

[2020] FWC 1281

The attached document replaces the document previously issued with the above code on 10 March 2020 to amend paragraph numbering.

Associate to Commissioner Simpson

Dated 11 March 2020



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Jeffrey Steffens

v

Greenmountain Food Processing Pty Ltd
(U2019/12573)

COMMISSIONER SIMPSON

BRISBANE, 10 MARCH 2020

Application for unfair dismissal – applicant dismissed for misconduct – dismissal harsh unjust or unreasonable – application upheld – compensation ordered.

[1] On 12 November 2019 Mr Jeffrey Steffens made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* for an unfair dismissal remedy against Greenmountain Food Processing Pty Ltd (the Respondent).

[2] A conciliation conference was held however the matter did not resolve. The matter was allocated to me and I issued directions for filing of material. The hearing took place on 25 February 2020. Mr Steffens was represented by Mr Buckley, Industrial Officer with the Australasian Meat Industry Employees' Union (AMIEU), and the Respondent was granted permission to be represented by Mr Taylor of Employer Protect.

[3] Mr Steffens worked for the Respondent from 12 February 2008 until 23 October 2019 when he was dismissed, a period of just over 11 years and nine months.

[4] Mr Steffens is a member of the AMIEU and was also a union delegate for the slaughter floor workers at the Respondent's abattoir. Mr Steffens provided a witness statement¹ and gave oral evidence at the hearing.

[5] Mr Steffens claimed that the Respondent's management were hostile to the union and refused to recognise AMIEU delegates. Mr Giddins, the General Manager of the Coominya Processing Facility operated by the Respondent, denied Mr Steffens' claim that the Respondent was hostile to the AMIEU.

[6] Mr Steffens said that at various times he spoke to other AMIEU officials about union matters. He said that most of these discussions were with Mr Ian McLauchlan, who is the AMIEU official responsible for organising at the Respondent's Coominya site.

[7] Mr McLauchlan provided a witness statement² and gave evidence in support of Mr Steffens. He said he is currently the Assistant Secretary of the Queensland Branch of the AMIEU and has been a full time official for more than twenty years.

[8] Mr McLauchlan gave evidence that Mr Steffens was the AMIEU slaughter floor delegate at the Coominya abattoir operated by the Respondent.

7 August 2019 Warning

[9] Mr Giddins provided a witness statement³ and oral evidence. He said that Mr Steffens was on a final warning following a workplace incident on 6 August 2019 recorded on CCTV on the floor of the plant, which showed Mr Steffens pushing another employee twice. Mr Giddins said that the employees were holding knives at the time of the incident and he made the decision to issue the final warning because of the inherent risk attached to employees physically contacting each other in such a hostile way whilst holding such knives.

[10] Mr Steffens said that on that occasion he was working on the slaughter floor doing the flanking job, but the worker before him on the chain, one of the leggers, was not doing his job properly.

[11] Mr Steffens said the worker was “undercutting” him, which means he was not opening up the legs of the carcass far enough. Mr Steffens said that this meant he had to open the legs up further in order to do the flanking job. Mr Steffens said in other words, he was being made to do part of the other workers job before he could do the job he was supposed to do.

[12] Mr Steffens said this was both tiring and very frustrating, particularly when they have to work at the pace of a mechanical chain and only have so much time to perform the job they are meant to do on each carcass. Mr Steffens said this worker had been doing this for the entire run, and he got sick of it and said to the other worker, “*Stop undercutting me.*” Mr Steffens said that the other worker became abusive and replied, “*Get fucked.*” Mr Steffens said that he admits that he lost his temper and went over to the other worker on the legging stand.

[13] Mr Steffens said he again asked the worker to stop undercutting him and he again told Mr Steffens to “*Get fucked.*” Mr Steffens said he pushed the worker a couple of times, pushing his right shoulder with his left hand. He said a supervisor came and told them to stop.

[14] Mr Steffens confirmed this version in his oral evidence. He accepted that he lost his temper that day. He was not cross examined about his evidence in any detail on this point. The CCTV footage was not produced however given Mr Steffens conceded that he had pushed the other employee I accept that the warning was warranted and appropriate.

26 September 2019

[15] Mr McLauchlan said that on Thursday 26 September he attended the Coominya abattoir and held discussion with workers there. He said during the visit, and indeed on previous visits to the abattoir, several workers had complained to him about the rate of pay they were receiving. He said some workers were also complaining that temporary visa workers were receiving higher rates of pay than other workers.

[16] Mr McLauchlan said that he was listening to workers’ complaints whilst sitting at a table with them in the meal room and there were several workers at the table, but he did not

know their names. Mr McLauchlan said that he said to Mr Steffens that to investigate these complaints it would be good if the workers could provide copies of payslips. Mr McLauchlan said he also said to Mr Steffens it would be handy to get payslips from some of the visa workers as well. Mr McLauchlan said that Mr Steffens said to him something like:

“That should be easy. One of the blokes I work with is living with one of the visa workers, he will get me one for sure.”

[17] Mr Steffens’ evidence was generally consistent with that of Mr McLauchlan on this point. He said that sometime in late September 2019 Mr McLauchlan spoke to him about the wage rates that were being paid at the Respondent. Mr Steffens said that other workers had been complaining about the rates of pay they were receiving and Mr McLauchlan wanted to investigate whether the Respondent was paying the minimum award wages to all workers.

[18] Mr Steffens said that Mr McLauchlan asked him if he could get payslips for some visa workers. Mr Steffens said that he told Mr McLauchlan he would see if he could get some for him.

2 October 2019 Text Messages with Mr Marchel

[19] Mr Steffens said that on the evening of 2 October 2019, he sent a text message to another employee of the Respondent, Mr Cody Marchel. Mr Steffens said he sent the message using the Facebook Messenger app and the message said:

“Hey bud the union bloke wants me to get some payslips of people would you be able to get one of your missus and your [sic] as well.”

[20] Mr Steffens said that Mr Marchel replied with a message that said:

“Yeah I’ll see what I can do.”

[21] Mr Steffens said that he replied by clicking the “Like” button which sent a “thumbs up” image to Mr Marchel.

[22] Mr Steffens said that Mr Marchel then sent a message which said:

“How many people are joined in the union now Jeff”.

[23] Mr Steffens said that he replied with a message that said:

“Not enough a boner signed up the other day, I think there [sic] going to try and get a pay rise for us, because I’ve told him there’s been no pay increase in over 12 years.”

[24] Mr Steffens said he kept these messages and later took a “screenshot” of these messages and he attached them to his statement.

[25] Mr Steffens said that Mr Marchel never provided him with a copy of any payslips.

[26] Mr Marchel provided a witness statement⁴ in the Respondent’s case and also provided oral evidence. Mr Marchel said that on 2 October 2019 Mr Steffens demanded that he give

Mr Steffens one of his payslips and he also wanted Mr Marchel to give him one of his girlfriend's payslips. In his oral evidence he repeated this allegation.

[27] Mr Marchel accepted that Mr Steffens made the request via a text message. Mr Marchel accepted he sent a later text asking Mr Steffens how many people had joined the union.

[28] Mr Marchel said his girlfriend, who also works at the plant is Taiwanese. Mr Marchel said Mr Steffens wanted copies of these payslips to check if they were being paid correctly. Mr Marchel said in his statement that he said no to this demand.

[29] Mr Marchel accepted in his oral evidence Mr Steffens had sent him the text messages attached to the statement of Mr Steffens on 2 October at 8.26pm. Mr Marchel then gave evidence that Mr Steffens had also approached him earlier but did not elaborate on this. He agreed that 2 October was the date Mr Steffens sent him the messages and it appeared reasonably clear the request in the text message was the subject of his subsequent complaint.

3 and 18 October 2019 Complaints

[30] Mr Marchel said that on 3 October 2019 he complained to management about Mr Steffens asking for their payslips as he was not a union member and did not think Mr Steffens had any right to demand the payslips in the way he did. Mr Marchel said he also did not like that Mr Steffens was asking for Mr Marchel to give Mr Steffens his girlfriends' payslips. Mr Marchel said that Mr Giddins said to him if he wished to make a complaint he could.

[31] Mr Marchel was asked if Mr Giddins asked him to put in a complaint in writing and he said he could not remember. Mr Marchel was asked if Mr Giddins said he would investigate the complaint and he said he was not too sure. Mr Marchel was asked if Mr Giddins asked him if Mr Steffens had been asking anyone else for payslips and he said he couldn't remember.

[32] Mr Marchel was asked if between the making of his complaint to Mr Giddins on 3 October 2019 and the statement he provided to Mr Giddins on 22 October 2019 had Mr Giddins or anyone else from management spoken to him about the complaint. Again, he responded that he could not remember.

[33] Mr Giddins said that in early October 2019 Mr Marchel complained that Mr Steffens had been asking employees for copies of their payslips to check if employees were being correctly paid. Mr Giddins said that he was not overly concerned by this but became concerned when he was told that Mr Steffens had asked a colleague Mr Jamie Bond, to source the payslips of a worker who Mr Steffens referred to as "your Asian girlfriend". Mr Giddins said this was a term he understood Mr Steffens used to refer to one of the Respondent's workers who was in Australia under a subsection 417 visa.

[34] In his oral evidence Mr Giddins said that Mr Marchel approached him with the concern that Mr Steffens had asked him for payslips for himself and his girlfriend. Mr Giddins said Mr Marchel was not comfortable with the request because it was put to him that the AMIEU wanted the payslips.

[35] Mr Giddins said in his oral evidence that at the time Mr Marchel did not tell him that the request had been made by text message or show him any text messages. Mr Giddins said in his oral evidence he was not overly concerned at the time and told Mr Marchel that it was a matter for him if he wanted to hand over his payslips or not, he didn't have to if he did not want to and it was entirely his decision.

[36] In his evidence Mr Steffens said that apart from Mr Marchel, the only other person he asked to show him their payslip was a co-worker named Chris Wilson. Mr Steffens said that Mr Wilson said that he would try and find one for Mr Steffens, but he never gave Mr Steffens a payslip either.

[37] Mr Giddins said on 18 or 19 October Mr Jamie Bond made a complaint to him about being asked for payslips. Mr Giddins said that Mr Bond told him more about the matter verbally then he did in a later written statement. Mr Giddins said that Mr Bond has left employment with the Respondent and this was not related to Mr Steffens unfair dismissal claim.

[38] Mr Giddins said that his concern about the issue arose because Mr Steffens had allegedly claimed he was an official of the union. Mr Giddins was asked who told him that. Mr Giddins said Mr Bond told him that Mr Steffens said he was acting for the union and wanted the payslips. Mr Giddins was asked why he thought that if Mr Steffens said the union wanted the information Mr Steffens was therefore acting in some kind of official capacity? Mr Giddins said he did not form that view, and he was told that.

[39] Mr Giddins appeared to agree that Mr Bond told him that Mr Steffens said the union wants a payslip and can he get one from his girlfriend. It seemed from this evidence that Mr Giddins believed that Mr Steffens was purporting to be exercising a right or power that he did not have. Mr Giddins said in his evidence Mr Bond complained in the week before the 23 October. He then said he thought it was late on the Friday which would have been 18 October. Mr Giddins said Mr Bond did not tell him when Mr Steffens approached him requesting the payslip.

[40] Mr Giddins said his concern was that it was a covert attempt to get information from someone without their knowledge or consent as Mr Bond's girlfriend was not working for the Respondent and was no longer in the country. Mr Giddins was asked if Mr Bond told him that Mr Steffens had asked Mr Bond to get the payslip without his girlfriend's consent. Mr Giddins' reply was that Mr Bond told Mr Giddins he didn't think it was appropriate because the request was not to her directly.

[41] Mr Giddins said he responded to Mr Bond to leave it with him and he would do some digging around. Mr Bond did not give evidence at the hearing. The allegation that Mr Steffens purported to be acting as an official, or with some right or power because of his association with the AMIEU was never put to Mr Steffens when he gave his evidence at the hearing.

18 October 2019 Mr Steffens told about Mr Marchel complaint to management

[42] Mr Steffens said that on or about 18 October 2019 he was approached by Mr Wayne McEwan, one of the slaughterman. Mr Steffens said that Mr McEwan told him that Mr Marchel had gone to the office and shown Mr Giddins the message Mr Steffens had sent him.

Incidents 21 October 2019

First Incident

[43] Mr Marchel said in his statement that on 21 October he had an altercation with Mr Steffens in the washroom area at work. Mr Marchel said that Mr Steffens said a number of things to him in a hostile voice such as calling him a “dog cunt” for making the complaint to management about his demand for the payslips.

[44] Mr Steffens said that on Monday 21 October at the start of his shift he was in the boot wash area, washing his boots before going onto the slaughter floor. He said he saw Mr Marchel was also there in the boot wash area. He said there were a couple of people in the area at the time, but he did not notice who they were.

[45] Mr Steffens said that he said to Mr Marchel “A little birdie told me you dogged me”. He said he was referring to Mr Marchel informing management about his inquiries on behalf of the union. He said that when he said this, he was at one end of the boot wash area, and Mr Marchel was at the other end. He said they were about four metres apart. Mr Marchel in his oral evidence accepted that they were about four metres apart at the time and Mr Steffens had said words to this effect to him.

[46] Mr Steffens said Mr Marchel’s response was to come up to him and speak to him in a raised voice. Mr Steffens said that Mr Marchel said;

“You won’t get a pay rise. It’s a waste of fucken’ time.”

[47] Mr Marchel denied saying this.

[48] Mr Steffens said that at that point he said to Mr Marchel;

“You’re a dog cunt.”

[49] Mr Marchel agreed that Mr Steffens called him a dog cunt at that time. He claimed Mr Steffens said it multiple times. Mr Steffens said that Mr Marchel said to him, still in a raised voice;

“Don’t forget you’re an old cunt, Jeff, I’ll take you out.”

[50] Mr Marchel accepted that he said this to Mr Steffens and said he was not too sure if they were going in or going out. Mr Marchel said he then went to work on the floor. Mr Steffens said that he cannot remember exactly what he said in reply, but he said it was something like;

“You haven’t got it in ya.”

[51] Mr Steffens said that Mr Marchel left at that point to go into the slaughter floor. Mr Steffens said that he did not follow him in straight away

[52] Mr Steffens said that he went to his workstation where he was starting his shift, which was on the third flanking stand. He said the flanking stand is a raised work platform. He said that Mr Marchel was working on the legging stand (second leg) and was quite close to where he was working. Mr Steffens said that they were roughly two to three metres apart. Mr Steffens said when he came into the work area he did not say anything to Mr Marchel and Mr Marchel did not say anything to him.

[53] Mr Steffens said that he deliberately did not engage at all with Mr Marchel, and Mr Marchel did not say anything to him either. Mr Marchel agreed that Mr Steffens and himself did not speak to each other while they worked that morning before the first break.

[54] Mr Steffens said that during the first run of the shift Mr Chris Wilson was working near him on the hide puller. Mr Steffens said that at sometime during this run, Mr Wilson said to him that Mr Marchel was staring or glaring at Mr Steffens from the legging stand. Mr Steffens said that he did not react, and he just ignored Mr Marchel and what he was doing. Mr Marchel denied this.

Second Incident

[55] Mr Steffens said that later, they had their first smoke break for the day. Mr Steffens said that at the end of the break which would have been about 8.30am or so, he went back to the slaughter floor. He said he went back to the slaughter floor through what they call the “blue-side” entrance. Mr Steffens said that he went to the boot wash area which was a different boot wash area from the one he used in the morning.

[56] Mr Steffens said that at this time the only other person in this area apart from Mr Marchel was Mr Wilson.

[57] Mr Steffens said that Mr Marchel looked hyped up to him and was aggressive in his manner. Mr Steffens said that he started to say something to Mr Marchel and Mr Marchel spoke and challenged Mr Steffens to a fight. Mr Steffens said that he cannot remember the exact words that Mr Marchel used but he said he would see me;

“Out the gate after work.”

[58] Mr Steffens said that by this he understood that Mr Marchel wanted to fight him after work outside the workplace. Mr Steffens said that when Mr Marchel said that he started laughing, and Mr Marchel got angrier and said;

“You won’t be laughing this afternoon, I promise you.”

[59] Mr Steffens said that Mr Marchel walked off and went into the slaughter floor area. He said Mr Marchel went in before him because the legging stands start a minute or so before the flank stand. Mr Steffens said he followed shortly after.

[60] Mr Steffens said that when he worked on the flanking stand they were working at the same stands as the first run and he deliberately ignored Mr Marchel.

[61] Mr Wilson provided a witness statement and gave oral evidence in support of Mr Steffens.

[62] Mr Wilson said that he recalled in late 2019, shortly before Mr Steffens was dismissed, Mr Steffens had an argument with another employee called Cody (Mr Marchel). Mr Wilson said on his oral evidence this was just after the first break on the day in question. Mr Wilson said this occurred in a kind of anteroom to the slaughter floor, where they wash their boots before going into the work area.

[63] Mr Wilson said that Mr Steffens was a few paces away from Mr Marchel, but he said something to Mr Marchel. Mr Wilson said he did not remember the exact words, but he did remember Mr Steffens called Mr Marchel a “dog cunt”. Mr Wilson said that Mr Marchel responded by saying something like;

“Righto then, after work you old cunt.”

[64] Mr Wilson said that Mr Steffens replied to Mr Marchel;

“Your nothing,” and then laughed.

[65] Mr Wilson said that Mr Marchel responded with;

“You won’t be laughing after work, I guarantee you that.”

[66] Mr Wilson said that neither Mr Steffens or Mr Marchel hit or touched each other. He said they were about four or five steps away from one another. Mr Wilson said that after they exchanged words, they both went back to work.

[67] Mr Wilson said that he was not aware of any previous antagonism between Mr Marchel and Mr Steffens, but Mr Steffens told him that Mr Marchel had gone to management and reported Mr Steffens for asking for payslips to give to the union to look at.

[68] Mr Wilson said that for most of the exchange between Mr Steffens and Mr Marchel, he was the only other person in the anteroom apart from Mr Steffens and Mr Marchel.

[69] Mr Wilson said that no one from the Respondent has ever asked him for a statement about what happened in the anteroom area on that day, or even asked him about what happened. Mr Wilson’s version of the incident was not challenged by the Respondent during his cross examination.

[70] Mr Marchel said in his statement that when he came back onto the killfloor after morning tea Mr Steffens said to him that;

“If I was a real man, I would wait for him after work”.

[71] Mr Marchel said that he took this as a threat and replied;

“If you want to wait, wait.”

[72] It was put to Mr Marchel that he said to Mr Steffens “I’ll see you at the gate after work.” Mr Marchel denied that. He did however agree that Mr Steffens had said “if you

were a real man, you wouldn't wait until after work." Mr Marchel said Mr Steffens said that twice.

[73] Mr Marchel said that later that day he complained to management about the incident. He said in his oral evidence he couldn't remember who he made the complaint to.

Meeting with management 9am 21 October

[74] Mr Steffens said that he worked on the flanking stand until just before 9.00am when he was told to go to the office by Rob Richardson the foreman.

[75] Mr Steffens said that he went to the office where he met with Mr Giddins and Mr Damian Porter, who is in charge of health and safety with some other roles.

[76] Mr Steffens said he was asked if he wanted a representative and he said no as the only person he would want was the union organiser who would not be available at short notice.

[77] Mr Giddins said on 21 October he met with Mr Steffens after the first break to discuss the complaints about payslips. Mr Giddins said during his oral evidence he did not know at the time of this meeting about the incidents between Mr Steffens and Mr Marchel earlier that day and at the time he decided to suspend Mr Steffens based on the payslip issue.

[78] Mr Giddins said in his oral evidence that he said to Mr Steffens it was unlawful to ask for someone's payslips without their knowledge or consent.

[79] Mr Giddins said he told Mr Steffens there was a view he had been representing himself in some kind of official capacity for the union. Mr Giddins said he could not remember if Mr Steffens denied this or not. Mr Giddins said that Mr Steffens did not deny he had asked for payslips.

[80] Mr Steffens said that Mr Giddins spoke to him about the fact that he had been asking people for payslips. Mr Steffens said that Mr Giddins told him it was unlawful to ask people for their payslips.

[81] Mr Steffens said that Mr Giddins said he had been harassing people about their payslips, and Mr Steffens said that he denied this. Mr Steffens said that he couldn't be harassing anyone if he hadn't even been asking them for payslips.

[82] Mr Giddins agreed that he did not specify to Mr Steffens who had complained to him about Mr Steffens seeking payslips at this meeting. Mr Giddins said in his oral evidence that he said to Mr Steffens he had asked numerous people for payslips. When Mr Giddins was asked during cross examination what he meant by numerous and he replied more than one.

[83] Mr Steffens said Mr Giddins claimed at the meeting that Mr Steffens was misrepresenting himself as some kind of official, and Mr Steffens said he denied that he had ever done that. Mr Steffens said that he told Mr Giddins that he knew Mr Giddins had a message he had sent (to Mr Marchel) and that Mr Giddins could see for himself what he had and hadn't done.

[84] Mr Steffens said that Mr Giddins said to him;

“But you’ve asked a lot of other people too.”

[85] Mr Steffens said he replied;

“No I haven’t”.

[86] Mr Giddins said in his oral evidence he believed that Mr Steffens did not say this at the meeting on 21 October but said it at the 23 October meeting.

[87] Mr Steffens said he estimated that the meeting lasted about 15 to 20 minutes. Mr Steffens said that at the end of the meeting Mr Giddins said to him that he was suspended while Mr Giddins conducted an investigation. Mr Steffens said that he left the workplace and on his way home he stopped at Fernvale and rang Mr McLauchlan and told him what had happened.

[88] Mr Steffens confirmed in his oral evidence consistently with Mr Giddins that the incidents between Mr Marchel and himself that occurred that day were not raised by Mr Giddins at this meeting.

[89] Mr McLauchlan gave evidence that on Monday 21 October 2019 he received a phone call from Mr Steffens. He said Mr Steffens told him that someone had reported him to Mr Giddins. Mr McLauchlan said that Mr Steffens said to him that Mr Giddins had spoken to him and told him that asking people for payslips was deceitful and unlawful. Mr McLauchlan said he told Mr Steffens that was nonsense.

[90] Mr McLauchlan said that later that same day he instructed the AMIEU’s branch industrial officer to draft a letter to Mr Giddins about the allegations he made to Mr Steffens. Mr McLauchlan said he approved the content of the letter, signed it, and caused it to be emailed to Mr Giddins that same day. The letter read as follows;

“21 October 2019

.....

Dear Mr Giddins

Re: Our member, Jeffery Steffens

I am writing in relation to our member, Jeffery Steffens. I have been advised by Jeffrey that he has been suspended, without pay, pending investigation of an allegation that he requested a pay slip from another employee (or employees).

I note that the alleged conduct of Mr Steffens, even if true, is not in any way improper and does not amount to misconduct of any kind. I further note that Clause 18 of the *Employee Collective Agreement Greenmountain Food Processing Pty Ltd* [“the Agreement”] permits the employer to suspend an employee without pay, only if they are “...under investigation for conduct of a kind described in Clause 7 – definitions.”

The reference in Clause 18 to “conduct” presumably refers to the definition of “Gross Misconduct” found in Clause 7. As noted above, even if it is established that our member engaged in the conduct alleged, it cannot possibly amount to misconduct of any kind, much less gross misconduct.

Accordingly, the employer does not have the right in these circumstances to suspend Mr Steffens without pay, and the decision to suspend him constitutes a contravention of the Agreement.

Would you please advise as a matter of urgency that the suspension of Mr Steffens employment has been withdrawn. If you fail to do so, the AMIEU reserves the right to commence legal proceeding without further notice to you.

Yours sincerely,

Ian McLauchlan
Assistant Secretary
AMIEU Qld Branch

[91] Mr Giddins confirmed in his oral evidence he received the letter from the union. Mr Giddins said that on the same day that Mr Steffens was suspended, a supervisor had informed him that there had been an argument of some sort between Mr Steffens and Mr Marchel. Mr Giddins said that he arranged to meet with Mr Marchel and the other people he knew to be witnesses to the incident.

22 October 2019

Interviews with employees regarding payslips and alleged altercation

[92] Mr Giddins said that on 22 October Mr Porter and himself met with Mr Marchel, Mr Chadd Menesch Johnson, Mr Matt Jillett and Mr Jamie Bond about both the payslips complaints and the altercation between Mr Marchel and Mr Steffens. Mr Giddins said Mr Porter and himself interviewed these four employees at different times.

[93] Mr Giddins said at the completion of each interview they asked each of the employees to complete and sign a Record of Interview about the matters discussed. Mr Giddins provided copies of the records of interview.

[94] Mr Marchel’s record of interview included the following:

“On 2 October at 8:26am He Jeff Steffens contacted me and ask me for mine and my girlfriends payslip and I said no and the next day I put in a complaint in about it. I came to work on the 21 October and I walked into the killfloor and the first thing I heard was Jeff calling me a dog cunt and he keep repeating it over and over and when I came back in after morning tea and walked into put my gloves on and I had Jeff telling me if I was a real man I would wait for him after work for a fight and it not just me he harassed other people as well”.

[95] Mr Marchel said he could not remember if he wrote his record of interview on the day of the incident or the day after. Mr Marchel agreed that Mr Giddins gave him the paper to write his complaint. Mr Marchel was asked if Mr Giddins asked him any questions about what he had written, and he said that Mr Giddins only said “*Is this all you want to write?*” and he said yes.

[96] Mr Menesch Johnsons provided a witness statement⁵ and gave oral evidence. His record of interview included the following;

“On the 21 October at 8.35am I had come back in from morning tea to run on chain and start production. As I walked towards the legging stand I heard the voice of Jeff Steffens tell Cody Marchel “If you’re a real man you’ll meet me out the front”. When I proceeded to go over to them I asked them what the problem seemed to be. Mr Steffens remained silent and continued to go to his work station. Mr Marchel then told me that Mister Steffens had been trying to start a fight with him. I had told Cody to continue to his work station and notified my area supervisor where Mr Steffens was called to the office where corrective action was taken.”

[97] Mr Menesch Johnson is a Process Monitor at the Coominya facility. His witness statement was consistent with the record of the interview.

[98] Mr Menesch Johnson said in his oral evidence he was not in the anteroom he was walking past it. He said he could not see them and only hear them. He agreed that it was possible that Mr Steffens said something like “if you’re a real man you wouldn’t wait until after work.” Mr Menesch Johnson agreed he could not be sure if Mr Steffens heard him or not when he asked what the problem was.

[99] During his evidence Mr Marchel said he showed Mr Menesch Johnson who was his foreman, the message that Mr Steffens had sent him about the payslips.

[100] Mr Jillett provided a witness statement⁶ and gave oral evidence. His record of interview included the following;

“On the 21st of October I was sitting in the smoke shed when we heard early in the morning and I could here people yelling. Later on I got told it was Jeff having a go at Cody and then when I was walk back into the wash room I head Jeff say to Cody if you were a real man you would wait around till after work” he kept say other things but I walked away. Jeff is always having a go a someone for something.”

[101] Mr Jilletts’ main role is that of a slaughterer. His witness statement was consistent with his record of interview.

[102] Mr Marchel agreed that Mr Jillett was a friend of his. Mr Jillett agreed that he was told what was said as part of the earlier conversation in the day by someone else but he could not remember who. Mr Jillett did not accept the alternative formulation that Mr Menesch Johnson accepted was possible regarding the second exchange on the day.

[103] Mr Steffens said that his union representatives told him that they received a letter emailed to them on 22 October 2019 and that the email had been copied to his email address. Mr Steffens said however he did not receive the email from the Respondent on 22 October

and that he did not get until the following day. Mr Steffens said that he did check his emails because Ms Giddins had said that they were going to email him a letter.

[104] Mr Steffens said however he did receive a phone call from Mr McLauchlan on 22 October who told him about the letter, and sent it to Mr Steffens. It is apparent that this letter was sent by Mr Giddins after the interviews set out above conducted on 22 October. The letter read as follows:

“Suspension Whilst Under Investigation

Jeff Steffens

22 October 2019

RE: Unlawful actively trying to solicit and collect personal information from third parties by deception (misrepresentation/misleading as an official under the Fair Work Act) without the individual employees’ knowledge or consent.

This letter is to advise you that you are to remain suspended without pay according to clause 18.1 Suspended Whilst Under Investigation, clause 7 Definitions – Gross Misconduct of the Greenmount Food Processing Pty Ltd August 2009 Collective Variation Agreement (The Agreement) until we meet to discuss the matter further.

A meeting was held today to inform you of the serious and unlawful allegations where you have misrepresented yourself as a legal organisational official (permit holder) to collect private and personal information from employees without their knowledge or consent through other third party personal employed on site.

You are offered a support person for today’s meeting where you declined.

It was put forward to you these allegations are serious allegations and you responded that you are acting under instruction from an organiser from the A.M.I.E.U a Mr Ian McLauchlan.

You indicated that you have approached 1 person only asking for both his and his girlfriends weekly payslip.

I indicated to you that I have been approached by numerous employees with resentment that they have been approached by yourself and requested to gather personal information (payslips) from other employees without the consent or knowledge of these employees.

It has also been forwarded to management that you have indicated to these approached employees that you are acting in an official lawful capacity.

Upon investigations regarding the above matter, further serious allegations of bullying and harassment by yourself towards fellow employees have been brought to management’s attention.

A further meeting is now scheduled for Wednesday 23rd October 2019 at 7:00am in the Greenmountain Board Room.

I advise you to bring a support person with you to this meeting.

Yours faithfully

Jason Giddins
General Manager”

[105] Mr Giddins accepted that the heading of the letter “RE: Unlawful actively trying to solicit and collect personal information from third parties by deception (misrepresentation/misleading as an official under the Fair Work Act) without the individual employees’ knowledge or consent” was a summary of what he was investigating. .

[106] Mr Giddins accepted in his oral evidence that no one had represented to him that Mr Steffens was representing himself as an official under the Fair Work Act. Mr Giddins was asked what was it about the complaints that made him conclude Mr Steffens wanted the information without the consent or knowledge of the person. He replied because they weren’t asked directly. He said the view was put to him by Mr Marchel and Mr Bond that they were not happy that Mr Steffens was seeking the payslips from another person through them.

[107] Mr Giddins accepted in his oral evidence that the reference in the third paragraph to “A meeting held today” in the letter sent on 22 October 2019 was an error as the letter had been commenced to be drafted on 21 October but was not sent until the following day.

[108] Mr McLauchlan said that on Tuesday 22 October he received another phone call from Mr Steffens asking if he could be at the Respondents’ premises at 7am the following day 23 October. Mr McLauchlan said that Mr Steffens said he had been told he had to have a meeting with Mr Giddins and Mr Porter before he could start work.

[109] It was put to Mr Giddins that the third paragraph of the suspension letter alleged that Mr Steffens was misrepresenting himself as a permit holder. Mr Giddins accepted that no one had said to him that Mr Steffens had claimed to be a permit holder.

[110] Mr Steffens was asked how he worked out who to interview for his investigation. He said Mr Rob Richardson the supervisor had told him of an event between Mr Steffens and Mr Marchel. Mr Giddins was asked if he had asked Mr Marchel if Mr Wilson was present at the incident. Mr Steffens said no one mentioned Mr Wilson to him including Mr Steffens on 23 October.

[111] Mr Giddins said he conducted the interviews with employees one at a time with Mr Porter. He accepted that Mr Marchel’s statement does not claim Mr Steffens represented himself as a union official or a permit holder and he accepted that he did not ask Mr Marchel about that. Mr Giddins said during his oral evidence that at that point in time his focus shifted to the altercation on 21 October.

[112] Mr Giddins accepted that Mr Bond did not work for the Respondent anymore. Mr Giddins accepted Mr Bonds’ record of interview only pertained to the payslip issue. Mr

Giddins accepted that Mr Bond did not say anything about payslips in his record of interview about Mr Steffens claiming to be a union official. Mr Giddins accepted he did not ask Mr Bond about that.

23 October 2019 Termination of employment

[113] Mr Steffens said that on 23 October 2019 at around 7:00am he went to the Coominya Plant to meet with the Respondents management and Mr McLauchlan came to the meeting with him as his representative. He said the meeting was in the boardroom and Mr Giddins and Mr Porter were there for the Respondent. Mr Gibbins said that on 23 October he met with Mr Steffens and Mr McLauchlan.

[114] Mr Steffens said that Mr Gibbins started speaking about the payslips and the allegations against him. Mr Steffens said that Mr Gibbins said to Mr McLauchlan that it was gross misconduct, and that he had misled the workers saying Mr Steffens was some sort of union official. Mr Steffens said Mr Gibbins said he had been bullying workers about giving him payslips. Mr Giddins denied in his oral evidence that he said that.

[115] Mr Steffens said that Mr McLauchlan replied to Mr Giddins that he had asked Mr Steffens to collect some payslips because workers were complaining about their pay rates and that it was not misconduct, and that there was nothing illegal about asking for payslips.

[116] Mr McLauchlan said that Mr Giddins did most of the speaking at the meeting and Mr Porter mostly took notes.

[117] Mr McLauchlan said that Mr Giddins said to Mr Steffens that he faced allegations of serious harassment and bullying of fellow employees. Mr McLauchlan's version included that Mr Giddins said to Mr Steffens that it was completely illegal to ask for people's personal payslips. Mr McLauchlan said that he told Mr Giddins that was totally wrong, and if people wanted to give Mr Steffens their payslips there was no problem with Mr Steffens accepting them.

[118] Mr McLauchlan said that he told Mr Giddins that it was common throughout the industry for people to give delegates their payslips when they had problems with pay issues. Mr McLauchlan said that Mr Giddins replied;

“Payslips are personal information and no-one has the right to ask for them, and there was complaints from employees regarding Jeff asking for payslips.”

[119] Mr McLauchlan said that Mr Steffens said all he had done was send Mr Marchel a message asking for payslips. Mr Giddins said that he said to Mr McLauchlan there is nothing illegal about asking for payslips if you have consent of the person and ask them directly.

[120] Mr Steffens said that at the meeting Mr Giddins began talking about allegations that he had bullied and harassed Mr Marchel. Mr Steffens said that Mr Giddins alleged that he had shirtfronted Mr Marchel and challenged him to a fight, and had called him a “dog cunt” repeatedly. Mr Giddins agreed that he made these allegations to Mr Steffens at the meeting.

[121] Mr Steffens said he replied to Mr Giddins by saying something like;

“I did call him a dog, yeah, but I didn’t ask him for a fight, he was after me for a fight.”

[122] Mr Giddins accepted in his oral evidence that Mr Steffens said something to this effect, however went on to say that Mr Steffens denied calling Mr Marchel a dog cunt. In his oral evidence Mr Steffens claimed he did say to Mr Giddins that he called Mr Marchel a dog cunt.

[123] Mr Steffens said that Mr Giddins said he had also been harassing Mr Marchel on the slaughter floor, getting down off the stand and going up to him to abuse him. Mr Steffens said that Mr Giddins claimed one of the supervisors had reported hearing a big commotion at their end of the slaughter floor, and that the supervisor had come from the other end of the room to investigate but it had stopped by the time he got there.

[124] Mr Steffens said that Mr Giddins said he had six statements from witnesses about this. Mr Steffens said he said;

“They’re all liars.”

[125] Mr Steffens said that Mr Giddins asked him if he was calling 250 employees liars and he replied “No” because that was not what he said at all. Mr Steffens said that he meant that if people had said he was involved in some big commotion on the slaughter floor then they must be liars because this just didn’t happen.

[126] It was put to Mr Giddins that Mr Steffens did not directly deny calling Mr Marchel a dog cunt during the meeting and Mr Giddins refuted this.

[127] Mr Steffens said that he said to Mr Giddins the cameras would show what happened in the wash room. Mr Steffens said that Mr Giddins had also said he had harassed Mr Marchel on the slaughter floor and there were cameras there. Mr Steffens said that he said the cameras would show that he never got off his stand during the run.

[128] Mr McLauchlan said that there was a break in the meeting for maybe fifteen minutes or twenty minutes and when the meeting resumed Mr Giddins said that Mr Steffens was guilty of harassment and bullying for threatening Mr Marchel.

[129] Mr McLauchlan said that the allegation was that on the morning of 21 October Mr Steffens had called Mr Marchel a “dog cunt” and threatened to fight him. Mr McLauchlan said that Mr Steffens said something like;

“Yeah I did call him a dog. Cody reacted by saying he would see me after work, old man, and I said that if you were a real man you wouldn’t wait until after work to do something.”

[130] Mr McLauchlan said that these are not the exact words used, but this was the effect of what Mr Steffens conveyed with his answer. Mr McLauchlan said that Mr Steffens said that the exchange had occurred in the wash room, after which the two of them had gone to the slaughter floor to work.

[131] Mr McLauchlan said that Mr Giddins alleged that the acting supervisor heard a commotion from the other end of the slaughter floor and walked down to investigate what was going on. Mr McLauchlan said that Mr Steffens denied that there had been any contact or commotion on the slaughter floor at all.

[132] In his oral evidence Mr McLauchlan confirmed that it was his recollection that Mr Steffens said he called Mr Marchel a dog.

[133] Mr McLauchlan said that he said to Mr Giddins that there would be video footage of the slaughter floor, and that would tell them whether there was any pushing, shoving or yelling. Mr McLauchlan said that Mr Giddins reply was;

“It doesn’t show everything”.

[134] Mr McLauchlan said he asked Mr Giddins again to have a look at the footage and again Mr Giddins declined. Mr McLauchlan said that Mr Steffens said he believed that the cameras would have a view of the area in which the commotion was said to have occurred.

[135] Mr Giddins said in his statement that in the course of the meeting Mr Steffens admitted to calling Mr Marchel a “dog” but denied calling him a “dog cunt”. Mr Giddins said that this denial was made by a statement;

“They are all lying”.

[136] Mr Giddins said he asked Mr Steffens why he thought everybody was lying and Mr Steffens did not reply and put his head down.

[137] It was put to Mr Giddins during his oral evidence that the statement “They’re all lying” was not in response to whether he said dog or dog cunt. Mr Giddins said there was context to that, and he said he had put to Mr Steffens that he had numerous statements that Mr Steffens did it and Mr Steffens responded “That’s not true, there all lying”.

[138] Mr Giddins accepted that Mr Steffens and Mr McLaughlin asked to see the CCTV cameras and he said that there was nothing to see as the cameras would not point to the relevant areas.

Decision to dismiss

[139] Mr Steffens said that Mr Giddins also brought up a previous incident from August and said it would be considered. Mr Steffens said that shortly after that Mr Giddins said that he had no option but to dismiss him and that he would not hold back his holiday pay or his entitlements.

[140] Mr McLauchlan said that Mr Giddins told Mr Steffens that the Respondent was terminating his employment because of his bullying and attitude on the plant. Mr McLauchlan said Mr Steffens was told he had been spoken to about such matters before. Mr McLauchlan said that Mr Giddins told Mr Steffens he would be paid a notice period and all his entitlements.

[141] Mr Giddins said that in the course of the meeting he formed the view that Mr Steffens had lied about the number of people he had asked for payslips from, and that he had lied about the nature of the altercation with Mr Marchel and on this basis he decided to terminate Mr Steffens employment and advised Mr Steffens and Mr McLauchlan of his decision.

[142] Mr Giddins said he was of the view that Mr Steffens conduct was sufficiently serious to justify summary termination but chose to make a payment in lieu of notice. Mr Giddins said he drafted and sent a letter of termination of Mr Steffens private email account.

[143] Mr Steffens said that the meeting finished up and he collected his belongings from his locker. Mr Steffens said that he was provided with a termination letter that read as follows;

“Notice of Termination

Jeff Steffens

23 October 2019

This letter is advising you that your position with Greenmountain Food Processing has been terminated on the 23 October 2019 at 8:00am.

An investigation was undertaken due to serious and unlawful allegations regarding your conduct that was discussed with you on 21 October 2019 and forwarded to yourself on 22/10/2019 (attached).

Due to witness statements voluntarily provided by employees, Greenmountain management consider these serious allegations regarding your conduct as factual and stand by the position of suspended you without pay and Gross Misconduct.

During the investigations regarding the above matter, further serious allegations of bullying and harassment by yourself towards fellow employees have been brought to management’s attention.

A further meeting was held today with your support person (Mr. Ian McLauchlan) to inform you of these serious allegations of bullying and harassment; where you repeatedly call a fellow employee a “*dog cunt*” and threatening this employee for a fight on the morning of 21 October 2019.

You replied that you called him a “*dog*”.

You were also informed of allegations that you approached this employee on the return from the break in an aggressive intimidating manner threatening this employee by in an elevated voice stating “*if you were a real man you would wait until after work for a fight*”

You were also informed that an acting supervisor had overheard the commotion from the other end of the slaughter floor where he proceeded to investigate the matter where you returned to your workstation prior to him arriving at the scene.

Your response to these allegations is that “*they are all lying*”.

Due to further witness statements voluntarily provided by employees, Greenmountain management consider these serious allegations of bullying and harassment conduct as factual and also amount to Gross Misconduct.

I remind you of a recent incident on 06 August 2019 where you received a final written letter (a copy provided to you and your support person at today's meeting) for unsatisfactory conduct where you left your workstation and physically assaulted a fellow employee. This conduct was also considered as Gross Misconduct by management; however management gave you a final written letter so you could reflect on your conduct and correct your behaviour.

You were also reminded that due to your duties as an acting and trained HRS on site; management expectations are that you are aware of requirements and actions that cause or may cause an imminent and serious risk to the health and safety of persons on site.

Due to your continuing unsatisfactory behaviour and conduct; management are left in no other position than to terminate your employment.

As discussed today with yourself and your support person, management will elect to pay you with payment in lieu of notice and provide you with a verbal reference to any future prospective employers.

Yours faithfully

Jason Giddins
General Manager

[144] Mr Giddins accepted during his oral evidence that the second paragraph in the termination letter referred to the payslip allegations and that the third paragraph of the termination letter confirmed that these allegations discussed at the 21 October meeting were found to be made out on the basis of the witness statements provided on 22 October.

[145] Mr Giddins was asked about the use of the plural "employees" in the fourth paragraph and asked if this was referring to anyone other than Mr Marchel. Mr Giddins' evidence was to the effect that it said employees other than Mr Marchel because other employees had said Mr Steffens was always having a go at them.

[146] It was put to Mr Giddins that the sequence of the termination refers to Mr Steffens replying he called Mr Marchel a dog, and then refers to the allegation that Mr Steffens challenged Mr Marchel to a fight and a supervisor saying he overheard a commotion and that the termination letters reads as if Mr Steffens response that "they are all lying" was a response to the allegations. Mr Giddins continued to maintain it was a response to the allegation Mr Steffens called Mr Marchel a dog cunt.

[147] Mr Giddins accepted that he had concluded that Mr Steffens challenged Mr Marchel to a fight and not the other way around.

[148] Mr Giddins accepted that Mr Marchel had been disciplined for an incident involving fighting with a Mr McEwan at the workplace since the termination of Mr Steffens. Mr Giddins agreed that Mr Marchel struck Mr McEwan. Mr Giddins said Mr Marchel was given a first and final warning because of that incident.

Valid Reason

[149] Mr Steffens' version of the incidents with Mr Marchel on 21 October was not challenged in cross examination. I found Mr Steffens to be a witness of truth who was not inclined to give self-serving evidence and was prepared to make concessions about his own conduct even where it would not assist him.

[150] I found Mr Marchel's evidence less reliable. Firstly, he claimed in his evidence that he refused Mr Steffens' request to assist him regarding obtaining payslips on 2 October. This claim is clearly incorrect, as his response to Mr Steffens by text for assistance read "Yeah I'll see what I can do."

[151] A further issue that undermines the value of Mr Marchel's evidence is the record of interview Mr Marchel provided to Mr Giddins on 22 October that claims Mr Steffens made contact with him at 8.26am on 2 October to make his request, when the text messages were exchanged between Mr Steffens and Mr Marchel in the evening of 2 October not the morning.

[152] In my view Mr Steffens had some justification for being angry at Mr Marchel given Mr Marchel's disingenuous conduct toward him. Mr Steffens made a request of Mr Marchel for assistance in exploring a concern raised that employees were not being paid correctly.

[153] Whilst it was not the subject of evidence and I place no weight on this observation for the purpose of determining this matter, I note in passing that the industrial instrument referred to by the Respondent in the suspension letter of 22 October purportedly empowering it to suspend Mr Marchel without pay, appears to be a pre-reform Agreement made over ten years ago. If the instrument still applies to employees at Coominya it would hardly be surprising if employees were seeking to investigate their entitlements under such an instrument.

[154] Mr Steffens' request of Mr Marchel was in keeping with the ordinary conduct one would expect of a union delegate. It was not contested in the course of the hearing and I accept that Mr Steffens was a bona fide delegate under the rules of the AMIEU.

[155] Mr Marchel said he was not a member of the AMIEU. Mr Marchel was entitled to refuse Mr Steffens' request if he wished, and had he done so presumably that would have been the end of the matter as far as Mr Marchel was concerned.

[156] Mr Marchel did not tell Mr Steffens he did not wish to assist him, and instead Mr Marchel led Mr Steffens to believe in his text message that he did intend to attempt to assist him. However rather than doing what he indicated he would do in his text, he instead made a complaint to management about Mr Steffens that misrepresented what Mr Steffens had done, and without any indication to Mr Steffens that he took any objection to Mr Steffens' request.

[157] Mr Marchel in his evidence described Mr Steffens' text message to him as a demand. It appears Mr Marchel deliberately led Mr Gibbins to a view that Mr Steffens had been making inappropriate demands for Mr Marchel to produce payslips. Mr Steffens is not

entitled to demand employees to produce payslips to him if they do not wish to. However, the evidence is clear Mr Steffens made no such demand of Mr Marchel. Mr Steffens did nothing more than make a request which he was perfectly entitled to make. The request did not otherwise interfere in any way with the performance of work or break any law.

[158] Mr Marchel's evidence up to the time of his oral evidence also gave a version of the incidents of 21 October involving himself and Mr Steffens that painted Mr Steffens as the provocateur and Mr Marchel the victim of a bully. However, for the first time in the course of his oral evidence he conceded that he said to Mr Steffens "Don't forget you're an old cunt, Jeff, I'll take you out."

[159] I also observed that during his evidence Mr Marchel had a poor memory of key incidents. All of these things taken together lead me to prefer Mr Steffens' evidence as more reliable than the evidence of Mr Marchel.

[160] The Respondent's finding against Mr Steffens on this point appeared to be that because Mr Steffens asked person A for the payslip of another person B that was somehow unlawful and or misconduct. There is no basis on the evidence to suggest that Mr Steffens was asking either Mr Marchel or Mr Bond to obtain payslips from another person without their consent.

[161] There was also no reasonable basis to say Mr Steffens was claiming to be a union official or permit holder. The termination letter indicates these findings against Mr Steffens were made on the basis of the records of interview provided to the Respondent by Mr Marchel and also Mr Bond who was not available to give evidence. There is nothing in the evidence of Mr Marchel or the record of interview of Mr Bond to make out the allegations against Mr Steffens.

[162] The evidence is reasonably clear that Mr Steffens did not purport to deceive anyone into giving him payslips on false pretences or demand that he be giving payslips because he was a representative of the union.

[163] Moving on to the incidents with Mr Marchel, Mr Steffens gave evidence that it was Mr Marchel who challenged him to a fight after work on 21 October and not the other way around as was found by the Respondent. On the basis of the evidence on the factual dispute concerning this issue, and my earlier expressed preference for Mr Steffens' evidence over that of Mr Marchel, I accept that Mr Marchel proposed the fight during the second incident between them on 21 October and not Mr Steffens.

[164] Mr Marchel during his evidence, without making the specific concession, accepted that he in effect threatened Mr Steffens in the course of the first incident when he said "Don't forget you're an old cunt, Jeff, I'll take you out."

[165] In respect to the second incident Mr Wilson gave unchallenged evidence that corroborated Mr Steffens' version of the second conversation after the first break. Mr Marchel gave a different version but had made the concession that he threatened Mr Steffens in the course of first incident. Mr Wilson was never interviewed at the time.

[166] In regard to the disputed versions concerning who was the provocateur in the second altercation, Mr Marchel appeared to accept that Mr Steffens said "if you're a real man you

wouldn't wait til after work". A logical interpretation of that language would be that it is said as a response to something said by Mr Marchel. Given Mr Marchel's concession about what he had said to Mr Steffens, Mr Steffens' version is a more logical fit with the totality of the evidence. Mr Jillett did not waiver from his recollection of the incident involving his friend Mr Marchel, however Mr Menesch Johnson accepted that what he heard could have been consistent with the responsive language as has been put by Mr Steffens.

[167] My preference for Mr Steffens' version is influenced by my preference for his credibility as a witness generally over Mr Marchel. My view on this issue is reinforced by evidence of Mr Giddins that Mr Marchel has subsequently been disciplined by the Respondent for striking another employee in a separate incident after the termination of Mr Steffens. In closing on this issue none of this should be taken to suggest that Mr Steffens statements in the course of the two incidents on 21 October involving Mr Marchel were appropriate.

[168] The Respondent has also attempted to rely on its claim that Mr Steffens lied in the course of the meeting on 23 October about the number of people he had asked for payslips and not admitting that he called Mr Marchel a dog cunt on 21 October.

[169] In regard to the payslips Mr Giddins said he was aware at the time Mr Steffens had approached Mr Marchel and Mr Bond. In his own evidence Mr Giddins accepted that he said to Mr Steffens at the meeting on 21 October that Mr Steffens had approached numerous people about obtaining payslips and said when he used the word numerous he meant more than one. It was clear from his evidence Mr Giddins was referring to two people and it would appear that he either did not understand the meaning of the word numerous or was exaggerating the number of people who had complained about being approached by Mr Steffens.

[170] Mr Steffens was asked in cross examination at the hearing who he asked for payslips and he said Mr Marchel. He was asked if he had asked anyone else for payslips and he said no. Mr Steffens said the request of Mr Marchel was only made through the text message.

[171] It was apparent from Mr Giddins' evidence it was his view Mr Steffens had asked Mr Marchel and Mr Bond for payslips. Mr Bond was not available to give evidence but in his record of interview he does not mention payslips. Further the record of conversation provided by Mr Bond identifies the date Mr Steffens allegedly spoke to him about payslips was 27 September. The allegation about Mr Bond was not put squarely to Mr Steffens at the meeting on 23 October or when he was cross examined during the hearing.

[172] It may well be that contrary to Mr Steffens' evidence he did speak to Mr Bond about payslips in September 2019, well before he was first approached on 21 October about the complaint by Mr Marchel. However, I am not satisfied on the evidence Mr Steffens deliberately lied at the meeting on 23 October about the number of people he had approached about payslips.

[173] If he did in fact ask Mr Bond back in September to assist him, he may have forgotten, and in any event as already observed, if he did approach Mr Bond in the manner Mr Giddins hearsay evidence suggested he may have, even on that evidence there would be nothing wrong with what he did. Mr Bond was unavailable to give evidence.

[174] In his witness statement Mr Steffens described having called Mr Marchel a dog cunt on 21 October⁷ and used the word dog when describing what he said at the meeting on 23 October with Mr Giddins. Mr Steffens witness statement is consistent with the witness statement of Mr McLauchlan to the extent that Mr McLauchlan believed Mr Steffens used the word dog at the interview on 23 October. However, in his oral evidence Mr Steffens claimed he did use the expression “dog cunt” at the meeting with Mr Giddins on 23 October which is different to Mr McLauchlan’s evidence.

[175] Mr Giddins said Mr Steffens said he called Mr Marchel a dog, however Mr Giddins concluded Mr Steffens had called him a dog cunt.

[176] It was never squarely put to Mr Steffens whilst he was giving his oral evidence that he denied using the expression in response to an allegation from Mr Giddins during the meeting on 23 October that he did. This is important because the evidence suggests an alternative explanation.

[177] I am inclined to prefer the view that contrary to what Mr Steffens said in his oral evidence, he probably did say “dog” and not “dog cunt” at the meeting with Mr Giddins on 23 October however I do not intend to place any significant weight on that issue for a number of reasons.

[178] Firstly, I am inclined to the view that the Mr Steffens did not deliberately lie to Mr Giddins about that issue at the meeting on 23 October. The Respondent submits that Mr Steffens statement to Mr Giddins that “They’re all lying” or words to that effect, was in response to the allegation that he called Mr Marchel a “dog” and denied calling him a “dog cunt”.

[179] Mr Steffens probably dropped the expletive in the course of the meeting because he did not want to highlight his use of strong language in the incident on 21 October in the meeting. However, I am not satisfied from the evidence that he directly denied an allegation that he used the expression on 21 October.

[180] Mr Giddins in his witness statement said that Mr Steffens denied using the expression “dog cunt” by saying “They’re all lying”. Mr Giddins witness statement indicates it was from this statement that he took it that Mr Steffens denied using the expression “dog cunt”. Mr Giddins did not include in his witness statement a claim that Mr Steffens expressly and directly denied using the expression in response to a question from him as he later claimed in his oral evidence.

[181] Mr Giddins description in his witness statement is broadly consistent with the description in the termination letter.

[182] Mr Giddins statement was prepared after the statement of Mr Steffens was filed which made clear that it would be Mr Steffens’ evidence that he made the statement to Mr Giddins that “They’re all liars” in response to a number of issues including the suggestions put to him by Mr Giddins that there were witnesses to support an allegation that Mr Steffens challenged Mr Marchel to a fight, and that there had been a big commotion.⁸

[183] The evidence indicates it is more likely he used the words “They’re all lying” or alternatively “They’re all liars” as a response to a number of allegations put together

including that he challenged Mr Marchel to a fight and had caused a commotion. This is consistent with the evidence of Mr Steffens, Mr McLaughlin and also the sequence of the termination letter written on the 23 October which is a contemporaneous record. Mr Giddins may have understood Mr Steffens intended to include in his response a denial that he used the expression ‘dog cunt’ but I am not persuaded that was Mr Steffens’ intention.

[184] I am inclined to the view that had the issue of Mr Steffens allegedly lying about whether he said dog or dog cunt in the meeting of 23 October been such an important consideration at the time to the Respondent in arriving at the decision to terminate him, then the termination letter would have reflected this, and not been written in a manner indicating that it was the alleged earlier conduct, and not the alleged lying in the meeting about the conduct, that triggered the decision.

[185] There is also another reason to prefer Mr Steffens’ explanation over Mr Giddins’ version on this issue of allegedly lying. Mr Giddins’ evidence included a claim that there were numerous witnesses to the allegations. However, none of the records of interview other than that of Mr Marchel use the expression dog cunt. There were however several witnesses who provided a statement of interview relevant to who proposed a fight. Therefore, a claim that there were “numerous” witnesses is more likely to have been said in regard to the fighting allegation than the language allegation.

[186] The context is also important for another reason. Strong language itself would be more common on the kill floor at an abattoir than at some other workplaces. Even if it was the case (though I have found otherwise) that Mr Steffens denied using the expression when he did (as he admitted in his evidence) the use of the language itself would not provide a valid reason for termination in the particular circumstances of this case.

[187] For all of these reasons set out above the Respondent did not have a valid reason for termination.

Notification of reason

[188] Mr Steffens was notified of the reason for termination at the meeting on 23 October 2019.

Opportunity to respond

[189] Mr Steffens was provided an opportunity to respond at the meeting on 23 October 2019.

Any unreasonable refusal to allow a support person to assist

[190] The Respondent did not refuse to allow Mr Steffens to have a support person.

Whether Mr Steffens was warned about unsatisfactory performance

[191] The Respondent’s decision to terminate Mr Steffens related to his conduct and not unsatisfactory performance.

The degree to which the size of the Respondents enterprise would be likely to impact on the procedures followed

[192] The Respondent said in its Form F3 application that it had 253 employees. This is there not a relevant consideration in this matter.

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

[193] The Respondent did not have a dedicated human resource specialist. This is likely to have impacted the procedure followed as Mr Giddins, who was the decision make is not a trained human resources specialist.

Any other matters that the FWC considers relevant

[194] Mr Steffens had a length of service of 11 years and 9 months. Mr Steffens' conduct in the language he directed at Mr Marchel on 21 October 2019 was inappropriate and amounted to misconduct, however termination of employment was too harsh a consequence and was disproportionate to the actual conduct.

[195] This is especially so given my finding that Mr Marchel challenged Mr Steffens to a fight and not the other way around. Mr Marchel was not disciplined at the time for his conduct.

[196] The Respondent failed to interview Mr Wilson which contributed to the Respondent's investigation being flawed and reaching findings not based on the facts.

Conclusion on Harsh, Unjust and Unreasonable

[197] Having considered all of the matters in accordance with s.387 I am satisfied that the dismissal of Mr Steffens was harsh, unjust and unreasonable.

Remedy

[198] In submissions Mr Steffens sought reinstatement, however at the hearing made clear in his evidence that he no longer sought that remedy and sought compensation instead. Given Mr Steffens does not seek reinstatement it would be inappropriate to order that remedy.

[199] It is appropriate to award compensation in this case. Mr Steffens said that he worked full time hours on a standard 38-hour week as a slaughterer and earned \$22.63 per hour.

[200] I have taken into account that he had received a final warning for the incident in August 2019. Mr Steffens gave evidence about the context of that incident and made admissions about his own conduct on that occasion. I have concluded that Mr Steffens did not seek to initiate a physical altercation with Mr Marchel on 21 October and am satisfied that he was unlikely to do so again after the incident in August. I have taken into account the uncontested evidence that he deliberately avoided engaging with Mr Marchel whilst performing work after their initial verbal exchange on 21 October.

[201] I am satisfied that given Mr Steffens was an employee of the Respondent for 11 years and nine months it is likely he would have remained in employment for at least another 12 months had he not been dismissed at the relevant time.

[202] Based on an hourly rate of \$22.63 multiplied by 38 equals \$859.94 per week. \$859.94 multiplied by 52 weeks equals \$44,716.88. Mr Steffens was paid five weeks' notice which equals \$4,299.70. It is appropriate to deduct this amount resulting in a compensation amount of \$40,417.18.

[203] Mr Steffens said that since late November 2019 he found some employment with the Hilton Food Group. He said he only works as a casual and attracts a casual loading however his hours are not predictable. He said there have been weeks where he receives fulltime hours and others where he received much less. He said he is hopeful that this work will continue but at the moment the hours are irregular.

[204] Mr Steffens provided copies of all of his payslips from his employment since termination.⁹ His total gross earnings in the new casual role up to 15 February 2020 was \$9,979.31. It is appropriate that this amount be deducted resulting in a reduction in the compensation amount to \$30,437.87.

[205] Based on his earnings I estimate that Mr Steffens would have been reasonably likely to earn in the order of approximately \$850 gross per week for the period between his last recorded payment on 15 February 2020 and the date of this decision being a period of three weeks amounting to \$2,550 and reducing the compensation amount to the date of this decision to compensation of \$27,887.87.

[206] It is reasonably likely that Mr Steffens will earn a similar amount from his casual employment in the period between this decision and the making of an order for compensation and the actual compensation which is payable in 14 days. It is therefore appropriate to reduce the amount by a further \$1700 resulting in a figure of \$26,187.87.

[207] I am satisfied Mr Steffens made appropriate efforts to mitigate his loss in obtaining employment in a short period of time after his termination and this is not a basis for further reduction.

[208] There is no evidence that an order for compensation will affect the viability of the Respondent and I make no deduction on that basis.

[209] I am satisfied that Mr Steffens' misconduct including for conduct that resulted in a final warning and his using inappropriate language directed at Mr Marchel contributed to the Respondent's decision to terminate his employment. On that basis his misconduct requires a further deduction of 10% from the initial compensation amount of \$44,716.88 being \$4,471.69 reducing the amount to \$21,716.18.

[210] The amount of \$21,716.18 is less than half of the annual wage of Mr Steffens and therefore is less than the compensation cap.

[211] An order will be issued separately and concurrently with this decision requiring the Respondent pay to Mr Steffens an amount of \$21,716.18 gross taxed according to law within 14 days.

COMMISSIONER

Appearances:

Mr C. Buckley AIMEU on behalf of the Applicant.

Mr G. Taylor of Employer Protect on behalf of the Respondent.

Hearing details:

2020

Brisbane;

25 February

<PR717370>

¹ Exhibit 1.

² Exhibit 4.

³ Exhibit 5.

⁴ Exhibit 6.

⁵ Exhibit 7.

⁶ Exhibit 8.

⁷ Exhibit 1 para 17.

⁸ Exhibit 1 para 31.

⁹ Exhibit 2.