knew that he placed his PDA in the foil bag and that they should have known the effect that this action would have on the PDA device.

[38] However, I can find no plausible explanation why Mr Colella would create a faraday cage around his PDA, except to obstruct the GPS collecting capacity of the device. Mr Colella appears to have been deliberately mischievous in acting in this manner.

[39] I regard the PDA GPS data to be inconclusive. All three experts testified that it was basically impossible for the GPS co-ordinates to be exactly the same for the month of April.

This means that the rationale that was used by Mr Van Der Vaart to recommend Mr Colella's termination was flawed (see PN23 above). I have taken this into account.

[40] Having found that Mr Colella was on a variety of sites for the majority of the days that were the subject of the investigation, Mr Musgrove's conclusion that the PDA remained in Mr Colella's house for the month of April 2016, cannot be sustained. During the month of April, Mr Colella was able to travel to a number of worksites, make telephone calls that were transmitted from suburbs as far afield as Quinns Rock, Gnangara West and Ocean Reef, submit jobs on his PDA from a variety of locations at relevant times which were corroborated by the Telstra information, yet his PDA GPS continued to register the exact same co-ordinates at Mr Colella's home. Unless the PDA device was faulty for the entire month of April, the only logical conclusion is that Mr Colella was able to somehow operate the device whilst keeping it in the faraday cage that he had developed or by only removing it for very brief periods of time to log his jobs but not give away his location. I have taken this into account.

[41] I have taken into account that Mr Colella's emails do not have the usual identifying concluding commentary e.g "sent from my iphone". It is impossible to ascertain the location of Mr Colella when he sent his emails.

[42] I find that Mr Colella was not at work on the 1st, 12th and 21st of April. As a result, I find that Aroona had a valid reason to terminate Mr Colella's employment.

Section 387(b) notified of the reason

[43] There is no contest that Mr Colella was notified of the reason for his dismissal. I have taken this into account.

Section 387(c) opportunity to respond

[44] Mr Heathcote submitted that Mr Colella was denied procedural fairness when he was not given a copy of the PDA information (ex AA1) when he requested a copy during the investigation. I agree with Mr Heathcote. Mr Colella should have been given an opportunity to take away the document, study it in its entirety and respond to any issues at a reconvened meeting. To not afford Mr Colella this opportunity is a breach of procedural fairness. However, Mr Colella has now been in possession of the document for many months. Mr Colella has failed to identify any flaws or mistakes in the data that is contained in this document, except for the challenge to the accuracy of the GPS data. I have taken this into account.

Section 387(d) refusal to have a support person present

[45] Mr Colella was represented and supported at each of his investigative and disciplinary meetings by a full time Official of the ETU. I have taken this into account.

Section 387(e) warning about unsatisfactory performance

[46] Mr Colella had been issued with a final written warning in 2002 for falsely claiming to have performed work. I have given this warning little weight on the basis that it was 14 years ago. I note that Mr Colella has been warned about other areas of his performance (ie unsafe driving) in more recent times. I have taken this into account.

Section 387(f) size of employer

[47] Aroona is a large employer. It followed a standard process in effecting Mr Colella's dismissal. I have taken this into account.

Section 387(g) HR specialists

[48] Aroona has trained HR specialists who were actively involved in the disciplinary process. Whilst I am critical of Aroona for not providing Mr Colella with the PDA data when it was requested, I accept that Mr Colella benefited from a staged, formal and documented disciplinary process. I have taken this into account.

Section 387(h) any other matters

[49] I am surprised by the limited investigation that was conducted by Aroona. Mr Van Der Vaart acknowledged that he relied on the PDA GPS data as the primary source of evidence that Mr Colella was not at work at the times that he claimed. Mr Van Der Vaart was adamant that Mr Colella was at home throughout April 2016 because that is what the PDA GPS had reported. Unfortunately, all of the expert witnesses agreed that it was just about impossible for the GPS data to record the same co-ordinates 28 days in a row, even if the PDA was stationary during this time. All of the experts confirmed that this was due to the fact that the number of satellites in range varied from time to time and the satellites location in the sky was also highly variable. I have taken this into account.

[50] I have taken into account that Aroona did not do a thorough analysis of the minutes of the pre start toolbox meetings. To conduct an investigation on only a sample of these meetings was inadequate. Mr Colella's fellow attendees should have been interviewed. Further enquiries should have been made.

[51] Mr Colella paid for the privilege to have private use of Aroona's vehicle. One of the conditions of Mr Colella's private use was that he filled out a log for his business travel. Mr Colella stopped filling out his vehicle log at the end of March 2016. I have taken this into account.

[52] I acknowledge the submission of Mr Ellery that the standard of proof required to substantiate Aroona's decision to terminate Mr Colella is the "balance of probabilities".¹⁵

Conclusion

[53] I am not convinced that the PDA GPS data proves anything except that Mr Colella had found a way, either inadvertently or otherwise, to function the PDA device whilst not allowing it to record his location.

[54] Mr Colella went out of his way to hide his whereabouts. He was concerned about Aroona tracking him when the Company introduced the PDA into the workplace. He protested about Aroona having this information at that time. Mr Colella then went out of his way to inhibit the functionality of the PDA by placing it in a foil bag to create a faraday cage. I cannot understand why Aroona condoned this practice but it clearly shows that Mr Colella did not want to be tracked.

[55] Mr Colella requested that Aroona cross reference the PDA job list against his telephone records. Taking into account the evidence of Mr Varis, I checked through Exhibit AA1 for all of the jobs which Mr Varis and Mr Colella identified would trigger an alarm. This alarm would then necessitate Mr Colella making a phone call to the Operators to advise them of his attendance. The PDA data shows that on both 12 and 21 April 2016, Mr Colella performed tasks which required him to contact the Operators yet no phone calls were made by his phone on that day. I find that Mr Colella was not performing the work on these days that he has claimed and for which he was paid.

[56] I acknowledge that Mr Colella is 60 years of age and is only currently working as an Uber driver earning a few hundred dollars per week. However, Mr Colella is a highly experienced and competent electrical/instrument technician. Whilst I accept that his skills may not be in high demand in a 4km radius from his home, I have no doubt that an experienced dual tradesman would be able to find well paid employment utilizing these skills within Perth's metropolitan area.

[57] I find that Mr Colella's actions were deliberate in trying to hide his whereabouts and deceive his employer. Whilst the PDA GPS data is open for interpretation, no such allegation has been raised in relation to the accuracy of the actual telephone calls that were, or were not, made from Mr Colella's mobile phone or the PDA work data.

[58] I find that Aroona had a valid reason to terminate Mr Colella. I am satisfied and find that Mr Colella received his statutory entitlement to a fair go.

[59] For the above reasons, I find that Mr Colella's termination was not harsh, unjust or unreasonable.

[60] Mr Colella's application for an unfair dismissal remedy is dismissed.

[61] I so Order.

COMMISSIONER

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¹ Exhibit C1 – witness statement Thomas Colella Attachment TC2

² Exhibit AA2 – witness statement Dean Rayner

³ Exhibit AA3 – witness statement Jerome Douzich

⁴ Exhibit AA4

⁵ (1995) 185 CLR 410

⁶ (1998) 84 IR 1

⁷ (1995) 62 IR 371

⁸ Witness statement Peter Van Der Vaart PV-10

⁹ Witness Statement Rebecca Alexander RA30

¹⁰ Transcript 5 September 2017 at PN36

¹¹ Transcript 5 September 2017 at PN47, 65 & 66

¹² Exhibit AA1

¹³ Witness statement Rebecca Alexander Annexure G

¹⁴ Witness statement Rebecca Alexander Annexure H

¹⁵ *Briginshaw v Briginshaw* (1938) 60 CLR 336