



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Chantelle Major

v

Strata Management Group Pty Ltd
(U2023/3223)

COMMISSIONER SIMPSON

BRISBANE, 7 SEPTEMBER 2023

Application for an unfair dismissal remedy

[1] On 17 April 2023 Ms Chantelle Major (**the Applicant**) filed a Form F2 Application for Unfair Dismissal Remedy against Strata Management Group Pty Ltd (**the Respondent**) for unfair dismissal remedy. The Applicant commenced employment with the Respondent on 22 March 2022 and her employment was terminated by the Respondent on 27 March 2023.

[2] The Respondent operates in the real estate industry. On 11 May 2023 the Respondent filed a Form F3 Response to the Application. The Response stated that the Respondent had 26 full time employees, so it was clear the Respondent was not a small business employer for the purposes of the Fair Work Act 2009 (**the Act**). There are no other jurisdictional issues.

[3] A hearing was conducted on 19 July 2023. The Applicant was assisted by a friend Mr Paul Mulder who is not a lawyer, and the Respondent was represented by Mr Stephen Clayton. The Applicant filed an initial statement,¹ and a statement in reply² which were admitted into evidence. The Applicant was paid four weeks' pay on termination. The Applicant said at the hearing that she had not obtained any other employment at the time of termination.

[4] Mr Clayton filed a witness statement³ as did Mr Andrew Peters⁴ and Ms Ella Baker⁵ as part of the Respondent's case.

[5] The reasons for termination are set out in the Respondent's termination letter as follows:

“Dear Chantelle,

RE: YOUR EMPLOYMENT AT STRATA MANAGEMENT GROUP

I refer to your current employment with us at Strata Management Group Pty Ltd (**SMG**).

The purpose of this letter is to inform you that we have elected to terminate your employment with notice. Notice will be paid in lieu and your employment will cease today, 27 March 2023.

Reasons for termination

As you know, we have sought your response to a number of allegations in our letter to you of 21 March 2023. We acknowledge receipt of your formal response to those allegations in your letter of 24 March 2023.

Based on your responses, we have reached the conclusion that, on the balance of probabilities, it is more likely than not that you engaged in the conduct as alleged. The reasons for our conclusions are as follows:

Allegation One - Forwarding SMG emails to your personal email address

We note that your response, amongst other things, confirmed that:

1. you admit to having engaged in the conduct as alleged;
2. you do not believe you have made any disclosure of confidential information as the forwarding of information to yourself in a personal capacity is not considered 'disclosure'; and
3. you believe that you may require copies of these correspondences for a recount of events at a future point in time.

We are of the view that, on the balance of probabilities, allegation one is substantiated. This is because SMG did not require you to forward any work emails containing confidential information to your personal email address, as part of your role. We note that these emails contained confidential and sensitive information including SMG templates, client information and data. We also note that you forwarded these emails to your personal account, without notifying anyone in a supervisory or management position at SMG that you had done so.

Furthermore, in our view, it was not necessary nor reasonable for you to forward work emails to your personal email address for future reference whilst you are working from home or otherwise outside of the office premises. You were assigned a work laptop specifically for this purpose, which we note was taken home with you on a regular basis. Accordingly, you would have had access to any relevant data and information necessary to complete the duties associated with your role without forwarding any emails to your personal email address.

In relation to your need for recounting and providing specific evidence at a future point in time in the event that you were challenged, we are of the view that your collection of confidential information was in breach of clause 6d. of your employment contract. Specifically, that you have used or attempted to use SMG's confidential information for your own purposes or for a purpose that is not a company purpose in a manner that may injure or cause loss directly or indirectly to the company and/or its business.

Allegation One Outcome

It is for the reasons above, that we are of the view that it is more likely than not, that allegation one is substantiated.

Accordingly, we have determined that your conduct engaged in allegation one:

- a. was dishonest;
- b. was in breach of clause 6 of your Employment Agreement, specifically clauses 6.2.a., b. and d.; and
- c. damaged the trust and confidence of SMG in your ability to perform your duties.

Allegation Two - Failure to attend at the Sunshine Coast office to perform work

It was alleged that you have not been in attendance at the Sunshine Coast office during normal business hours, despite your advices to us that you have been working from the Sunshine Coast office, since 24 February 2023.

Allegation Two Response

We note that your response, amongst other things, that:

1. The FOB data is not an accurate indication of whether or not you were in attendance at the Sunshine Coast office;
2. As part of your role as a Business Development Associate, you look for new business opportunities by visiting sites, investigating new builds, network and liaise with new people. These events typically occur outside of the business premises;
3. On the morning of 13 March 2023, you notified HR before business hours by email that you were working from home; and
4. You believe SMG has previously made representations to you about flexibility in working from home arrangements.

We are of the view that, on the balance of probabilities, allegation two is substantiated. This is because the FOB data and human witness account confirm your non-attendance at the Sunshine Coast office, which is also supported by your work mobile phone records. The mobile phone records show that you performed a majority of your work in “Noosa Heads” for the period alleged.

Your comments regarding the requirement to *visit sites, investigate new builds, networking and liaising with new people* have been noted. As you are aware and have been advised multiple times, any meetings outside of the office must be entered into the outlook calendar. If you have in fact been out of the office completing client relations meetings and these were not marked in your outlook calendar or noted within your Daily Report, then it is our view that these meetings not been approved by your Head of Department, scheduled within our internal system as required and/or recorded in your required end of day Daily Reporting.

Further, based on the mobile phone records, and your general lack of reporting of these activities, it seems reasonable to conclude that you did not actually perform the abovementioned tasks on a daily or weekly basis whilst employed at SMG.

In relation to your attendance at the Sunshine Coast office on the 13 March 2023, no email communication was received from you to our Human Resources (HR) department. In every other circumstance in which you have requested/reported the requirement to take personal leave and / or requested working from home; you have communicated with SMG via text or teams. Based on historical patterns / data of communication from you to SMG regarding work arrangements and your knowledge of our WFH requirements, SMG's position remains that you have not met your requirements to attend and preform your duties from the assigned office; in this instance the Sunshine Coast office.

Request to work from home

We also note your comments regarding an instance where you were denied permission to work from home when your two children were sick. When you approached us with this request, we made the recommendation that you take personal / career's leave for the day to attend to matters at home, so that you can duly care for your sick children. As such, in this instance, it was reasonable for SMG to decline this request as your child care duties took precedence. Personal / career's leave was made available to you upon providing the required medical certificates.

Allegation Two Outcome

Accordingly, we have determined that your conduct engaged in allegation two:

- a. was dishonest and unprofessional;
- b. was contrary to clauses 1.4 and 1.6 (a) and (b) of your Employment Agreement;
- c. was contrary to the previously approved work schedule;
- d. was contrary to previous full office staff updates/directions and direct internal instructions regarding working from home and attending client meetings outside of SMG's business premises; and
- e. damaged the trust and confidence of SMG in your ability to perform your duties.

Brisbane training matters

We also note that you believe to have been subjected to discriminatory treatment in relation to SMG's refusal to provide you with reimbursement for accommodation and / or travel expenses in relation to the training that was to take place in SMG's Brisbane offices.

Please note that these issues are entirely distinct and separate to those addressed in this letter, and do not form part of any consideration in the decision made to terminate your employment.

Allegation Three - Leaving the office after lunch and working from home for the remainder of the working day

Allegation Three Response

We note that your response, amongst other things, states that:

1. You do not recall the specifics of the dates and times as alleged; and
2. You require further information for your response.

As previously communicated to you, four days a week you were required to work from the Sunshine Coast office and one day a week from the Brisbane Office. If you were out of the office for any work related or client meetings, you were required to mark these in your outlook calendar. No working from home arrangements had been requested or approved. As such, any days worked from home and/or days in which you travelled home in the afternoon (during work hours) to work from home had not been approved; nor were SMG notified of you changing your work location.

Accordingly, SMG's position remains that you do not require access into our server to confirm your location each day. All work days and duties were instructed to be completed from one of our offices and should be in line with your daily reporting which included your office location.

Further to this, we have obtained work phone data and records that indicate you were not in attendance at the office on the two instances as detailed in allegation three (contradictory to your daily reporting); those being:

1. 7th of February 2023 at 1:43 pm; and
2. 9th of February 2023 at 1:46 pm.

Therefore, we are of the view that, on the balance of probabilities, allegation three is substantiated.

Allegation Three Outcome

Accordingly, we have determined that your conduct engaged in allegation three:

- a. was dishonest and unprofessional;
- b. in direct contravention of the directions provided to you, being the requirement that you attend work at the Sunshine Coast office during your designated work hours, and the agreed working arrangements made between you and SMG regarding work from home; and
- c. damaged the trust and confidence of SMG in your ability to perform your duties.

Outcome

We consider that your actions were willful and / or deliberate and are inconsistent with the continuation of your contract of employment. Your employment with Strata Management Group is therefore terminated effective immediately.

Accordingly, your last day of employment with Strata Management Group is today, Monday, 27 March 2023. You will not be required to attend at the office after this date. You will be paid one week's notice in lieu.

We acknowledge receipt of your confirmation that you will abide by Clause 10.4 of your employment contract.

Return of company property

We request that you return all SMG's equipment and access devices, in a reasonable condition, to our Head Offices located at 51 Ballow Street, Fortitude Valley as soon as practicable, and by no later than close of business Tuesday 28 March 2023.

We note such company property includes but may not be limited to the following –

1. Mobile Phone, including SIM and associated charging device;
2. HP-Pro Book Laptop and associated charger;
3. 2 x Monitors, stand and adaptors;
4. Mouse and Keyboard;
5. Access FOB – Fortitude Valley Office #111;
6. Access FOB - Sunshine Coast Office; and
7. Front Door Key – Sunshine Coast Office.

Alternatively, if you are unable to travel to the Brisbane Office, we request that you return all the above- mentioned equipment / asset to the HIVE Sunshine Coast Office at 1st Floor, Tower 2, Kon-Tiki Building, 55 Plaza Pde, Maroochydore Q 4558, take a photo of all the items returned and email this photo confirmation to me, leave the office locked and return to key to the Community Manager at the Sunshine Coast office, Ms. Fiona Marchant.

Your entitlements

You will also be paid your accrued entitlements and any outstanding pay up to and including your last day of employment and your one week's notice in lieu. This includes the balance of any time off instead of overtime paid accrued but not yet taken (paid at the overtime rate applicable when the overtime was worked), and superannuation. If you have been paid annual leave in advance, any amount still owing will be deducted from your final pay.

Continuing confidentiality and other obligations

We remind you that you must abide by all other contractual provisions that continue to operate after the termination of your employment including (but not limited to) the obligations regarding confidential information.

You must also return any confidential information in your possession or control and immediately destroy any of the information held by you electronically (including any information stored on your personal computer and/or personal email address).

We wish you the very best in your future endeavours.

Yours faithfully,
Andrew Peters
Managing Director
Strata Management Group”

SUBMISSIONS AND EVIDENCE

Allegation One

[6] A show cause letter was sent to the Applicant on 21 March 2023, setting out the allegations the Applicant had been asked to respond to. The allegations in relation to allegation 1 were as follows:

“It is alleged that you have forwarded private internal SMG email communications to your personal email address and deleted these sent emails (including from the deleted items folder) in attempt to conceal your actions. There was no company related reason or purpose in the forwarding of these private SMG email communications to your personal email address.

Specifically, it is alleged that this conduct occurred on the on the following dates, however we note the conduct may not be limited to the below dates only:-

- 8 February 2023 at 10:21 am;
- 10 February 2023 at 5:48 pm;
- 22 February 2023 at 11:23 am;
- 22 February 2023 at 2:14 pm;
- 22 February 2023 at 3:38 pm; and
- 27 February 2023 at 3:34 pm;

It is our view that the conduct, if true and substantiated:

- is dishonest;
- breaches clause 6 of your Employment Agreement, specifically clauses 6.2.a., b. and d.; and
- damages the trust and confidence of SMG in your ability to perform your duties.”

[7] Clause 6 of the Employment Agreement reads as follows:

“6. CONFIDENTIALITY

6.1 Confidential information

In the course of the employment, you will become a party to confidential information of the company or its clients, whether in written, computerized or in oral form.

6.2 Obligations of Confidence

You will both during the employment and for so long as the confidential information remains confidential after the termination of the employment (unless it ceases to be confidential due to your breach of this clause):

- a. Not at any time, either directly or indirectly, disclose or communicate to any person and confidential information that may come to your knowledge during or in the course of the employment, unless expressly authorized by the company or required by law or court order;
- b. Use your best endeavours to prevent disclosure or publication of the confidential information where at disclosure or publication is not authorized by the company;
- c. If required by law or court order to disclose any confidential information, advise the company of that fact and take all lawful steps to confine disclosure of the confidential information and preserve its confidentiality, including taking steps to allow the company or its agents to do so;
- d. Not use or attempt to use confidential information for your own purposes or for any purposes other than for the purposes of the company in a manner which may injure or cause loss directly or indirectly to the company and/or its business; and
- e. Acknowledge and agree that, without prejudice to any other remedy that the company may have, the company will be entitled to injunctive and other equitable relief to prevent or cure any breach or threatened breach of this clause.
- f. You shall indemnify the company against any loss or damages incurred as a result of breach of the terms of this agreement.

6.3 The obligations set out in this clause survive the termination of Employment.

[8] The Applicant submitted that disclosure would mean that information has been provided to an individual that is not aware “to disclose”. The Applicant said she cannot disclose something to herself that she is already privy to. Similarly, it does not make sense to communicate something to oneself since communication involves the exchange of information or messages between two or more parties.

[9] The Applicant stated that she wished to clarify that the correspondence sent to her personal email was sent for no other reason than for items she flagged that may pose as a future legitimate company-related item that she may need to recount or specifically evidence, “*where I was involved specifically and/or directed, or directly related to me as a copied in recipient to the email communication and was not DISCLOSED to another party/person.*” The Applicant said that as an employee, and as an individual, she is within her rights to track all information and correspondence relating to her, as well as any instruction or directive provided to her, or that may relate to her as an employee in performance of her duties and that such information can be recalled and stored provided that she abided by Clause 10.4 of her Employment Contract.

[10] The Applicant submitted that as an employee, she has the right to access this documentation and keep it for her own records. The Applicant said that regarding the alleged deletion of these emails, putting aside that it is general practice for employees to delete emails, she did so as they were company-related items that she had ‘legitimate concern’ they may need

to be recounted or specifically evidenced at some point in the future, and any correspondence that may have been forwarded to her personal email was considered by her as a 'legitimate concern' as she was either a recipient or a related party and she had concern that if she was challenged at a point in the future, she would need to have an adequate recollection (evidenced in writing) of the event(s). The Applicant said denying her the right to maintain such evidentiary information whilst still being employed at the Respondent in such instances, insinuates the Respondent wished to deny her the ability to adequately respond to claims or allegations made and unfairly pre-empts her non-compliance to clause 10.4 of her Employment Contract. The Applicant submitted that this is further evidenced by the fact that her suspension resulted in her inability to access documentation on the Respondent's remote access server that enables her to further support and respond to allegations in the fullest possible manner.

[11] The Applicant said during her oral evidence that she did not have anything further to add to what she had said in her witness statements concerning this issue.

[12] Mr Clayton said in his statement that the company carefully considered the Applicant's response to allegation one. He said there was no possible risk anticipated or reported by the Applicant or its clients potential or otherwise, that gave any legitimate concerns for company records to be transmitted nor would a company require an employee to hold personal information as to company business. No explanation was given to the double deletion of the records, a method commonly used to conceal the action of transmitting specific documents. Given the response of the Applicant, the Respondent formed the opinion that the allegation was more likely than not to be substantiated.

[13] Mr Peters said in his statement that the Applicant was in breach of her employment agreement by emailing client information and company information from her work email to her personal email without authority in contravention of her employment agreement and written company policy provided to her and then double deleting the emails from her Outlook account on the company server, a method used to conceal the fact. Mr Peters said the action was admitted by the Applicant, which was defended on the basis that she may have needed this information as evidence in the future in the event that there was any legal action involving a client. In addition, she denied she was in breach on the basis she emailed the data to herself privately and not a third party. Mr Peters said this action was in breach of her employment agreement at clause 6. Mr Peters said there was absolutely no reason for the Applicant to send any emails to her personal email address concerning the Respondent's business.

[14] Ms Baker gave evidence that the Applicant's defence to this allegation was that the Applicant had circulated this company data for future recounting and providing specific evidence. Ms Baker said the Company did not provide authority for any work-related correspondence to be sent to personal email addresses, as part of the role. Further, it was not required or necessary for the Applicant to send correspondence to their personal email address, as the Applicant had an assigned /signed out work laptop specifically for this purpose which Ms Baker said was taken home on a daily if not regular basis. Further the Applicant appears to have attempted to conceal her actions, and the emails included company information, templates and policies.

[15] Ms Baker said the emails were available to be produced but as the Applicant did not dispute she did it, the Respondent did not produce them for the hearing. Ms Baker said the IT

team was able to recover 30 days' worth of the deleted emails which shows the content of the emails. Ms Baker said the IT team could also provide three months' worth of historical data which was provided in excel format. Ms Baker said the matter was brought to the employer's attention by another employee's resignation and a requirement for a handover of tasks and rolls between the two team members. Ms Baker said as part of that handover she completed an investigation of what each team member was completing and that was when the matters came to the Respondent's attention. Ms Baker said due to the severity of the matters, and that it was in breach of the employment contract it wasn't regarded as a performance management issue.

[16] Ms Baker was asked about the content of the emails. Ms Baker said the emails included internal policies and procedures that the Respondent had created, as well as some client information including contact details. Ms Baker said the emails included templates showing the Respondents' reporting styles, client contact information and copies of internal updates to staff about policies and procedures. It was put to Ms Baker that they should have been provided to the Applicant so she could respond. Ms Baker said that as the Applicant confirmed she was sending the emails home and double deleting them Ms Baker felt that the allegation was confirmed. Ms Baker also said that the Applicant would have a copy of all of the emails that she had sent home to herself. Ms Baker was asked what specific client information she was referring to. Ms Baker said emails to and from clients including their email address, contact phone number and the address of the site, and details about the project which was information that could be taken and given to a competitor. Ms Baker said there was no reason to send company emails home.

Allegation Two

[17] The show cause letter set out the particulars in relation to allegation 2 as follows:

“It is alleged that you have not been in attendance at the Sunshine Coast office during normal business hours, despite your advices to us that you have been working from the Sunshine Coast office, since 24 February 2023.

Particulars

- a. Upon investigation, the last “FOB” access data (prior to 13 March 2023), linked to your FOB device, indicates that the FOB has not been used since 2.11pm on 24 February 2023. This FOB is used by you to gain access to the Sunshine Coast office;
- b. The Community Manager at the Sunshine Coast office, Ms Fiona Marchant, has advised that you have not been in attendance at the Sunshine Coast office since 24 February 2023 and up to 13 March 2023;
- c. The Community Manager at the Sunshine Coast office, Ms Fiona Marchant, confirmed that access into the HIVE office space for SMG is only available via use of the FOB device;
- d. On 13 March 2023, Mr Andrew Peters, Managing Director, attended the Sunshine Coast office and you were not in attendance at the office;
- e. Your hours of work are between 8:30 am to 5:00 pm on weekdays and you have not received any approval to perform your normal tasks and duties outside of the allocated office and/or from your residences (home);

- f. You are required to attend and perform your duties at your assigned office; in this instance at the Sunshine Coast office.

It is our view that the conduct, if substantiated:

- a. is dishonest and unprofessional;
- b. contrary to clauses 1.4 and 1.6 (a) and (b) of your Employment Agreement;
- c. contrary to the previous approved work schedule and our internal policies regarding working from home; and
- d. damages the trust and confidence of SMG in your ability to perform your duties.”

[18] In the Applicant’s show cause response she stated that her Employment Agreement referenced her as a Senior Strata Manager, and this is an outdated contract whereby arrangements have moved on in accordance with what was mutually agreed when the Applicant first joined the Respondent, which was to move into the Business Development space (after having covered for a maternity leave vacancy). The Applicant said that when she had moved into her role as a Business Development Associate her role and responsibilities, and the office she resides out of should have been updated in the contract. The Applicant said precedence of the current agreements verbal or written is what applies, not the outdated employment agreement referred to.

[19] The Applicant referred to email correspondence dated Sunday, 5th March 2023 at 17:46 in relation to the statement that “On or around 4 November 2022 you made a unilateral decision to relocate to the Sunshine Coast. There was no agreement that your base work location as stipulated in your employment contract, would be changed from the Brisbane office to the Sunshine Coast office”. The Applicant responded in her show cause response that this is an administrative outdated legacy matter where arrangements have moved on in accord with what was mutually agreed when she first joined the Respondent (and further when she moved into her role of Business Development Associate) of expanding the Respondent up to the Sunshine Coast office. The Applicant said she was based out of the Sunshine Coast office, has a business card showing this as well as the Respondent having a formal month by month lease for the premises. The Applicant said should any accident occur up at this office where insurance could be called upon to respond, it would show her work location is the Sunshine Coast office not Brisbane.

[20] The Applicant also responded to the show cause letter that when Mr Peters interviewed her initially, he made a specific point in committing to her that it was the employer’s position that the Respondent had extremely flexible working from home arrangements. The Applicant said when she was hired as a Senior Manager in March 2022, flexible working arrangements were provided to her, and when she transitioned to the Business Development Associate role that included an understanding the Respondent would be opening a Sunshine Coast office, which at her initial interview was discussed as being a good fit as she would be moving to the Sunshine Coast at the end of the year. The Applicant said despite being assured that flexible working arrangements would continue in her new role; she was informed she would also undergo training in the respective Office(s) from time to time on an as needed basis. The Applicant said since then, no formal training was ever ‘appropriately coordinated’, with only sporadic training for a couple of hours here and there being availed to her, yet she continued to

carry out all her duties in her new role and was provided additional workload of other vacating staff members.

[21] The Applicant also referred to appropriate co-ordination (or the lack thereof) regarding her attendance at the Brisbane office for a consecutive five-day training period, which ultimately did not take place. The Applicant said she had requested accommodation or travel allowance (which she would use for accommodation), which was not granted, and felt that this decision was not fair or reasonable. The Applicant said she had expressed concerns regarding the safety implications of traveling a minimum of 6 hours per day for 5 days in a row being over 1000kms in a week while maintaining full-time working hours, which was not accepted as a valid reason with SMG still referring to the outdated Employment Contract when she first started in Brisbane as her main office. The Applicant said based on this further evidence, she believed she was again being subjected to discriminatory treatment. The Applicant said on several occasions, other employees have been offered accommodations and/or travel allowances to mitigate any inconvenience caused by long distance travel or late hours. This led her to believe that such treatment has not been extended to her, despite similar circumstances.

[22] The Applicant said a further act of blatant discrimination was when her request to work from home whilst caring for two of her sick children was denied whilst others who need to get their car serviced, await a postal delivery, or must catch-up on backlogged work tasks can work from home. The Applicant said having flexible work arrangements if she achieves her tasks set, was at the core of the representations to her in joining the Respondent, and why she agreed to join and now the employer was making allegations that fly in the face of what the employer had committed to and tasked her to achieve.

[23] The Applicant claimed in her first witness statement and during her oral evidence that she was promised full flexibility in working remotely and this was a basis for her accepting the roll and leaving her previous place of employment. The Applicant said she had moved across to work in Strata Management for the Respondent, after performing that work for another employer, and said she was told she would start in Strata Management and transfer into business development within 18 months or after maternity leave cover was no longer required, which ever was sooner. The Applicant said she was transferred into business development within 8 months of starting the role and was praised for her good work.

[24] The Applicant said that the Sunshine Coast office was established by the Respondent in October 2022 which she was singularly heading up as the Respondent's representative as she lived in Noosa and had advised the Respondent of this. The Applicant said this was in accord with her discussion with Mr Peters prior to starting the role as she told him she was moving to the Sunshine Coast at the end of the year and this aligned with Mr Peters ambitions of opening up a Sunshine Coast branch. The Applicant said she was very clear from day one that it was her desire to move to the Sunshine Coast however she accepted in her oral evidence there was no firm timetable about that.

[25] The Applicant said in her reply statement that the telephone records provided merely demonstrate her performance in her business development role, which necessitated being on the road and fulfilling her duties regardless of location, whether it be in the Sunshine Coast office, Fortitude Valley office, or while traveling. The Applicant said no factual evidence has been provided, except for a phone record that vaguely indicates her potential whereabouts. The

Applicant said as a Business Development Manager, her responsibilities included identifying, pursuing, and securing new business opportunities to help the Respondent grow and achieve strategic goals. The Applicant said engaging in activities such as exploring new construction projects, networking, and connecting with new individuals is customary for Business Development Managers and aligns with Mr Peters expectations. The Applicant said her performance and work ethic were never in question.

[26] The Applicant said the sole issue of concern revolved around the Applicant's whereabouts between 24 February and 13 March, 2023. The Applicant said she was denied access to emails and Teams chat, which hindered her ability to accurately determine and document her whereabouts. It was put to the Applicant that at one point she wrote to Ms Baker in Human Resources claiming that she had a flexible working arrangement. The Applicant said she may have but did not recall. The Applicant was asked whether she recalled the response from Ms Baker and the Applicant said she could not remember. It was put to the Applicant that Ms Baker said she would check the Applicant's contract and when reverting to the Applicant and advising her there was no such agreement that the Applicant apologised to Ms Baker. The Applicant responded that she did remember that conversation and it appears from the evidence that is what occurred.

[27] The Applicant said the original arrangement (before she moved to the Sunshine Coast) was that she was afforded full working from home flexibility. The Applicant accepted that she was still in the period of training for business development at the time of her termination, and this training was being done by Ms Baker who was the previous business development manager. The Applicant agreed this training was to be happening on Wednesdays in Brisbane, and otherwise she was to be in the Sunshine Coast Office, on the road, or in Brisbane if required. The Applicant accepted that whilst in the training period she was advised any flexible work arrangements needed to be requested. The Applicant was asked whether she was approved to have flexible work arrangements while in the training period and she said no.

[28] The Applicant said the flexible working arrangement continued until she started to hand over her portfolio and transition to commence the business development role in the September/October 2022 period, and at that point she said she was falsely advised by Ms Baker that she would need to come into the office for training for business development, and then she would be allowed to go back to a flexible arrangement. The Applicant emphasised the decision for her to transfer to the Sunshine Coast was a mutual decision, and not a unilateral decision taken by her, as evidenced by all the steps the Respondent took to facilitate the establishment of the Sunshine Coast Office.

[29] The Applicant was asked whether it was the standard practice that for the times that she was to be out of the office whilst on the Sunshine Coast she was supposed to make a note of it in the outlook calendar or to make a diary note of it. The Applicant responded that the answer was yes and no. The Applicant said until about three weeks before her termination the business development team was considered divorced from the rest of the office, because they worked directly for the Managing Director. The Applicant agreed that it was advised that they were to put their whereabouts in the teams chats however this did not happen all the time. The Applicant described it as being a grey line, and another business development manager didn't follow this process. The Applicant did not deny that it was a requirement to provide daily reporting and confirmation of any meetings attended. The Applicant said it was not always

followed. The Applicant said she was reprimanded several times by both Mr Peters and Ms Baker for not doing that. The Applicant said she regarded it as an administrative task and clients came first. The Applicant said this was not an issue until March and the breakdown in her relationship with Mr Peters.

[30] It was put to the Applicant that it was possible the issue of her not attending the office was not raised with her before March 2023 because no one knew that she was not attending the office. The Applicant said the Respondent had access to her phone records and emails and they would have known. I asked the Applicant if the Respondent had any other employees at the Sunshine Coast office and the Applicant said no, only herself. It was put that the Applicant has not responded to the Respondent's evidence to the effect that she was at Noosa Heads at her home address between 24 February and 13 March and not at the Sunshine Coast. The Applicant was asked what her response was to this evidence, and she answered that she did not know. Her evidence was then that the training only pertained to the Wednesday each week, however she also accepted that the expectation was that she would be working from the Sunshine Coast office on the other four days of the week.

[31] Mr Clayton said the Applicant advises she was discriminated against by not being allowed to work from home, however the email making the request had not been sent or received by the Respondent. The Applicant claimed that "*it was stuck in her outbox*". Mr Clayton said the company at no time approved flexible working arrangements as it is against the company policy to do so for workers undergoing training, and this was known and explained to the Applicant on a number of occasions. Mr Clayton said the Respondent formed the opinion that the conduct in the second allegation was substantiated.

[32] In his oral evidence, Mr Clayton said the Respondent accepted that someone could potentially follow someone into the Sunshine Coast office and when leaving do the same. Mr Clayton said this all came about because Ms Marchant had advised the Respondent that no one had been in the office, and the telephone records show that the Applicant was not in the Maroochydhore area. Mr Clayton said that the FOB records were just one of the things relied upon, combined with the Office Manager saying she had not seen the Applicant, and the phone records leading to a conclusion that the Applicant had not been attending the office. Mr Clayton said Ms Marchant initiated the contact with the Respondent because she had someone else that was willing to take the office if the Respondent wasn't using it. It was put to Mr Clayton that there was no evidence of this. Mr Clayton said he believed it may be in the evidence of Ms Baker or Mr Peters.

[33] Mr Peters said that what was mutually agreed when the Applicant first joined the Respondent, was contained in her employment agreement at clause 1.5 that she was to work out of the Ballow Street office. He said they did discuss proposed business expansion at her employment interview and that they could train her in business development over 12 to 18 month period from head office. Mr Peters said the Applicant had insisted that this form part of her employment agreement and requested formal inclusion which was included as annexure A to her employment agreement at clause 4. He said there was no discussion at that time of the formation of an office on the Sunshine Coast or the relocation of her residence 8 months after commencement with the Respondent. Mr Peters said the Respondent denied that the employment contract "*is an outdated legacy matter*" and stated that the employment contract was current as the Applicant was a trainee in business development.

[34] Mr Peters said flexible working arrangements were not approved nor agreed with the Applicant, and the Applicant was aware that they she was required to work from the office full time during business hours unless attending meetings listed and approved in the Outlook calendar. He said this was reinforced in an email dated 3 March 2023.

[35] Ms Baker said the Applicant admitted not being in attendance at the Sunshine Coast office on the 13 March 2023. Ms Baker said in her defence of that allegation the Applicant stated that she had sent an email early that day advising that she was working from home. Ms Baker said the Applicant provided a copy of a 'draft email' allegedly 'stuck in the outbox' and advised that the Applicant was using her phone for internet. Ms Baker said no email communication was received from the Applicant nor was their evidence provided of any email being sent, nor was approval sought to work from home as required and the change in office location was not reported in the teams 'leave' chat as per standard process. Further, this method of informing management contravenes the Company Policy, which confirms that notification of leave is to be via text/SMS. Ms Baker said the Applicant had used this method of informing management of leave in all other instances.

[36] Ms Baker said on 18 January 2023, at 11.03 am she sent an email to the Applicant seeking feedback as to why she had not attended the Brisbane office as agreed on her weekly scheduled day and was reminded the Applicant was required to attend the Brisbane office each Wednesday unless approved otherwise. Ms Baker said it was also noted that any changes from normal scheduled office days required approval to be sought. Ms Baker provided this email as part of her evidence.

[37] The Applicant responded that regarding the FOB access data, she believed it is inconclusive and irrelevant in determining her attendance as it assumes that the FOB is the only way to enter the office, which is not the case and not the way she, in majority enters the office at both the Sunshine Coast and Fortitude Valley offices. The Applicant said the Sunshine Coast office operates out of a shared working space that caters to over 50 clients with varying schedules. Whilst there is a site manager stationed at the front desk who grants access to clients who do not have their FOB on their person, when they are not in attendance for whatever reason at the front desk other tenants have let her into the office. If access data is to be considered an accurate representation of attendance, the same assertion should be applied to the Fortitude Valley office. The Applicant said the data there in using the same reasoning would suggest that she has only visited the Fortitude Valley office a handful of times since she began working at the Respondent in March 2022, which is totally incorrect.

[38] The Applicant said she has either required access to be allowed to her by the front desk personnel, other personnel in the office when front desk personnel is not present, or she has walked in alongside another person entering the office/s. Not carrying her FOB on her person always is not a breach of her Employment Contract. The Applicant said she had a recorded discussion with the Hive Office Manager Ms Marchant where she outlined clearly FOB access in no way represents office attendance and in fact she stated that as the Applicant worked at the other end of the office she would not be aware if the Applicant walked in with others or not or was even there.

[39] The Applicant said her current role of Business Development Associate and what it entails, should not be ignored. As a Business Development Associate of the Respondent, the Applicant said she was responsible for identifying, pursuing, and securing new business opportunities to help the Respondent grow and achieve its strategic goals. This involves but is not limited to market research and analysis, lead generation, sales presentations, negotiations, and closing deals. The Applicant said it is common practice for Business Development Associates to look for new business opportunities by visiting sites, investigating new builds, networking, and liaising with new people. It was submitted that these activities are part of the industry standard for a business development role and certainly is not achieved by remaining stagnant behind an office desk for the entire day and in fact would be in direct conflict with the employers' expectations.

[40] The Applicant said her Employment Contract as a Business Development Associate has not been updated and the expectations of her from the Respondent in this role versus her previous role are different. The Applicant said she has been taking necessary actions to improve her performance as the Business Development Associate and in fact, expectations of being in the field and on the road is a big part of this role. Additionally, an employee's working location is not a basis for termination or disciplinary action particularly with commitments made by the employer from the outset of having autonomy and discretion if she did her job and achieved her tasks. The Applicant said she has never been formally performance managed or provided any formal warnings for not achieving expected performance levels and tasks and she has continued to meet or exceeded the expected standards and work output, whilst working the required work hours or exceeding them.

[41] Mr Clayton said in his statement that the Applicant claimed that she did attend the office during the period in relation to allegation 2 and advised that she attended the office the majority of times as "other tenants have let me in" or she was out visiting potential clients. Mr Clayton said this is an action requiring the approval of her manager which did not occur. Mr Clayton said on further investigation the evidence contained in telephone records issued on the 23 March removed any doubt of the Applicant being present at the office during the period of which she reported to be.

[42] Mr Clayton said in relation to the allegation of discrimination that the on 4 March the Applicant agreed to attend the Brisbane office for training, and on 6 March the Applicant raised an issue of safety. Mr Clayton agreed that the Respondent did not rely on the Applicant's decision not to attend the training on safety grounds as a reason for termination.

[43] Mr Peters said that an office was rented by the Respondent from HIVE Service Office space on the Sunshine Coast to be occupied by the Applicant in carrying out her duties. He said Ms Fiona Marchant on or around the 12 March 2023, advised the Respondent's office manager that if the Respondent did not need the office on the Sunshine Coast they could lease it out as the security FOB needed to gain entry and depart the office had not been used since the 24 February. Mr Peters said on the 13 March he drove to the Sunshine Coast office and was given entry by Ms Marchant and the Applicant was not present. He said a note pad was on the desk open on the last page written in the Applicant's handwriting headed '24/2/23 Things to Do'. Mr Peters said there were no further entries in the notebook. He said Ms Marchant advised that to her knowledge the Applicant had not attended the office since the 24 February.

Mr Peters provided as an attachment to his evidence what he said was a photo of the notebook page he referred to.

[44] Mr Peters said in an alleged telephone audio recording between the Applicant and Ms Marchant, Ms Marchant advised in an email to the Respondent that she was unaware she was being recorded and denied giving permission to do so. The Respondent submitted that if this recording is admissible as evidence Ms Marchant confirms providing to the Respondent evidence as to dates on which the security FOB was not used to provide entry into the premises. Mr Peters provided with his evidence a copy of what he said was the report of FOB entry to the premises.

[45] Mr Peters said it was a condition of the Applicant's employment agreement that she abide by the company policy which included provision to be at the office on-time each day, the office being open between the hours of 8:30am and 5pm. It was a strict obligation to notify the HR department when unable to attend the workplace or seeking approval to work from home by text message or Teams chat. Mr Peters said as he was included in Teams chat, he was aware that no advice had been received from the Applicant, and he contacted HR to see whether a text message had been received neither of which had occurred. Mr Peters said the Applicant was aware of this process which she had used numerous times in the past.

[46] Mr Peters said when he returned to the office later that day, he asked to see the daily reports which confirmed what actions the employee took during each day and which office they worked from. He said the Applicant only reported working from either the Brisbane office when in attendance for training and the Sunshine Coast office other times. He said no approvals were given to work from home as the Applicant was still being trained out of the Brisbane office and when not in the Brisbane office the Respondent required the Applicant to work out of the office on the Sunshine Coast.

[47] Mr Peters said the Applicant advised in her response to the allegations that she was in attendance at all times at the Sunshine Coast office when not in the Brisbane office during the relevant period (save as to the day he attended the Sunshine Coast office on the 13 March) and gained access to and was able to exit the building by following some other occupants in and out of the building contrary to the security arrangement for these premises. Mr Peters said though this is possible, it is improbable given the advice previously received from Ms Marchant, and phone records received on 23 March 2023.

[48] Mr Peters said on checking the phone records for the work mobile phone number issued to the Applicant and used by her it showed that from the 24 February to the 13 March, the day when he attended the Sunshine Coast office, no phone calls were made from the vicinity of the mobile cell tower in Maroochydore and all phone calls were made from Noosa near the Applicant's residence, a distance of 34 km from the Sunshine Coast office or the mobile cell tower in Fortitude Valley being the mobile cell tower near the Brisbane office. Mr Peters said given the times registered for each call in Noosa it was not possible to travel to and from the Sunshine Coast office in Maroochydore. Mr Peters said given the phone records and the advice from the Sunshine Coast community manager Ms Marchant, he formed the opinion that the Applicant was not in attendance at the Sunshine Coast office between the 24 February and the 14 March 2023 contrary to her advice and daily reports that she had done so. Mr Peters said

this conduct is in breach of the terms of her employment and company policy. Mr Peters produced a copy of the phone records with his evidence.

[49] Mr Peters said that the Applicant was aware and had been formally reminded by both him and by the Ms Baker the HR officer for the company in emails, that all out of office meetings must be scheduled in the Outlook calendar and further reported as part of the Applicant's daily summary report none of which were provided which could explain any periods of absence from the Sunshine Coast office. Mr Peters provided as an attachment with his evidence what he said was a typical daily report received from the Applicant on the 27 February which is typical for the period 24 February to 14 March showing that her location to be working from the Sunshine Coast office.

[50] Mr Peters gave evidence that the training period is an everyday situation, not just the one day in Brisbane, and Ms Baker was overseeing the training. He said the primary focus of the training at that stage was on back of house new development budget building which was done through Ms Baker. Mr Peters said in terms of other work such meeting with clients, established schemes were taken off the Applicant because they wanted the training to focus on what Ms Baker was training the Applicant on, and the intention was to train further on the sales strategy. Mr Peters said the Respondent encourages people to be out on the road, but the Applicant had not reached that point in her training at that stage. Mr Peters said if the Applicant was going out to obtain leads the Respondent did not receive any of those leads. Mr Peters said the Respondent was not aware of what builders or sites she met with, which would be typical of someone being out on the road. Mr Peters was asked if it was his evidence that the Applicant was expected to sit in the office for 4 days on the Sunshine Coast. Mr Peters said it was his expectation that her role would be office based at that stage. Mr Peters said when an opportunity comes up it is discussed at a team level, and he did not recall the Applicant ever bringing such an opportunity or potential lead up. Mr Peters said training in marketing takes a long time.

[51] Mr Peters said the HIVE office was beneficial as it would provide a meeting place, and it provided a place for clients to turn up unannounced and it allowed the business to grow without having to put on a full-time receptionist.

[52] It was put to Mr Peters that after 8 March the Applicant was excluded from meetings from other staff. Mr Peters denied that, saying there was no intention for the Applicant to be excluded.

[53] Ms Baker said in the Applicant's defence against allegation two, it has been advised that the FOB access data is not an accurate indication of attendance as access could be achieved without the use of the required security system, in particular via 'tail gating' other guests/occupants in and out of the building. Ms Baker said however, this is contrary to the advice provided by Ms Marchant the Office Manager at the Sunshine Coast building who reported the Applicant's absence from the office along with supporting access FOB data.

[54] Ms Baker said the Applicant submitted an audio recording of discussions with Ms Marchant regarding the security FOB system. Ms Baker said Ms Marchant has since confirmed in writing to the Company Director Steve Clayton, that permission to record the call was not requested or granted. Further in support of the FOB data usage, the Applicant's work mobile telephone records, obtained during the investigation process on the 23rd of March 2023, show

that telephone calls made by the Applicant during this period, were generally made from the origin (locality) of Noosa or Noosa Heads which is a distance of roughly 36km from the Sunshine Coast office. Ms Baker said that based on these phone records it is evident that when the Applicant was working from the Sunshine Coast office, as the origin (locality) of these calls is shown as Maroochydore. Accordingly, it was not possible for the Applicant to have been located and working from our Sunshine Coast offices within business hours, during the period of allegation.

[55] Ms Baker said in the Applicant's submission, a separate matter was raised regarding the Applicant's requests for the Respondent to provide travel reimbursements and a 'fully serviced' unit/accommodation in Brisbane for planned in house training. The training was to be held in the Brisbane office, as per normal and as per the Applicant's employment agreement base location. The request was declined in line with details of the employment agreement and further information / feedback was requested to allow for additional discussions. Ms Baker said this matter is entirely distinct and separate from the allegations and did not form part of the considerations/investigations completed made when deciding to terminate.

[56] The Applicant said regarding the accusation of not working from the Sunshine Coast office when the Managing Director attended the Sunshine Coast office in person on 13 March 2023, that whilst acknowledging she was not at the Sunshine Coast office, the show cause letter fails to acknowledge she had notified HR early that morning on the 13th March before business hours, by email correspondence, that she was working from home.

[57] The Respondent's evidence was that the Applicant did not seek permission to work from home that day. The Applicant later gave evidence that she believed she had sent an email advising that she wished to work from home however later discovered the email was still in her email outbox. The Applicant said she did not forward the email later but provided a screenshot of the email. The Applicant said she kept clicking to forward the email in the outbox, but it wouldn't go and that is why she took a screenshot of the email and sent it to she believed Ms Baker, however she couldn't recall. It was put to the Applicant that the email she said she took a screenshot of was fabricated when she discovered that Mr Peters had attended the office and she was not at the office. The Applicant denied that.

[58] Mr Clayton said in relation to the issue of 13 March, the Applicant in contravention of the normal process of seeking approvals or providing advice by sending a text to the HR manager, claimed to have sent an email early that morning. Emails are not an accepted method of notification. The copy of the email provided as evidence was a draft. In relation to the claim of the Applicant that Mr Peters had acted deceptively by indicating he was intending to go to the Gold Coast on 13 March, and not the Sunshine Coast, Mr Peters said he typed GC rather than SC in a chat message and he had always planned to go to the Sunshine Coast that day and he had other clients that he was seeing on the Sunshine Coast that day. Mr Peters said the Applicant was in training and he would have to know about any meetings she was having with clients.

Allegation Three

[59] The show cause letter set out the particulars in relation to allegation 3 as follows:

“It is alleged that you, during your work hours, left the office after lunch and did not return to the office for the remainder of the working day. It is alleged that you conducted your work from home for the remainder of the working day. You did not seek approval for this change in working arrangements nor did you advise any upper management as required under our internal policies.

It is alleged that you engaged in the above conduct, on multiple occasions, including on or about:

- 7th of February 2023 at 1.43pm;
- 9th of February 2023 at 1.46pm; and
- Potentially on further occasions, which we are currently in the process of investigating and ascertaining data. Further information regarding these additional occasions will be available at a later time. At this stage, we seek your response to the occasions in paragraph 9a and 9b only. No outcome or decision regarding your employment will be made on the basis of these further occasions until you have been provided with the opportunity to respond to these accordingly.

It is our view that the conduct, if substantiated:

- is dishonest and unprofessional;
- in direct contravention of the directions provided to you, being the requirement that you attend work at the Sunshine Coast office during your designated work hours, and the agreed working arrangements made between you and SMG regarding work from home
- damages the trust and confidence of SMG in your ability to perform your duties; and
- may be in breach of clause 1.4 of your Employment Agreement.”

[60] The Applicant submitted in her show cause response that her memory does not recall the specifics of the dates and times, and it is unrealistic to expect someone to remember every single detail of their whereabouts during their working hours, especially if those dates were weeks ago and they have no ability to revisit their calendar or emails to examine the work that had been conducted.

[61] The Applicant requested that the Respondent provide her with further information regarding how these specific dates and times were ascertained as this would assist her in attempting to recall what transpired during those hours. The Applicant said alternatively, because her suspension has resulted in her inability to access documentation on the file server that would enable her to further support and respond to allegations in the fullest possible manner, the Applicant requested that the Respondent provide her work files so that she may extract the required information enabling her to respond and ensure a fair and balanced review of the allegations can occur and natural justice is served.

[62] The Applicant thanked the Respondent for the offer of an in-person meeting, however she believed it is appropriate to provide the employer with sufficient time to review the comprehensive information provided in her response and address her concerns and request(s).

[63] During her oral evidence the Applicant was asked whether she wished to say anything further in relation to allegation three, and the Applicant said she did not know (where she was)

in relation to those two days. The Applicant was asked how she conveys if she said she was going to lunch or going to meetings and she said most team members did this by recording it in team chats. The Applicant said that this did not pertain to anyone in the marketing or business development team. The Applicant said she rarely put in that chat when she left and nor did other staff in the that team.

[64] It was put to the Applicant that she claimed she did not have access to records so she could not respond to allegation three, however in her statement of evidence she provided in pages 80 to 112 in the court book material from the Respondent's leave notification chat. It was put to the Applicant that while she said she did not have access to the records, she has produced approximately 40 pages of this material. The Applicant said these are photos she took prior to this instance as evidence of discrimination against her concerning her working from home arrangements, where others were not forced to take annual leave or personal leave. The Applicant said she took the photos on her own personal mobile phone, which was separate to her work mobile phone.

[65] It was put to the Applicant that her phone records show that she was in Noosa on 7 and 9 February. The Applicant said if that is what the records show she was probably working in the area. The Applicant said she was not provided access to these phone records prior to her dismissal. The Applicant said she lives in the Noosa area, and she said she was going around talking to sites. It was put to the Applicant that she was aware that she was required to report visiting any clients and she was asked whether she did report visiting clients in the Noosa area. The Applicant said that she could not recall, however Ms Baker and Mr Peters were aware she did not always record visiting clients. The Applicant was asked whether she could name any clients she visited in Noosa and she said no, just as she could not remember the name of any clients she visited in Kawana or Maroochydore. The Applicant also said she could not recall any person she may have spoken to in Noosa.

[66] Mr Clayton said in relation to leaving the Sunshine Coast office at around lunch time on the 7 and 9 February 2023 the Respondent advised it had data showing that this occurred and there was no evidence that the Applicant had gained the necessary approvals to do so in accordance with the internal company policies. Mr Clayton said the Applicant's response to the allegation advised she was denied access to the company server and accordingly was not required to provide a response. He said on the dates of the allegations the telephone records included in Mr Peters statement show clearly phone calls made all morning from the Sunshine Coast office and all afternoon from an origin location close to or from the Applicant's residence some 30km distance which irrefutably indicates that the Applicant was not in attendance at the Sunshine Coast office in the afternoons of those days alleged. Even if the Applicant could not recall the exact dates, the leaving from the office without providing advice or following procedures on or around those dates 3 weeks earlier, the events would have been known to her.

[67] In his oral evidence Mr Clayton was asked why the Applicant was not granted access to records concerning her whereabouts. Mr Clayton said he did not think it was necessary. He said asking whether she went home on 7 and 9 February after lunch, it would be expected she would remember. Mr Clayton said it was incumbent to include in leave chats her whereabouts and she had produced a record of a chat for 7 February.

[68] Mr Peters said when these allegations concerning allegation 3 were made, the Applicant had no recollection of and was unable to respond to the allegation without access to the company server. Mr Peters said telephone records for 7 and 9 February show calls made in the morning from the vicinity of the Maroochydore office in the morning and Noosa in the afternoon when no report of client visits or working from home was made in contravention of company policy and in contradiction of the Applicant's daily report. Mr Peters said the phone call account held by the Applicant showed calls originating from Maroochydore in the mornings of 7 and 9 February and Noosa after lunch.

[69] Ms Baker said that the Applicant noted in her response to the allegations that she could not recall specific dates and time. Ms Baker said the Applicant's witness statement contained multiple screenshots of 'teams' chats throughout the month of February 2023, including copies of the full office teams 'leave' chat in which employees announce when they are leaving their desk (e.g. for a meeting and/or lunch etc.). Ms Baker said accordingly, it is apparent that the Applicant did have access to the historical data available to determine their location. Further on both 7 and 9 February 2023 the Applicant confirmed when she left the office for lunch within the 'leave' chat however did not report leaving the office for the remainder of the day or any change of location.

[70] Ms Baker said as part of the investigations into this allegation, the Applicant's work mobile telephone records were obtained and show that on 7 and 9 February 2023, the origin (locality) of the calls being made changed from Maroochydore (Sunshine Coast office) to Noosa / Noosa Heads from the afternoon onwards. The Applicant did not seek approval to relocate from the Sunshine offices within business hours on these days, nor was any notification provided to the Company. Further, the change in location was not outlined by the Applicant in their daily report, as required.

Procedural Issues

[71] In her show cause response, the Applicant complained that she was not afforded natural justice in relation to the suspension. The Applicant said that while the Respondent had access to all emails and the remote access server for details on work activities, her access has been ceased so she simply had to do her best in responding to prescriptive allegations of dates and times and whereabouts with little information, and from memory. The Applicant said to properly respond she would need provision of her work emails, teams chat and remote access server, and a period of 2 days.

[72] Mr Clayton said it was the Respondent's view that to respond to these allegations it did not require access to the company server and that this conduct did occur whereby the Respondent formed the opinion that it was dishonest, unprofessional, and in direct contravention of the directions provided to her and damaged the trust and confidence of the Respondent in the Applicant's ability to perform her duties. Mr Clayton's evidence was that the Applicant did not require access to the Respondent's records to respond to the allegations. Mr Clayton said that the Applicant's own evidence is that she cannot recall any clients in the Noosa area when the phone records show she was in the Noosa area on the afternoon of 7 and 9 June 2023.

[73] Following an investigation of the response by the Applicant, the Respondent formed the opinion that on the balance of probabilities, the Applicant engaged in the conduct as alleged. The Applicant was invited to attend an in-person meeting which was rejected by the Applicant. A lengthy letter of termination was issued to the Applicant giving reasons for the termination. The Applicant was suspended from the workplace on full pay while responding to the allegations and while an investigation was being carried out. The Applicant was initially paid one weeks' notice on termination, however when the Applicant drew to the Respondent's attention her contractual entitlement to four weeks' notice pay, this was paid.

[74] In her reply witness statement, the Applicant said it was impossible to properly respond (to the allegations) without access to work emails, and team chats. The Applicant said the Respondent was put on notice that for a proper response to be given, access would need to be provided to that material and the employer denied that access.

CONSIDERATION - SECTION 387

(a) Valid reason

[75] The Applicant has submitted that her failure to follow the requirement to report her whereabouts only became an issue from March when her relationship with Mr Peters broke down. The Applicant maintained there was a significant change in the relationship after the travel dispute over attendance at the training course in Brisbane, and the fact of a \$5000 bonus being due the day following the date of her termination in circumstances where there were no previous performance issues point to the termination occurring after the travel dispute, and performance bonus not being a coincidence. The Applicant has submitted the issues the Respondent relies upon to dismiss her were performance based issues and she could have been performance managed rather than terminated.

[76] The Respondent characterised the situation as being that the Applicant was in effect a trainee for a 12 to 18month period. The Applicant accepted that and accepted that it was her desire to be trained as a business development manager. Having considered the evidence overall, I am not inclined to agree with the Applicant's view that that the reason for termination was motivated by these other and not the reasons relied upon by the Respondent.

[77] The Respondent submitted that the reasons given in relation to allegation one for sending the emails to her home address or reasons for double deleting those emails did not ring true. I am inclined to agree. In relation to allegation 1, it would have been preferable if the emails referred to by the Respondent as having been sent by the Applicant from her work computer to her home email address were produced in evidence. The Respondent adopted the view that as the Applicant admitted she had been sending work emails to her home email address there was no need to. The Respondent's concern was that the emails were being used other than for work purposes. The Applicant's evidence appeared to be to the effect that she may need the emails at some point in the future in the event that she was required to defend herself. The Applicant did not provide a specific explanation about precisely what it was that she may need the emails for to defend herself. The Applicant appeared to assert that she was entitled to forward work related material to her private email address if it pertained to matters involving herself and that she may need to rely upon that information at some point in the future.

[78] I have no doubt that the Respondent was seriously concerned about the Applicant forwarding work related material to her personal email address in circumstances where she had already been provided with a laptop computer by the Respondent and there was no apparent justification for her doing this. Ms Baker's evidence clarified to some extent the content of the emails themselves and I am satisfied on Ms Baker's evidence that the emails were work related, and did contain sensitive information belonging to the Respondent. I do not accept that the evidence disclosed any proper basis for the Applicant to be forwarding work related material to her private email address and the Respondent was entitled to hold serious concerns about the Applicant's conduct. It appears to be the case that the reason given for forwarding the information to her private email account would conflict with her obligation under clause 6.2(d) of her employment contract.

[79] In relation to allegation 2, the Applicant's evidence that she did not know whether she was at Noosa or the Sunshine Coast Office on the dates between 24 February and 12 March 2023, (a period of nine working days) tends to tell against the reliability of her evidence. It seems less likely than likely that the Applicant could not recall her whereabouts over a period of nine working days even in a general way for example by stating she recalled visiting a particular client or location but not the specific date, or that she recalled mostly being in the office or mostly working out of the office. The fact that the Applicant said in her evidence that she could not remember the name of any clients that she visited in Noosa, or Kawana or Maroochydore was surprising, and tends to support the Respondent's conclusion that the Applicant was not in fact visiting clients but was in fact at home in Noosa which is consistent with the telephone records.

[80] It follows from that conclusion that the Applicant was not complying with the Respondent's lawful and reasonable directions concerning working from either the Brisbane or Sunshine Coast Office or otherwise reporting her whereabouts when not at those locations. It is clear the Applicant was not entitled to be working from home on the occasions between the dates of 24 February and 13 March when I am satisfied on the balance of probability she was for significant proportion of the time.

[81] I accept that taking into account the combination of the report provided by Ms Marchant, the failure of the Applicant to record her whereabouts using the methods she had been instructed to use, and the phone records indicating the Applicant's location at various times, and the evidence of Mr Peters concerning the notebook he found at the Sunshine Coast office on 13 March that the Respondent's conclusion regarding the second allegation has been made out on the evidence. Not much turns on the evidence the Applicant has sought to rely upon in the form of a telephone call the Applicant recorded between herself and Ms Marchant without advising Ms Marchant. Ms Marchant merely conceded it would be possible to enter the premises without Ms Marchant being aware of it. It does not persuade me to change my view that the evidence in its totality still supports the conclusion that the Applicant was not working at or from the Sunshine Coast office for much of the time she was supposed to be.

[82] It is apparent from the evidence that the Applicant was not entitled to the same flexibility arrangements which she appeared to have enjoyed prior to her commencing the process of training into the role of business development, and it is clear the direction and expectation of the Respondent was that the Applicant be working from the Sunshine Coast office, the Brisbane office, or she could be with a client out of the office if this was recorded and preferably

discussed with her work team. It is clear this did not occur, and in all likelihood the Applicant was continuing to work as if she was entitled to a flexible working arrangement which she was not.

[83] On balance, I accept the Respondent was entitled on the evidence to be satisfied that the Applicant had not been in attendance at the Respondent's Sunshine Coast office during the relevant periods in relation to allegation 2 as she was required to be. For similar reasons to those set out above, I also accept that it is more likely than not that on 7 and 9 February 2023 the Applicant had left the Sunshine Coast office at lunch time and had then returned to her home in Noosa.

[84] I am satisfied on the basis of the evidence that each of the three allegations have been made out and taken together provided a valid reason for termination of employment.

(b) Whether the person was notified of the reason

[85] The Applicant was notified of the reasons for termination in the termination letter.

(c) Opportunity to respond

[86] The Applicant has argued it was impossible to properly respond without access to work emails, and team chats and the Respondent was put on notice about that. In relation to allegation 1 as Ms Baker pointed out in her evidence, the Applicant admitted she had sent the emails referred to the show cause letter to her own email account so it follows that she would have had access to those emails as she stated she needed them. I am not satisfied the Applicant was denied an opportunity to respond in relation to allegation 1.

[87] In relation to allegations 2 and 3, whilst it is arguable that the Respondent's decision not to accede to the Applicant's request to view the Respondent's internal records in relation to allegations 2 and 3 denied the Applicant an opportunity to respond as fulsomely as she could have, the Respondent's reluctance to agree to this request whilst the Applicant had been suspended is understandable in the context of its concerns about the nature of allegation 1, and the potential that further confidential information may be exposed unnecessarily. I have concluded that whilst the decision of the Respondent not to disclose the information that the Applicant requested meant the Applicant did not have the same information available to her, that the Respondent had available to it, the evidence supports the conclusion that even had this information been disclosed to the Applicant it would not have affected the outcome in any event. To the extent that there may have been a procedural failing on the part of the Respondent to disclose all relevant information to the Applicant, and to the extent this may weigh in the Applicant's favour, it is mitigated by the fact that on the evidence it would not have affected the outcome in any event were it provided.

[88] The Applicant was given a reasonable opportunity to respond to the allegations through the show cause process.

(d) Any unreasonable refusal to have a support person present

[89] The Applicant was offered an opportunity to meet with the Respondent but did not take up this opportunity on the basis that the Applicant maintained the Respondent should consider the Applicant's request for further particulars. The Applicant did not refuse any request on the part of the Applicant for a support person. This is a neutral consideration.

(e) if the dismissal was related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance before the dismissal

[90] The Applicant claimed that the reasons for termination were issues in relation to her performance. I do not agree. It is clear the three separate allegations that the Respondent relied upon as the reasons for termination were issues concerning the Applicant's conduct, not her performance.

(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

[91] The Respondent is not a small business and this is a neutral consideration.

(g) The degree to which the absence of dedicated human resources management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal

[92] The Respondent has an internal human resources manager. This is a neutral consideration.

(h) Any other matters that the FWC considers relevant.

[93] The Applicant's tenure was reasonably brief. There are no other matters that I consider relevant.

CONCLUSION

[94] I have considered all of the matters required to be considered in section 387. I have concluded the Respondent had a valid reason for termination, and I have also concluded that despite the Respondent's decision not to provide the Applicant access to her work emails and team chats records before reaching the decision to terminate the Applicant's employment, on the basis of the evidence now before the Commission, had it done so, the provision of this further information would not have assisted the Applicant to any great extent in establishing that her dismissal was unfair in the particular circumstance of this case. For all of the reasons as set out above the termination of the Applicant was not harsh, unjust or unreasonable. On that basis the application is dismissed. An order to this effect will be issued separately and concurrently with this decision.



COMMISSIONER

Appearances:

Ms Chantelle Major assisted by Mr Paul Mulder for the Applicant.

Mr Stephen Clayton for the Respondent.

Hearing details:

2023

Microsoft Teams Video

19 July

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<PR765950>

¹ Exhibit 1

² Exhibit 2

³ Exhibit 3

⁴ Exhibit 4

⁵ Exhibit 5