



DECISION

Fair Work Act 2009
s.394—Application for unfair dismissal remedy

Mr Stuart Rollo

v

Serco Traffic Camera Services (Vic) Pty Ltd
(U2010/15201)

COMMISSIONER SMITH

MELBOURNE, 26 MAY 2011

Unfair dismissal; GPS reliability; application dismissed.

INTRODUCTION

Mr Stuart Rollo has made an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) claiming that his employment with Serco Traffic Camera Services (Vic) Pty Ltd (Serco) was terminated harshly, unjustly and unreasonably. In accordance with s.396 of the Act I find that the application was made within the period required and that the person was protected from unfair dismissal. Sections 396(c) and (d) of the Act do not apply.

At the commencement of the matter before me on 7 April 2011, I conferred with the parties in accordance with ss.398 and 399. All parties advised that, in the circumstances, the Tribunal should hold a hearing as it was the most effective and efficient way to resolve the matter. I agreed. I also formed the view that further discussions within the conference setting would not resolve the matter.

Briefly stated, Mr Rollo was employed by Serco as a Mobile Safety Camera Operator (MSCO) on 31 May 2010 and was summarily dismissed from his employment for serious misconduct on 10 December 2010. The reason for his dismissal is an allegation that he had been speeding excessively.

THE BACKGROUND FACTS

Serco has a contract with the Victorian Government for the operation and maintenance of its traffic camera system. Mr Rollo was employed to set up, monitor and operate a mobile speed camera. To be able to undertake this task Mr Rollo needed to be accredited and have certain probity checks by the Department of Justice. In addition, the Department of Justice has access to information including GPS data on the vehicles used. It is stated the Department of Justice is able to monitor the speed of these vehicles and regards speeding “highly unfavourably”. A further reason for having GPS information is for the safety of the MSCO. This is all explained to the drivers when they become an accredited MSCO. Mr Rollo was aware of the existence of the GPS equipment and that it was monitored.

During his period of employment Mr Rollo was working with the special operations group within Serco that was used by Victoria Police to target particular road safety risk areas.

In September 2010 the applicant and two others were detected at speeds exceeding the limit of 100 km/h. The applicants speed varied between 107 km/h and 113 km/h.

On 3 December, Serco was advised that a vehicle it leased was exceeding the speed limit (alleged speed 87 km/h in an 80 km/h zone) and a speeding infringement would be sent. This was investigated and it was established that this was the car driven by the applicant on 22 October 2010. For this incident, the applicant was given a speeding infringement by Victoria Police and fined. During this investigation to identify the driver of the car, it was also discovered that the applicant had exceeded the speed limit on two more occasion on that day. He speed was recorded at 102 km/h in a 50 km/h zone and further 80 km/h in a 50 km/h zone. This led to random audits of the applicant's driving using GPS data and it was discovered that the applicant had exceeded the 100 km/h speed limit on a number of occasions with speeds ranging from 110 km/h to 123 km/h.

On 7 December the applicant was advised of the information obtained and stood-down on full pay so that he may show cause as to why his employment should not be terminated. On 8 and 9 December the applicant provided medical information to support his continued employment. This was not accepted by Serco and his employment was terminated on 10 December 2010.

THE EVIDENCE

Essentially the applicant relies upon three main arguments as to why there was not a valid reason for his termination of employment. The first is that the GPS data could not be relied upon. The second is that he did not believe that the GPS equipment would be used to track the speed of the vehicles and that, given what had been said to him about the consequences of speeding, the termination was a disproportionate response. The final argument was that he had a medical condition which should be taken into account in the event that it is accepted that he was speeding.

I turn firstly to the accuracy or otherwise of the GPS data which has been used as a basis for the termination of employment of Mr Rollo. The applicant relied upon the decision of Blair C in *Gervasoni v Rand Transport*.¹ In that decision, the Commissioner formed the view that the GPS data was unreliable. On appeal, a Full Bench found² that the Commissioner's overall conclusion was not available to him on the evidence and quashed his decision. In this matter Serco requested that an order be issued requiring the attendance of Mr Ben Ditford, the major projects and account manager for Mobile Tracking and Data Pty Ltd (MTData). MTData is the company which supplies the GPS equipment installed in the Serco vehicles. Evidence was led from Mr Ditford about the reliability of the GPS equipment installed in the Serco vehicles. It was the evidence of Mr Ditford that the GPS technology used was accurate and in some cases more accurate than the speedometer in the motor car. In addition, evidence was given that Mr Ditford had examined the information obtained from the vehicle driven by Mr Rollo and that he had no reason to doubt its accuracy.

Mr Ditford was cross-examined and asked questions about possible errors resulting from a difference between the clock in the satellites and the time measurement device in the receiver. Further, Mr Ditford was questioned about any possible areas of error in the equipment. Whilst

¹ [2009] FWA 1269

² [2010] FWAFB 2526

Mr Ditford accepted that there could be errors, he did not have any doubt about the accuracy of the information provided by the GPS equipment.

I found that Mr Ditford's evidence conveyed a level of expertise and understanding which permits me to be comfortable in accepting his evidence. He was not shaken under cross-examination. I accept the evidence of Mr Ditford and I find the GPS equipment on the Serco vehicles is reliable. In any event, to the extent that errors may exist, I find, on Mr Ditford's evidence, that it is unlikely that any error could lead to the equipment not being able to discern the difference between 50 km/h and 102 km/h together with the difference between 50 km/h and 80 km/h hours.

I find that on 22 October Mr Rollo exceeded the speed limit three times by the amounts of:

1. 7 km/h
2. 52 km/h and
3. 30 km/h.

Turning to Mr Rollo's view that the equipment would not be used to monitor speeding and that speeding infringements would not be taken seriously, he relies upon a statement of his supervisor³ who said that a speeding ticket would not result in severe punishment. His supervisor, Mr Hodges, gave evidence that during a refresher course conducted in August 2010 he advised those present, which included Mr Rollo, of the importance of not speeding. His evidence was:

*"It's always been a strong focus when discussing time management issues that you need to be responsible, not to speed, and get to your site safely."*⁴

I have considered this aspect of the evidence carefully. To begin, I do not accept that Mr Rollo didn't know that the GPS equipment could be, or was, used to monitor the speed of vehicles. The presence of sophisticated GPS equipment is installed in the vehicles and the drivers are aware of this. It has many functions and, in particular, it can identify the location of the vehicle in case a MSCO needs assistance. It is also known that the speed of the vehicles is randomly audited by the Department of Justice. Further, the policy in relation to the use of company vehicles is clear about complying with the *Road Safety Act 1986*.⁵ It does appear to me that, generally speaking, a driver would not be at risk of having their employment terminated in circumstances where the speed limit was passed on an occasional basis. Sensibly, it will be a matter of fact and degree.⁶

The final matter relates to Mr Rollo's medical condition. There are two direct issues: one which related to lapses of concentration and the second which related to a level of urgency to attend the toilet. In addition, Mr Rollo had seen a Psychologist through the employers EAP programme. The Psychologist reported on what Mr Rollo said was his medical condition and the need to maintain his employment because of his personal circumstances. This is a matter which he raised in mitigation with the employer. These documents were not available to Serco at the time the decision was taken to dismiss but it was the evidence of Mr Rankin that

³ Exhibit D1 at paragraph 11

⁴ Transcript PN622

⁵ Exhibit D2

⁶ There is evidence of others exceeding the speed limit by amounts ranging from 11 km/h and 14 km/h but these individuals were not dismissed

he was not convinced that the report would justify the excessive speeding.⁷ There was no direct challenge to the medical evidence as it stood although questions were put to Mr Rollo as to why he thought it was necessary to return to the depot rather than go to the nearest available toilet. The impact of the evidence in relation to the need to attend a toilet urgently is that it related to only one incident and that was the one where his employment was in jeopardy. It had not been raised with the employer before in the context of Mr Rollo obtaining a level of consideration so that he could perform the inherent requirements of the job. The witness statement of Mr Rollo does not record that he needed to get back to the depot to go to the bathroom but it did arise during cross-examination.⁸ It was also revealed in cross-examination that Mr Rollo did not raise the issue during the interview which subsequently led to his termination of employment.

Mr Rollo has not accepted that he knew he was speeding. However this does not sit comfortably with the evidence of Mr Fryer who said that Mr Rollo admitted to him that he may have set off a speed camera on the night in question.⁹ This evidence was consistent with the GPS data which showed there was a sudden drop in speed immediately after the speed camera detected him exceeding the speed limit. I am satisfied on the balance of probabilities that Mr Rollo was not unaware of the fact that he was travelling at a speed which was above the speed limit.

THE ACT AND CONCLUSION

In considering applications pursuant to s.394 attention must be given to s.387 which provides:

“In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA 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 FWA considers relevant.”*

⁷ Exhibit J9 at paragraph 24

⁸ Transcript PN169-170

⁹ Exhibit J4 at paragraph 10

I turn firstly to determine 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). Against the background of Mr Rollo's employment responsibilities and the findings made that he was knowingly speeding excessively, I find that there was a valid reason for his termination of employment.

As to whether or not Mr Rollo was notified of the reason I find that he was.

The next consideration is whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person. In connection with this, I find that he was given an opportunity to respond to the allegations before the decision was made to terminate his employment. It may have been prudent to wait for the medical advice before moving to termination but as it turned out this didn't assist Mr Rollo.

There was an issue raised about whether or not Mr Rollo was given a warning that his employment would be in jeopardy if he was speeding. In this connection he relied upon the view that he was told that speeding would not result in severe punishment. To the extent there was a warning Mr Rollo pointed to a communication which occurred after the 22 October 2010. Had this been a simply matter of an accumulation of minor episodes of exceeding the speed limit then a specific warning may have been appropriate before the event. This is even against the background of the August 2010 refresher course and the normal expectations of the position. Given this incident there have now been a series of warnings given to staff.

Sections 387(f) and (g) are not relevant.

I turn now to the final legislative requirement and that is any other matter that Fair Work Australia considers relevant.

In this connection it is appropriate to examine the fact that it was a summary dismissal. A summary dismissal is more serious than a dismissal with notice. Although, I note that a notice period was paid as an ex gratia payment. A summary dismissal brings with it the notion that the conduct is of such a quality that the employer is entitled to bring the contract to an end immediately without the payment of notice. In this connection I have had regard for Regulation 1.07 of the Act.

It has been stated that misconduct connotes action which is 'so seriously in breach of the contract that by standards of fairness and justice the employer should not be bound to continue the employment'.¹⁰ Whilst it is not necessary to establish that the conduct was so serious as to justify summary dismissal at common law,¹¹ nevertheless the impact of a summary dismissal is a matter that can be taken into consideration:

*"Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable."*¹²

¹⁰ *North v Television Corporation Ltd* (1976) 11 ALR 599 per Smither and Evatt JJ

¹¹ *Annetta v Ansett Australia* (2000) 98 IR 233

¹² *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* per Sheppard and Heerey JJ (1992) 41 IR 452 at 460

[2011] FWA 3224

This approach was adopted by the Australian Industrial Relations Commission¹³ and in my view it remains good. The same can be said of the approach in *Windsor Smith v Liu & ors*¹⁴ where it is clear that the fact that there is a valid reason does not mean that the termination cannot be harsh, unjust or unreasonable.

I have also considered the fact that Mr Rollo asked if he could resign and was advised that he couldn't. Serco preferred instead to dismiss him for misconduct with all the opprobrium attached to such a dismissal. Of course Mr Rollo was able to resign and whether or not that bought the contract to an end immediately would depend upon the circumstances. Given the facts and circumstances I do not think this is a case where it could be said that the employer's response, whilst inaccurate, was harsh.

This matter involved a speed camera operator whose employment was to check the speed of motorists. The training and context of the work of a MSCO takes this conduct beyond that of the ordinary person who, for one reason or another, exceeds the speed limit. I am satisfied that the conduct of Mr Rollo on 22 October constituted serious misconduct.

The application is dismissed.

COMMISSIONER

¹³ *Fearnley v Tenix Defence Systems Pty Ltd*, Ross VP, Polites SDP and Smith C, Print S6238

¹⁴ Print Q3462

Appearances:

G. Dircks for the applicant.

T. Jacobs of counsel on behalf of Serco Traffic Camera Services (Vic) Pty Ltd

Hearing details:

2011.

Melbourne:

April, 7.

Printed by authority of the Commonwealth Government Printer

<Price code C, PR509840>