



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Mr Leigh Moiler**

v

**Cowra Meat Processors Pty Limited**

(U2025/4135)

COMMISSIONER WALKADEN

SYDNEY, 18 SEPTEMBER 2025

*Application for unfair dismissal remedy – dismissal for reasons that include communication of absence to employer, leaving shift early without notifying supervisor, conduct towards supervisor and other employees - dismissal found to be harsh, unjust or unreasonable - reinstatement ordered*

[1] This decision determines an application commenced by Mr Leigh Moiler (**the Applicant**) under section 394 of the *Fair Work Act 2009* (**FW Act**) against his former employer, Cowra Meat Processors Pty Limited (**CMP / the Respondent**). Mr Moiler contends that he was unfairly dismissed and seeks that the Fair Work Commission (**Commission**) order a remedy for the unfair dismissal. The remedy sought by Mr Moiler is reinstatement, and orders to maintain continuity and lost pay.

[2] The Respondent opposed the application and submitted that Mr Moiler's dismissal was not harsh, unjust or unreasonable.

[3] On 19 June 2025, the application was the subject of a hearing before me. The hearing was focused on the merits of the application and remedy. Mr Moiler was represented by Ms Cathy-May Gill. Ms Gill is an Industrial Officer with the Australasian Meat Industry Employees Union (**AMIEU**). Ms Samantha Freeman, Solicitor, appeared for the Respondent with permission granted under section 592(2)(a) of the FW Act.

[4] Mr Moiler relied upon witness material filed and served in advance of the hearing from: Ms Shay Grant (Mr Moiler's daughter), Mr Richard Moiler (Mr Moiler's father), Ms Jesse Young (Mr Moiler's daughter-in-law) and Ms Irene Grant (Mr Moiler's wife) and from Mr Moiler himself. Mr Richard Moiler, Ms Young and Ms Irene Grant were not required for cross-examination. Mr Moiler and Ms Shay Grant were cross-examined. Mr Moiler also relied upon written submissions filed and served in advance of the hearing.

[5] The Respondent relied upon witness statements filed and served in advance of the hearing from: Mr Wayne Rue (Production Manager), Mr Allan Ryan (Beef Foreman), Ms

Stephanie Taylor (Payroll Officer) and Ms Bonnie Stewart (Group HR/WHS Officer at the time of Mr Moiler's dismissal and now Operations Manager). Each of those witnesses were cross-examined. The Respondent also relied upon written submissions filed and served in advance of the hearing.

[6] All the evidence and submissions made by the parties has been considered.

[7] For the reasons explained below, I have taken into account the matters set out at section 387 of the FW Act and concluded that Mr Moiler's dismissal was harsh, unjust or unreasonable. I have made an order for reinstatement. I have made an order to maintain continuity. I have not yet made an order to restore lost pay. I am minded to make such an order. However, I require further material from the parties before determining the amount of any lost pay to be ordered.

### **Preliminary matters**

[8] The effect of section 390 of the FW Act is that the Commission may order a remedy for unfair dismissal if the Commission is satisfied of the two matters set out below:

(a) *the person was protected from unfair dismissal at the time of being dismissed; and*

(b) *the person has been unfairly dismissed.*

[9] Section 382 of the FW Act explains when a person is protected from unfair dismissal. To be a person protected from unfair dismissal, the person must have completed a period of employment with his or her employer of at least the minimum employment period (section 382(a)); and one or more of the following apply:

(i) *a modern award covers the person;*

(ii) *an enterprise agreement applies to the person in relation;*

(iii) *the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.*

[10] It was uncontested, and I find, that Mr Moiler was a person protected from unfair dismissal within the meaning of section 382 of the FW Act. Mr Moiler commenced employment with the Respondent on 25 April 2017 and was dismissed on 19 March 2025.<sup>1</sup> This is a period of employment that is of at least the minimum employment period. It follows that the requirement in section 382(a) of the FW Act is satisfied. I find that the Meat Industry Award 2020, which is a modern award, covered Mr Moiler<sup>2</sup> and Mr Moiler's sum of annual rate of earnings was less than the high income threshold.<sup>3</sup> It follows that the requirement in section 382(b) of the FW Act is satisfied.

[11] Section 385 of the FW Act explains when a person has been unfairly dismissed. It was uncontested, and I find, that Mr Moiler was dismissed, which means that section 385(a) is satisfied. Section 385(c), which concerns the Small Business Fair Dismissal Code, does not arise for consideration because the Respondent is not a small business employer.<sup>4</sup> It was

uncontested, and I find, that Mr Moiler's dismissal was not a case of genuine redundancy, which means that section 385(d) is satisfied.

### Events leading to dismissal

[12] The Respondent operates an abattoir in Cowra, which is a regional town in the Central West of New South Wales. Animals are slaughtered and processed at the abattoir.<sup>5</sup> The animals arrive at the abattoir at any point during week. However, the animals are only slaughtered and processed between Monday to Friday.<sup>6</sup> Such work is performed by production workers. Mr Moiler was one such production worker.

[13] Mr Moiler was employed by the Respondent for a period just short of eight years.<sup>7</sup> There was no dispute, and I find, that Mr Moiler had not been issued with a written warning for performance or conduct concerns prior to his dismissal.<sup>8</sup> There is a factual dispute whether Mr Moiler received any verbal warnings during his period of employment with the Respondent. I consider that factual dispute in detail below.

[14] There was no dispute, and I find, that Mr Moiler was on annual leave from Monday 24 February 2025 until Friday 28 February 2025. Mr Moiler's first shift back from that period of annual leave was scheduled to be Monday 3 March 2025.<sup>9</sup> For reasons that will be explained in detail below, Mr Moiler did not return to work on Monday 3 March 2025. Mr Moiler did not attend work for a period of 2 weeks following the end of his annual leave. The two week period was the week commencing Monday 3 March 2025 and the week commencing Monday 10 March 2025. Mr Moiler next attended for work on Monday 17 March 2025.<sup>10</sup> The Respondent submits that Mr Moiler took unapproved unauthorised leave in the period from Monday 3 March 2025 to Monday 17 March 2025, and failed to communicate his absence to the Respondent. The Respondent submits that the unapproved absence was a serious breach of Mr Moiler's employment and that Mr Moiler abandoned his employment.<sup>11</sup> I consider the events that occurred in this period in detail below.

[15] The Respondent also takes issue with Mr Moiler's conduct on Monday 17 March 2025. The Respondent alleges that Mr Moiler verbally abused Mr Peter Brown. Mr Brown was the acting foreman that shift as Mr Ryan was on leave. The Respondent further alleges that Mr Moiler displayed a hostile attitude towards other staff, and also left the shift before its completion.<sup>12</sup> I consider these allegations in detail below.

[16] At the start of shift on Tuesday 18 March 2025, which was approximately 5:30 a.m., Mr Rue met with Mr Moiler.<sup>13</sup> Mr Moiler was given a letter, which was before me.<sup>14</sup> The subject of the letter was '*24-Hour Suspension Notice*'. The text of the letter is reproduced below:

You are hereby suspended immediately for 24 hours on full pay due to your actions on 17<sup>th</sup> March 2025.

You are required to attend a formal meeting at Cowra Meat Processors 1:00 PM on 19<sup>th</sup> March 2025 to discuss this matter. You may bring a support person if you wish.

[17] Mr Moiler did not perform work on Tuesday 18 March 2025.

[18] Mr Moiler returned to work and worked on Wednesday 19 March 2025. The shift ended at approximately 12:30 p.m. Mr Moiler then met with Mr Rue and Mr Chris Cummins (owner of the abattoir).<sup>15</sup> Mr Craig Petty attended the meeting with Mr Moiler. Mr Petty attended as Mr Moiler's support person.<sup>16</sup> I consider this meeting in greater detail below. However, for present purposes, it is sufficient to note that Mr Rue advised Mr Moiler of his dismissal and gave Mr Moiler a letter to that effect. The letter of dismissal was signed by Mr Rue and dated 19 March 2025.<sup>17</sup> The text of the letter is reproduced below:

**Subject: Termination of Employment**

Dear Leigh,

Further to your suspension and our subsequent meeting with you on the 18<sup>th</sup> of March 2025 in your position of Meat Process Worker with Cowra Meat Processors Pty Ltd ('Cowra Meats'), we are notifying you of your termination of employment by way of serious misconduct.

Over the past weeks we have endeavoured to contact you to speak to you about your unexplained absences from the 3<sup>rd</sup> of March to the 14<sup>th</sup> of March 2025. During this time, we had limited communication with a family member as to your whereabouts, and at no time did you contact your immediate supervisor, despite our instruction to you and the company process.

When you eventually returned to the workplace on the 17<sup>th</sup> of March 2025. You left your shift early without notifying your supervisor, and subsequently engaged in multiple outburst towards other staff members. This behaviour in the workplace is unacceptable as outlined in our Anti-Harassment, Discrimination and Bullying Policy and the Code of Conduct Policy that you acknowledged on the 3<sup>rd</sup> of July 2024.

Due to the seriousness of these examples, we are terminating your employment with immediate effect on the basis of serious misconduct. You are not required to work out your notice period and you will receive a payment in lieu of notice.

You are required to return all company property, including uniforms and access cards immediately to Bonnie Stewart. Your final pay, including any entitlements, will be processed in accordance with company policy.

Yours sincerely

Wayne Rue  
Production Manager  
Cowra Meat Processors

[19] In answer to some questions from me at the hearing, Mr Rue confirmed that the reasons for Mr Moiler's dismissal also included that it was alleged that Mr Moiler had: (a) made racist comments towards other staff members, (b) engaged in bullying behaviour towards other staff members, (c) refused to follow instructions from management including regarding the need to train other staff, and (d) displayed a hostile attitude towards staff members.<sup>18</sup> Mr Rue confirmed

that none of those four allegations were set out in the letter of dismissal dated 19 March 2025.<sup>19</sup> I consider these four allegations in detail below.

### **Findings in relation to Mr Moiler's absence from work**

[20] On Friday 21 February 2025, Mr Moiler left his home to travel to Dirranbandi, which is a town in Queensland.<sup>20</sup> Mr Moiler was travelling to Dirranbandi to visit his father, Mr Richard Moiler.<sup>21</sup> Mr Richard Moiler resides and works as a caretaker on a station in Dirranbandi.<sup>22</sup> At that time, Mr Richard Moiler had recently had a heart attack and was recovering from major heart surgery.<sup>23</sup> Mr Moiler was travelling in his Ute with Ms Irene Grant.<sup>24</sup> Several hours into the journey, Mr Moiler's Ute began to experience difficulties with a leak of either oil or transmission fluid.<sup>25</sup> On reaching the town of Walgett, Mr Moiler was able to see a mechanic.<sup>26</sup> The mechanic told Mr Moiler that there was a problem with his Ute and that they did not have time to complete the repair.<sup>27</sup> The mechanic told Mr Moiler to keep an eye on the transmission fluid and oil and that Mr Moiler may reach his destination, however, that was not guaranteed.<sup>28</sup> The remaining travel time from Walgett to Dirranbandi was at least two hours.<sup>29</sup> Mr Moiler pressed on, and made it, to Dirranbandi.<sup>30</sup>

[21] On Monday 24 February 2025, Mr Moiler spoke to a mechanic in the town of St George,<sup>31</sup> which is a town in Queensland approximately 40 minutes from Dirranbandi. Mr Moiler's Ute was booked in with the mechanic for Tuesday 25 February 2025.<sup>32</sup> Ms Shay Grant took Mr Moiler's Ute to the mechanic on or about Tuesday 25 February 2025.<sup>33</sup> Mr Moiler was not given any firm date when the Ute would be repaired.<sup>34</sup> It appears that around the time that the Ute was taken to the mechanic that Mr Moiler was told that it could take up to two weeks to repair the Ute.<sup>35</sup> Ultimately, it was not until the afternoon of Monday 10 March 2025 that the Ute was repaired and collected from the mechanic.<sup>36</sup> Notwithstanding what he was told about the period that it could take to repair the Ute, Mr Moiler gave evidence that he did not think that it would actually take as long as it did that repair the Ute.<sup>37</sup> I accept that evidence.

[22] In the period that he was absent from work, Mr Moiler stayed on the station with his father.<sup>38</sup> Mr Moiler was caring for his father in this period.<sup>39</sup> There is a telephone at the station. Mr Moiler gave evidence, which I accept, that he was not allowed to use that telephone.<sup>40</sup> In particular, I accept that Mr Moiler was not allowed to make outgoing telephone calls from that telephone in circumstances where he did receive and take one incoming telephone call from the mechanic.<sup>41</sup> I note that Mr Richard Moiler is allowed to receive telephone calls on that telephone and make outgoing telephone calls on that telephone for work purposes.<sup>42</sup> Mr Moiler gave evidence, which I accept, that he did not have access to Wi-Fi at the station.<sup>43</sup>

[23] There is a factual dispute between the parties in relation to telephone calls between Ms Shay Grant on behalf of Mr Moiler and Ms Taylor concerning Mr Moiler's absence in this period. Mr Moiler did not himself notify his absence to the Respondent.<sup>44</sup> Mr Moiler delegated the notification of his absence to Ms Shay Grant. Ms Shay Grant also travelled up to Dirranbandi in the period in question, albeit in a separate vehicle to Mr Moiler.<sup>45</sup>

[24] As explained above, Mr Moiler was due back at work on Monday 3 March 2025. Ms Shay Grant provided a written statement of events in advance of the hearing.<sup>46</sup> That statement said that telephone conversations occurred between Ms Shay Grant and Ms Taylor on the dates set out below:

- Monday 3 March 2025 (call from Ms Shay Grant to Ms Taylor);
- Thursday 6 March 2025 (call from Ms Shay Grant to Ms Taylor);
- Friday 7 March 2025 (call from Ms Shay Grant to Ms Taylor);
- Sunday 9 March 2025 (missed call from Ms Taylor to Ms Shay Grant);
- Monday 10 March 2025 (call from Ms Shay Grant to Ms Taylor);
- Tuesday 11 March 2025 (call from Ms Shay Grant to Ms Taylor).

[25] Under cross-examination at the hearing, Ms Shay Grant said that she also made a telephone call to Ms Taylor on Tuesday 25 February 2025.<sup>47</sup>

[26] Screenshots from Ms Shay Grant's mobile telephone were before me. The screenshots were for the following periods: 28 February 2025 – 4 March 2025,<sup>48</sup> 4 March 2025 - 7 March 2025,<sup>49</sup> 10 March 2025 - 11 March 2025,<sup>50</sup> 11 March 2025 - Thursday.<sup>51</sup> Ms Shay Grant's screenshots suggest that telephone conversations or activity (i.e. missed calls etcetera) occurred between Ms Shay Grant and Ms Taylor on the dates set out below:

- Monday 3 March 2025;
- Thursday 6 March 2025;
- Tuesday 11 March 2025;
- Wednesday 12 March 2025.

[27] Under cross-examination at the hearing, Ms Shay Grant said that telephone conversations or activity (i.e. missed calls etcetera) occurred between Ms Shay Grant and Ms Taylor on the dates set out below:

- Monday 3 March 2025;<sup>52</sup>
- Thursday 6 March 2025 (Ms Shay Grant said that she made five telephone calls to Ms Taylor on this day and got through, and spoke to, Ms Taylor once);<sup>53</sup>
- Tuesday 11 March 2025 (Ms Shay Grant said that she had made two telephone calls to Ms Taylor and only one such call was picked up by Ms Taylor, and she also received a telephone call from Ms Taylor);<sup>54</sup>
- Wednesday 12 March 2025 (Ms Shay Grant said that she made four unsuccessful telephone calls to Ms Taylor, and she also received a telephone call from Ms Taylor).<sup>55</sup>

**[28]** In both her written statement of events and under cross-examination at the hearing, Ms Shay Grant said that every telephone conversation that she had with Ms Taylor was on speaker phone while she was in the car with her mother (Ms Irene Grant) and her sister-in-law (Ms Jesse Young).<sup>56</sup> A written statement of events from Ms Irene Grant was before me.<sup>57</sup> That statement consisted of six and a half lines. A written statement of events from Ms Jesse Young was before me.<sup>58</sup> That statement consisted of 19 lines. Both statements sought to corroborate Ms Shay Grant's evidence. Those statements were not written in identical terms, but were very similar. For example, I have reproduced below the account given by Ms Irene Grant and Ms Jesse Young of the telephone conversation that is said to have occurred between Ms Shay Grant and Ms Taylor on Thursday 6 March 2025:

Ms Irene Grant's account:

*.... on the 6<sup>th</sup> I was also with Shay Grant when she had called Steph saying that the mechanics had just ordered the parts and that it will take up two weeks for the parts to arrive. She also had explained what was wrong with the Ute and Steph had then said she knows nothing about cars and that she would also let Leigh Moilers supervisor know was happing (sic).*

Ms Jesse Young's account:

*I was also with Shay Grant on the 6<sup>th</sup> Shay had called Steph letting her know about the Ute. Shay also had told Steph what was wrong with the Ute. Steph had then said that she knows nothing about Utes and that she would let Leigh Moiler supervisor know what was going on.*

**[29]** Ms Taylor provided a witness statement in advance of the hearing.<sup>59</sup> In very summary terms, Ms Taylor said that she received two missed calls from Ms Shay Grant on Monday 3 March 2025, and shortly thereafter she returned the calls and spoke to Ms Shay Grant for about one minute on the afternoon of Monday 3 March 2025. Ms Taylor denied that she had any further telephone conversations with Ms Shay Grant after Monday 3 March 2025. Attached to Ms Taylor's statement was a record that she obtained from her telecommunications provider (Telstra) of all outgoing telephone calls and text messages from her mobile phone in the period from 1 March 2025 to 31 March 2025.<sup>60</sup> Ms Taylor's evidence was not seriously challenged or undermined under cross-examination.<sup>61</sup> I asked some questions of Ms Taylor at the hearing, which were focused on the basis upon which Ms Taylor denied that that certain telephone conversations were had with Ms Shay Grant in the period.<sup>62</sup> In answering my questions at the hearing, Ms Taylor denied that she received a telephone call and spoke to Ms Shay Grant on Tuesday 25 February 2025.<sup>63</sup>

**[30]** Having carefully considered the material before me and with the benefit of observing both Ms Shay Grant and Ms Taylor give evidence at the hearing, I prefer the evidence of Ms Taylor. That is, I find that the telephone calls, activity and conversations that occurred between Ms Shay Grant and Ms Taylor in the period to be consistent with Ms Taylor's evidence. I reject Ms Shay Grant's evidence. My reasons for making this finding are explained below.

**[31]** One, Ms Shay Grant's written statement of events was inconsistent with the screenshots from Ms Shay Grant's mobile telephone that were before me. In her written statement of events,

Ms Shay Grant said that on Monday 10 March 2025 that she called Ms Taylor.<sup>64</sup> The screenshots from Ms Shay Grant's mobile telephone for the period 10 March 2025 to 11 March 2025<sup>65</sup> does not record a telephone call from Ms Shay Grant to Ms Taylor (or an incoming call received from Ms Taylor). This inconsistency between Ms Shay Grant's own records and Ms Shay Grant's written statement of events is a clear example of Ms Shay Grant's unreliability as a witness.

**[32]** Two, Ms Shay Grant's oral evidence at the hearing was inconsistent with the screenshots from Ms Shay Grant's mobile telephone that was before me. In her oral evidence at the hearing, Ms Shay Grant said that on Tuesday 11 March 2025, that she made two telephone calls to Ms Taylor and only one such call was picked up by Ms Taylor, and she also received a telephone call from Ms Taylor.<sup>66</sup> Ms Shay Grant's screenshots for Tuesday 11 March 2025 record that Ms Shay Grant made four outgoing telephone calls to Ms Taylor on Tuesday 11 March 2025.<sup>67</sup> Ms Shay Grant agreed in cross-examination that the phone symbol underneath the name of the person is indicative of an outgoing call from her mobile telephone.<sup>68</sup> Ms Shay Grant's screenshots for Tuesday 11 March 2025 record that Ms Shay Grant received three telephone calls from Ms Taylor on that day.<sup>69</sup> This inconsistency between Ms Shay Grant's own records and Ms Shay Grant's oral evidence is another clear example of Ms Shay Grant's unreliability as a witness.

**[33]** Three, Ms Taylor's account of her outgoing telephone calls was corroborated by records that she said, and I accept, were obtained from Telstra. The Telstra record relied upon by Ms Taylor evidences an outgoing call made by Ms Taylor to Ms Shay Grant on the afternoon of Monday 3 March 2025. The Telstra record relied upon by Ms Taylor does not evidence outgoing calls made by Ms Taylor to Ms Shay Grant on Sunday 9 March 2025, Tuesday 11 March 2025 and Wednesday 12 March 2025. In her evidence before the Commission, Ms Shay Grant said that Ms Taylor made outgoing calls to her on those dates. That evidence is not corroborated by the Telstra records relied upon by Ms Taylor. Ms Shay Grant's account is corroborated by screenshots that she took in this period and the account of her mother and sister-in-law. In assessing the credibility of Ms Shay Grant and Ms Taylor, I place greater reliance upon the records provided by Telstra over screenshots taken by Ms Shay Grant and the account of close family members.

**[34]** Four, I am satisfied that Ms Shay Grant's account of the telephone conversations in this period is most unlikely. For example, in her written statement of events, Ms Shay Grant said that Ms Taylor tried to call Ms Shay Grant on 9 March 2025.<sup>70</sup> That was a Sunday. It is inherently unlikely that Ms Taylor (who works as a payroll officer) would have called Ms Shay Grant to discuss Mr Moiler's absence from work on a Sunday.

**[35]** Five, I do not accept that the screenshots taken by Ms Shay Grant are reliable. In cross-examination, Ms Freeman squarely put to Ms Shay Grant that the screenshots were not reliable. Ms Freeman put to Ms Shay Grant that she had changed someone else's number or name in her mobile phone to 'Steph Work' (which is how Ms Taylor was saved as a contact in Ms Shay Grant's mobile phone). Ms Freeman put to Ms Shay Grant that would explain the screenshots that identify a call to or from 'Steph Work' on Monday 3 March 2025 being in the colour grey whereas the screenshots that identify a call to or from 'Steph Work' after that date – which Ms Taylor denies occurred – being in a pinky-purple colour.<sup>71</sup> Ms Shay Grant denied that she altered her screenshots.<sup>72</sup> I do not accept that denial. I am satisfied that Ms Shay Grant did alter

her screenshots as alleged. In my view, Ms Shay Grant did this in a misconceived attempt to assist her father. I take the same view with the evidence of Ms Irene Grant and Ms Jesse Young, which as I have noted above was short and very similar.

[36] In the course of closing oral submissions, I raised with Ms Freeman if I was satisfied that Ms Shay Grant had altered her screenshots whether there was any evidence that Mr Moiler had colluded with Ms Shay Grant.<sup>73</sup> Ms Freeman confirmed there was no such evidence.<sup>74</sup> Critically, Mr Moiler was not put on notice that such an adverse finding may be made against him. As should be evident from the above, the evidence given by Ms Shay Grant was entirely unsatisfactory and unreliable. I am satisfied that her evidence was deliberately unreliable. If I was satisfied on the evidence that Mr Moiler had colluded with Ms Shay Grant in her giving that evidence, and been on notice and given a fair opportunity to respond to any such adverse finding, I would have given significant weight to those matters, especially in determining whether a remedy was appropriate. However, there is no such evidence. Mr Moiler was not on notice of the potential for such an adverse finding. In those circumstances, it is not appropriate for me to give any further consideration to this issue.<sup>75</sup>

[37] For the reasons explained above, the findings that I make about the telephone conversations between Ms Shay Grant and Ms Taylor are based on accepting Ms Taylor's evidence.<sup>76</sup> As such, I find that on Monday 3 March 2025, that Ms Shay Grant made two telephone calls to Ms Taylor. There were at 2:34 p.m and 2:35 p.m. respectively. Ms Taylor did not answer either call. At 2:45 p.m. on Monday 3 March 2025, Ms Taylor made a telephone call to Ms Shay Grant. Words to the following effect were said:

Ms Shay Grant: *"Dad is stuck where he went up to his dad last week. His car is broken down and we are still waiting for it to be fixed. There isn't any mobile reception so dad can't call. I have to drive into town to make the call. Dad will be back at work next week."*

Ms Taylor: *"Your dad will need to call Mick and speak with him about this."*

Ms Shay Grant: *"Dad can't use his phone."*

Ms Taylor: *"Why can't he use your phone."*

Ms Shay Grant: *"Ok."*

[38] After that telephone call, Ms Taylor sent an email to Mr Rue.<sup>77</sup> The text of the email is reproduced below:

Hey Ruey

I got a call from Shay Grant this afternoon about Leigh.

Apparently Leigh is;

- Stuck wherever he went to last week
- Car is broken down and waiting to get it fixed
- Doesn't have mobile reception where they are
- Shay had to "come into town to make a call"
- Expects to be back at work next week

I asked her to get Leigh to call Mick

[39] I am satisfied based on Ms Taylor's evidence that there were no further telephone conversations between Ms Shay Grant and Ms Taylor after that single telephone conversation on the afternoon of Monday 3 March 2025.

[40] In the course of the telephone conversation on the afternoon of Monday 3 March 2025, Ms Taylor told Ms Shay Grant that Mr Moiler would need to speak to Mick. Mick is Mr Ryan. In cross-examination, Ms Shay Grant confirmed that Ms Taylor said to her during the telephone conversation on the afternoon of Monday 3 March 2025 that Mr Moiler needed to contact Mick.<sup>78</sup> However, there is no actual evidence that Ms Shay Grant relayed that message to Mr Moiler. In cross-examination, Ms Shay Grant was not asked whether she relayed that message to Mr Moiler. Under cross-examination, Mr Moiler said that Ms Shay Grant did not relay the message that Mr Moiler was to contact Mr Ryan.<sup>79</sup> Having observed Mr Moiler give his evidence, I am satisfied that the evidence he gave was truthful. I accept Mr Moiler's evidence that Ms Shay Grant did not tell him that he had been asked by Ms Taylor to contact Mr Ryan.

[41] Mr Ryan gave evidence, which I accept, that he called Mr Moiler on Facebook messenger on Monday 3 March 2025, Monday 10 March 2025 and Wednesday 12 March 2025. Mr Ryan's evidence was that on each occasion, the call rung out without being picked up. Mr Ryan's evidence, which was unchallenged, was that Mr Moiler always uses Facebook messenger to telephone.<sup>80</sup> Mr Ryan gave evidence at the hearing that Facebook messenger is a communication platform that is used to communicate between workers and supervisors when they are not at work, for things such as an absence from work.<sup>81</sup> Mr Rue was cross-examined on that point and his evidence was that Facebook messenger is not a usual way for employees to notify their absence.<sup>82</sup>

[42] I am satisfied based on the evidence of Ms Stewart, Mr Rue and Mr Ryan that the Respondent made no effort to contact Mr Moiler in the period, other than the three calls made by Mr Ryan made over Facebook messenger on Monday 3 March 2025, Monday 10 March 2025 and Wednesday 12 March 2025.<sup>83</sup> In cross-examination, Mr Moiler was asked whether he received the Facebook messenger calls and looked at Facebook messenger in this period. Mr Moiler's responses were that he did not know that he received the Facebook messenger calls and hardly looked at his phone in this period because there was no service.<sup>84</sup> I accept Mr Moiler's evidence that he was unaware of the Facebook messenger calls and hardly looked at his phone in this period especially because there was no Wi-Fi at the station.

[43] Mr Moiler's evidence was that he asked Ms Shay Grant to ask another production worker at the abattoir, Clancy Scanlon, to notify the Respondent of his absence from work. Mr Scanlon was feeding Mr Moiler's dogs while he was away at Dirranbandi.<sup>85</sup> Mr Ryan's evidence, which I accept is that Mr Scanlon did not speak to him about Mr Moiler's absence from work.<sup>86</sup> I note this issue in giving a summary of the facts surrounding Mr Moiler's absence from work. It is unnecessary to give any further consideration to this issue.

#### **Findings in relation to the events on Monday 17 March 2025**

[44] Mr Moiler returned to work at 5:30 a.m. on Monday 17 March 2025. At the start of shift, the usual procedure is the Foreman will tick off the names of the production workers that

have attended for work that shift.<sup>87</sup> Mr Ryan attended for work at the start of shift and ticked off Mr Moiler's name.<sup>88</sup> Shortly after the start of shift, Mr Ryan went home sick. Mr Peter Brown filled in as the Foreman for the rest of the shift.<sup>89</sup>

[45] Mr Brown retired from employment with the Respondent on 2 May 2025.<sup>90</sup> Mr Brown did not give evidence at the hearing. Mr Brown was overseas at the time of the hearing.<sup>91</sup>

[46] The finish time of the shift is not fixed. Rather, the production workers finish the shift at the end of 'The Kill'. 'The Kill' ends when the last animal to be slaughtered and processed that shift has been slaughtered and processed.<sup>92</sup> That is usually sometime after six or seven and a half hours of work.<sup>93</sup> The production workers get paid eight hours at a minimum for each shift, even if the production workers finish 'The Kill' and leave site in under eight hours.<sup>94</sup> Before leaving site at the end of shift, the production workers must be dismissed by their supervisor.<sup>95</sup>

[47] It appears that on Monday 17 March 2025 that there were delays experienced in processing cattle and pigs.<sup>96</sup> It appears that there may have been some mechanical fault.<sup>97</sup>

[48] In her witness statement, Ms Stewart gave evidence that after lunch on Monday 17 March 2025 she observed Mr Moiler on the CCTV footage on the kill floor. Ms Stewart said that Mr Moiler was standing face to face with another employee and that the conversation was heated and aggressive. Ms Stewart could not hear what was said, however, she said that Mr Moiler was yelling. Ms Stewart said that Mr Moiler had a knife in his hand, however, explained that was not uncommon given his job. Ms Stewart spoke to Mr Rue about her observations and asked Mr Rue to speak to Mr Moiler. In her witness statement, Ms Stewart said that she did not approach Mr Moiler herself because after viewing the CCTV footage she was fearful of her own safety.<sup>98</sup> In answer to some questions from me at the hearing, Ms Stewart said that even though she could not hear what was said that she formed the view that Mr Moiler was yelling based on the body language of both Mr Moiler and the other employee, which included arms waving and head movements.<sup>99</sup> Ms Stewart said that she sent "Wayne up there to see if that was the case".<sup>100</sup> Ms Stewart also said that the other employee was behaving in an aggressive way, however, not to the same degree as Mr Moiler.<sup>101</sup> Ms Stewart also said that swearing can be common on the kill floor, however, the business has gone through significant culture change and that swearing is no longer acceptable.<sup>102</sup>

[49] In his witness statement, Mr Rue gave evidence that at approximately 2:00 p.m. on Monday 17 March 2025 he had a conversation with Ms Stewart. In summary, Ms Stewart explained that she had seen Mr Moiler and another employee having an issue on the CCTV footage, that they were up in each other's faces and that she was concerned it was going to escalate. Ms Stewart also relayed to Mr Rue that she had reports that Mr Moiler had been aggravated during the shift and was shouting abuse at other workers because he wanted to go home. Mr Rue agreed to go to the kill floor to speak to Mr Moiler.<sup>103</sup> Mr Rue explained that he went to the kill floor and saw that the rest of the team were still working, however, Mr Moiler was not there. Mr Rue then spoke to Mr Brown. This conversation was set out in Mr Rue's witness statement and is reproduced below:

Mr Rue: *I am looking for Leigh Moiler. Where has he gone?*

Mr Brown: *He just followed me down the stairs abusing me. He was really aggressive and has really rattled me. He accused me of deliberately stopping the machines and slowing down their shift on purpose. He said I was trying to sabotage their work. He swore at me a few times and was raising his voice. I felt like he was really threatening me.*

*Leigh said he needed to get the hell out of here and shouldn't have to stay at work so long. There have been a few problems with the chain today, but it was fixed and the rest of the team got stuck into it and the shift is still going. I have no idea where he is now. He just stormed off.*

*The real issue today has been Leigh having a go at others along the line swearing at them and telling them to hurry up. He has been abusive towards me and others today.*

Mr Rue: *Do you know where Leigh is he now? I will need to speak to him straight away.*

Mr Brown: *I don't know, he just stormed off after yelling at me. He hasn't asked for permission to leave early or told me that he is leaving.*

Mr Rue then explained that he looked around for Mr Moiler and that he could not see Mr Moiler. Mr Rue said it was apparent to him that Mr Moiler had left the premises even though the shift was still running.

**[50]** As explained above, Mr Brown did not give evidence. The only evidence before me concerning the interaction between Mr Moiler and Mr Brown on Monday 17 March 2025 is Mr Moiler's evidence and the hearsay evidence given by Mr Rue. Mr Moiler was cross-examined about his interaction with Mr Brown. It was put to Mr Moiler that he had an argument with Mr Brown. Mr Moiler disagreed that it was an argument and said that he was voicing his opinion.<sup>104</sup> Mr Moiler said, and I find, that he said words to the effect of: *"It's fucked that it's going this way. It's not the same place that I'd started at"*.<sup>105</sup> It is clear from Mr Moiler's evidence under cross-examination that he expressed his dissatisfaction with the delay experienced and I find that Mr Moiler said words to the effect that it felt like they (being a reference to CMP or management) were trying to slow us down (being a reference to the workers) and that it should not take as long as it did on that shift to process the number of animals.<sup>106</sup> Mr Moiler denied that he raised his voice at Mr Brown.<sup>107</sup> In the absence of anything other than hearsay evidence to the contrary, I accept Mr Moiler's denial.

**[51]** The other employee that was observed by Ms Stewart interacting with Mr Moiler on CCTV on Monday 17 March 2025 was not identified. That employee did not give evidence. The only evidence before me concerning the interaction between Mr Moiler and that unidentified employee is Mr Moiler's evidence and Ms Stewart's evidence based on watching the CCTV. The CCTV footage is only retained for a period of approximately four or five days and consequently was not available to be viewed at the hearing.<sup>108</sup> Mr Moiler was cross-examined about this interaction. I am satisfied that Mr Moiler told this and likely other employees to hurry up.<sup>109</sup> In saying something along those lines, I am satisfied that Mr Moiler was swearing, however, I accept that Mr Moiler was not swearing at this unidentified employee.<sup>110</sup> Mr Moiler could not recall having an argument, yelling, or standing up very close to this unidentified employee.<sup>111</sup> I am satisfied based on Ms Stewart's evidence that Mr Moiler

and this unidentified employee were standing in close proximity to each other. Given Ms Stewart was unable to hear what was said, I do not accept Ms Stewart's evidence that Mr Moiler was yelling. I am satisfied that Mr Moiler was speaking in a loud voice, but short of yelling. A loud voice was used in a noisy workplace.<sup>112</sup> I am satisfied that this interaction can be best described as an argument. However, I am not satisfied that Mr Moiler is solely responsible for this argument or even initiated the argument. Even on Ms Stewart's evidence, it appears that the unidentified employee was behaving in a similar manner to Mr Moiler. The adage that it takes two to tango appears to be an apt description of this argument.

**[52]** The other employees that Mr Moiler is said to have been abusive towards on Monday 17 March 2025 were not identified. No such employees gave evidence. The only evidence before me concerning any such interactions is Mr Moiler's evidence, the hearsay evidence of Mr Rue and the hearsay evidence of Ms Stewart. In cross-examination, it was put to Mr Moiler that he had abused other staff members on the production line on that day. Mr Moiler denied the allegation.<sup>113</sup> In the absence of anything other than hearsay evidence to the contrary, I accept Mr Moiler's denial. It was put to Mr Moiler that he had sworn at other staff members on the production line on that day.<sup>114</sup> Mr Moiler's answer to that question is reproduced below:

Mr Moiler: *"I probably did swear, but we all swear, so I didn't think there was any problems."*

**[53]** I accept Mr Moiler's evidence that he swore, and told these other staff members to hurry up.<sup>115</sup> I also accept Mr Moiler's evidence that swearing at the abattoir is common. That is consistent with Mr Stewart's evidence, albeit noting that Ms Stewart's evidence about the cultural change that is being implemented at the abattoir. I am unsurprised that the production workers frequently and commonly swear on the kill floor at the abattoir, or at least that swearing was more prevalent throughout Mr Moiler's period of employment at the abattoir.

**[54]** In cross-examination, Mr Moiler denied that he left the shift before its completion of Monday 17 March 2025. In summary, Mr Moiler said that there were four pigs to process and that he went to the bathroom. Mr Moiler said that Jay Bird, another production worker, 'cut him out', which means that Mr Bird took over Mr Moiler's duties for the period that Mr Moiler was in the bathroom. Mr Moiler said that when he came out of the bathroom, 'The Kill' was complete.<sup>116</sup> Mr Moiler did not obtain permission from the supervisor to leave the site.<sup>117</sup>

**[55]** At the hearing, I asked some questions of Mr Rue about his evidence that Mr Moiler had left the shift before its completion. Mr Rue said that 'The Kill' stopped about 30 to 40 minutes after he started to look for Mr Moiler.<sup>118</sup> Mr Rue said that he looked for Mr Moiler for a good 10 to 15 minutes.<sup>119</sup> Mr Rue said that he checked the area where Mr Moiler was supposed to be working that shift first and then checked other areas for Mr Moiler.<sup>120</sup> Mr Rue did not check the bathroom.<sup>121</sup>

**[56]** There is a factual contest between Mr Moiler and Mr Rue concerning whether Mr Moiler left the shift and the site before its completion. With respect to this factual contest, I prefer the evidence of Mr Rue. In particular, I accept Mr Rue's evidence that 'The Kill' stopped about 30 to 40 minutes after he started to look for Mr Moiler. I find it most improbable that Mr Moiler was in the bathroom for that entire period. The same applies with respect to the even shorter period of 10 to 15 minutes that Mr Rue spent looking for Mr Moiler. I find it most improbable

that Mr Moiler was in the bathroom for that entire period. I am satisfied the reason that Mr Rue did not find Mr Moiler was because Mr Moiler had left site. I am satisfied that 'The Kill' was not complete at that stage. It is clear that Mr Moiler was frustrated on the afternoon of Monday 17 March 2025. As much is clear from his interaction with Mr Brown and the argument that he had with the unidentified employee. I am satisfied that Mr Moiler acted on his frustration by leaving the shift and site before its completion. In leaving the shift before its completion, Mr Moiler did not obtain permission from his supervisor. This is contrary to the requirement that production workers can only leave site at the end of shift after first being dismissed by their supervisor.

### **Findings in relation to the events on Tuesday 18 March 2025 & Wednesday 19 March 2025**

[57] As explained above, Mr Moiler was suspended for 24 hours at the start of shift on Tuesday 18 March 2025 and required to attend a meeting at 1:00 p.m. on Wednesday 19 March 2025.<sup>122</sup>

[58] In his written material, Mr Moiler did not explain what was said at the meeting on Wednesday 19 March 2025. It is clear from Mr Rue's evidence as to this meeting,<sup>123</sup> which I accept, that the purpose of the meeting was not to put the allegations to Mr Moiler and seek his response. The purpose of the meeting was to inform Mr Moiler of his dismissal. The meeting was short, no more than 15 to 20 minutes.<sup>124</sup> Mr Rue's evidence as to the discussion at this meeting starts with Mr Rue explaining the reasons for the dismissal. Mr Rue did not put the allegations to Mr Moiler and seek a response from Mr Moiler before deciding whether to dismiss Mr Moiler. Mr Rue said at the hearing that the decision to dismiss Mr Moiler had been made prior to this meeting.<sup>125</sup>

### **Other reasons for dismissal and verbal warnings**

[59] As explained above, Mr Rue confirmed that the reasons for Mr Moiler's dismissal also included that it was alleged that Mr Moiler had: (a) made racist comments towards other staff members, (b) engaged in bullying behaviour towards other staff members, (c) refused to follow instructions from management including regarding the need to train other staff, and (d) displayed a hostile attitude towards staff members.<sup>126</sup> The Respondent referred to the allegations at (a), (b) & (d) in their written submissions and said that Mr Moiler had been spoken to about those matters.<sup>127</sup>

[60] The only evidence before me as to the alleged racist comments towards other staff members was hearsay evidence from Mr Ryan.<sup>128</sup> Mr Ryan did not say that he witnessed Mr Moiler making racist comments. Mr Ryan says that he spoke to Mr Moiler about his language. Under cross-examination, Mr Ryan confirmed that the claims of racist comments were never investigated, Mr Moiler was not given an opportunity to respond and the specific allegations were never put to him.<sup>129</sup> The allegations of racist comments were not put to Mr Moiler during his own cross-examination. I am not satisfied on the evidence before me that Mr Moiler made racist comments at work. I am satisfied that Mr Ryan spoke to Mr Moiler about his language at work. It was no more than that. Mr Ryan's comments were not expressed as a warning.

[61] There was no evidence before me that Mr Moiler engaged in bullying behaviour towards other staff members, refused to follow instructions from management including regarding the need to train other staff, or displayed a hostile attitude towards staff members (other than the events on Monday 17 March 2025). These allegations were not put to Mr Moiler during his cross-examination. It was only put to Mr Moiler that Mr Rue had spoken to Mr Moiler about such conduct. Mr Moiler had no recollection of any such discussions.<sup>130</sup> I am not satisfied on the evidence before me that Mr Moiler engaged in such conduct.

[62] In his witness statement, Mr Ryan alleged that he saw Mr Moiler hand over a bag of drugs to another employee in the hook room. Mr Ryan does not identify the drugs that he says that he saw Mr Moiler give to another employee. Mr Ryan says that in response that he said to Mr Moiler: “*You cannot do that at work Leigh*”.<sup>131</sup> These allegations were not put to Mr Moiler during his cross-examination. The inference that is sought to be drawn from this event is clear. That is, that Mr Moiler distributed illegal drugs at work. Given the type of drugs were not identified by Mr Ryan, I am not satisfied on the evidence before me that it is appropriate to draw that inference or determine that Mr Moiler engaged in misconduct. The evidence before me does not establish what was in any bag handed over by Mr Moiler.

[63] Some of these allegations are incredibly serious. There is no place for racism at work or anywhere else. An employee that makes racist comments towards their colleagues should be disciplined. A disciplinary sanction, which would almost inevitably be dismissal, can be expected if an employee is distributing illegal drugs at work. Speaking generally, such an employee is unlikely to persuade me that their dismissal was unfair. On the Respondent’s argument, Mr Moiler received verbal warnings for engaging in such conduct. A verbal warning is clearly insufficient given the gravity of any such conduct. The impression created by management’s response to these allegations is that workplace behaviour and conduct was managed with a high degree of informality. It does not appear that standards of acceptable behaviour and conduct were rigorously applied and enforced. In making this observation, I note Ms Stewart’s evidence given at the hearing that after Mr Moiler’s dismissal, there has been an almost full management restructure at the abattoir, and formal processes, modern compliance and governance standards are now being met.<sup>132</sup> As a result, Ms Stewart said that there has been a cultural transformation at the abattoir.<sup>133</sup>

[64] There are other examples where the Respondent says that Mr Moiler received a verbal warning.<sup>134</sup> The evidence before me does not establish that Mr Moiler engaged in the conduct that is said to have resulted in the issuing of a verbal warning. These allegations were not put to Mr Moiler during his cross-examination. I make no finding of misconduct against Mr Moiler with respect to such conduct.

[65] I do not accept that Mr Moiler received a verbal warning about any of the allegations discussed above. I accept that that Mr Moiler had been spoken to by his supervisor about his conduct at work, including his language. However, even on the evidence of the witnesses for the Respondent, those discussions do not evidence that Mr Moiler received a verbal warning. That evidence does not establish that Mr Moiler was warned about such conduct. It simply evidences that the supervisor spoke to Mr Moiler about such conduct. I do not consider a supervisor speaking to a worker as a verbal warning unless the supervisor expressly communicates that the discussion is a verbal warning.

## Merits

[66] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

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

[67] In an *Appeal by B, C and D*,<sup>135</sup> a Full Bench of the Commission discussed the phrase "harsh, unjust or unreasonable". The Full Bench held at [53]:

*A determination as to whether a dismissal was harsh, unjust or unreasonable involves the application of a broad discretionary standard. The discretion is nevertheless one that must be exercised judicially, that is, in accordance with applicable legal principles...The classic statement of principle comes from the judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465:*

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

[68] The Full Bench continued at [57]:

*In Byrne v Australian Airlines (1995) 185 CLR 410 at 467 McHugh and Gummow JJ endorsed the observations of Sheppard and Heerey JJ in Bostik (Aust) Pty Ltd v Gorgevski (No 1) [1992] FCA 209; (1992) 36 FCR 20 at 28 in relation to the phrase “harsh, unjust or unreasonable”:*

*“These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge’s view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee’s misconduct.”*

[69] Each of the matters in section 387 of the FW Act must be considered and treated as a matter of significance in the decision making process.<sup>136</sup> However, the Commission is only required to consider those matters insofar as they are relevant to the factual circumstances of the particular case.<sup>137</sup> The weight given to each such relevant matter is a matter for the Commission in coming to an overall conclusion as to whether the dismissal was harsh, unjust or unreasonable.<sup>138</sup>

[70] The matters set out in section 387 of the FW Act are considered below.

**Whether there was a valid reason for the dismissal related to Mr Moiler’s capacity or conduct (including its effect on the safety and welfare of other employees): Section 387(a)**

[71] A Full Bench of the Commission in *Sydney Trains v Gary Hilder*<sup>139</sup> explained that the principles applicable to the consideration required under section 387(a) were well established and reiterated those principles.<sup>140</sup> The reiteration of those principles is reproduced below:

*(1) A valid reason is one which is sound, defensible and well-founded, and not fanciful, spiteful or prejudiced.*

*(2) When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.*

*(3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).*

*(4) For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).*

*(5) Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).*

*(6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.*

*(7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).*

*(8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.*

*(9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable.*

[72] I apply those principles in taking into account section 387(a) of the FW Act. I will consider each allegation made against Mr Moiler and determine whether there was a valid reason for dismissal by reference to each of those allegations.

[73] The first allegation concerned Mr Moiler's being absent from work in the period from Monday 3 March 2025 to Monday 17 March 2025. I have made findings of fact about this event.

[74] An important finding of fact is that Ms Shay Grant spoke to Ms Taylor by telephone on the afternoon of Monday 3 March 2025. I have found the words spoken to be consistent with Ms Taylor's evidence.<sup>141</sup> As such, I am satisfied that Ms Taylor was told that Mr Moiler was out of town, that his Ute had broken down and Mr Moiler was waiting for it to be fixed, and that Mr Moiler did not have any mobile reception, which caused Ms Shay Grant to drive into town to make that telephone call. Ms Taylor's evidence, which I accept, was that Ms Shay Grant said "Dad will be back at work next week". Ms Taylor's email to Mr Rue, which was sent after the telephone call, does not definitively state that Mr Moiler would be back at work next week. It says that Mr Moiler "expects to be back at work next week". In cross-examination, Mr Rue confirmed that he knew that Mr Moiler would be absent for the week commencing Monday 3 March 2025.<sup>142</sup> As such, I do not accept that Mr Moiler failed to notify his absence for the first week of the two week absence. I do not accept that Mr Moiler abandoned his employment for that first week. Mr Moiler's absence for that week commencing Monday 3 March 2025 was

notified to the Respondent. I am satisfied that the Respondent knew that Mr Moiler was experiencing difficulties and that he would not return to work until Monday 10 March 2025, at the earliest.

[75] In closing oral submissions, I asked the parties as to how the concept of abandonment of employment was to be applied in this context.<sup>143</sup> The context being that Mr Moiler's contract of employment does not include a term dealing with abandonment of employment.<sup>144</sup> There is no modern award, enterprise agreement or other industrial instrument applying to Mr Moiler that contains a term dealing with abandonment of employment. Both parties submitted the question of whether Mr Moiler had abandoned his employment should be determined by use of a reasonable person test.<sup>145</sup> I reject those submissions. It was a common feature of many pre-modern awards to include a term dealing with abandonment of employment. Such a term remains in many enterprise agreements. In those circumstances, the concept of abandonment of employment is clear and provides a sensible basis for determining whether there was a sound, defensible or well-founded reason for dismissal where an employee has been absent. The concept of abandonment of employment does not assist in determining whether there was a sound, defensible or well-founded reason where there is no such term in the relevant contract, award, enterprise agreement etcetera. That is because in those circumstances there is a lack of clarity as to what abandonment of employment in that context even means or requires.

[76] I have approached the question of valid reason by reference to any policies, procedures or practices in place at the abattoir at the time of Mr Moiler's absence. Remarkably, I was not taken to a single policy or procedure that Mr Moiler is said to have breached, which specified how Mr Moiler was required to notify his absence.<sup>146</sup> The apparent absence of any such policy or procedure is consistent with my earlier observations that workplace behaviour and conduct appears to have been managed with a high degree of informality. Such informality is also consistent with Mr Moiler delegating the notification of his absence to his daughter. Mr Moiler gave evidence at the hearing, which I accept, that in his eight years at the abattoir that he had never had to ring a manager to advise that he was absent from work. Mr Moiler's evidence, which I accept, was that he had delegated the notification to Ms Shay Grant or another workmate and that there had never been a problem.<sup>147</sup>

[77] Accordingly, I am not satisfied that Mr Moiler has breached any policy or procedure with respect to his absence from work.

[78] However, it remains the case that Mr Moiler failed to notify his absence for the week commencing Monday 10 March 2025 in accordance with the informal practice of someone such as Ms Shay Grant or a workmate notifying his absence. I accept that there were difficulties with respect to communication caused by the lack of Wi-Fi at the station and the like. However, those difficulties were not insurmountable. For example, Mr Moiler was in town on Tuesday 11 March 2025<sup>148</sup> and consequently he could have contacted the Respondent while in town. In all the circumstances, I am satisfied that Mr Moiler's failure to notify his absence in the second week of his two week absence from work is a valid reason for dismissal. That provides a sound, defensible or well-founded reason for dismissal where Mr Moiler failed to notify that absence in accordance with the informal practice of his absence from work being notified by a person such as Ms Shay Grant or workmate.

**[79]** I do not accept that Mr Moiler's failure to contact Mr Ryan about his absence amounts to a valid reason for dismissal. I make that finding because I do not accept that Mr Moiler was made aware that he needed to contact Mr Ryan.

**[80]** The second allegation concerned the interaction between Mr Moiler and Mr Brown on the afternoon of Monday 17 March 2025. I have made findings of fact about this event. I do not accept that Mr Moiler verbally abused Mr Brown. Mr Moiler expressed his frustration at the delay and expressed the opinion that the delays were caused by management. In doing so, Mr Moiler swore while talking to Mr Brown. Mr Moiler did not raise his voice. There was no misconduct in Mr Moiler swearing given my finding that the production workers frequently and commonly swear on the kill floor at the abattoir, or at least did at the time of Mr Moiler's dismissal. There was no misconduct in Mr Moiler expressing his frustration and opinion.

**[81]** In terms of what Mr Moiler said, I am not satisfied that amounts to a valid reason for dismissal. In my view, Mr Moiler was entitled to express his frustration and opinion. I am also not satisfied that the manner by which Mr Moiler delivered those words amounts to a valid reason for dismissal. I am not satisfied that Mr Moiler's interaction with Mr Brown provides a sound, defensible or well-founded reason for dismissal.

**[82]** The third allegation concerned the interaction between Mr Moiler and the unidentified employee. I have made findings of fact about this event. I am satisfied that Mr Moiler argued with this unidentified employee, and told this unidentified employee to hurry up. In doing so, Mr Moiler was swearing. Mr Moiler was not yelling, but using a loud voice. No evidence was given by this unidentified employee. It was unclear on the material before me whether Mr Moiler was solely responsible for the argument or who initiated the argument. It is clear that Mr Moiler and the unidentified employee were participants in the argument. The argument occurred on the kill floor where there is a lot of noise and the production workers frequently and commonly swear (or at least did at the time of Mr Moiler's dismissal). I am not satisfied that Mr Moiler's role in this argument provides a sound, defensible or well-founded reason for dismissal. I am not satisfied that that Mr Moiler's conduct with respect to this allegation is a valid reason for dismissal.

**[83]** The fourth allegation concerns the other employees that Mr Moiler is said to have been abusive towards on Monday 17 March 2025. I have made findings of fact about this allegation. I am not satisfied that Mr Moiler abused these unidentified employees. No evidence was given by any such employee. I have found that Mr Moiler told these employees to hurry up, and in doing so, that he swore. Such conduct occurred on the kill floor where the production workers frequently and commonly swear (or at least did at the time of Mr Moiler's dismissal). I am not satisfied that Mr Moiler's conduct provides a sound, defensible or well-founded reason for dismissal. I am not satisfied that Mr Moiler's conduct with respect to this allegation is a valid reason for dismissal.

**[84]** The fifth allegation concerns an allegation that Mr Moiler left the shift before its completion on Monday 17 March 2025 without seeking permission from his supervisor. I have made findings of fact about this allegation. I have found that Mr Moiler left the shift and site before its completion. I have found that in doing so that Mr Moiler did not obtain permission from his supervisor. Mr Moiler's actions are contrary to the requirement that production workers must only leave site after first being dismissed and obtaining permission from their

supervisor. This requirement is entirely reasonable and sensible, especially in circumstances where the finish time of the shift is not fixed and dependent upon completion of ‘The Kill’. There are obvious issues that arise if a production worker simply decides to leave work before the end of shift without telling anyone. I am satisfied that Mr Moiler’s conduct in leaving the shift and site before the end of shift and without first seeking permission and being dismissed by the supervisor on Monday 17 March 2025 is a sound, defensible or well-founded reason for dismissal. Mr Moiler’s conduct is a valid reason for dismissal.

**[85]** There were several other allegations made against Mr Moiler. These allegations include that Mr Moiler had (a) made racist comments towards other staff members, (b) engaged in bullying behaviour towards other staff members, (c) refused to follow instructions from management including regarding the need to train other staff, and (d) displayed a hostile attitude towards staff members. Mr Rue confirmed in evidence at the hearing that those four reasons formed part of the reasons for Mr Moiler’s dismissal.<sup>149</sup> I am not satisfied on the evidence before me that Mr Moiler engaged in any such conduct. An additional allegation was made that Mr Moiler handed over a bag of drugs to another employee in the hook room. I am not satisfied on the evidence before me that it is appropriate to draw that inference or determine that Mr Moiler engaged in misconduct with respect to this allegation. There were other examples where the Respondent says that Mr Moiler received a verbal warning. I made no finding of misconduct against Mr Moiler with respect to such conduct. In closing oral submissions, Ms Freeman submitted that these other allegations gave rise to a valid reason for dismissal,<sup>150</sup> however, Ms Freeman seemed to acknowledge that not much weight could be placed on those past behaviours.<sup>151</sup> I have made findings of fact about each of these allegations. Based upon those findings of fact, I am not satisfied that any of these allegations amount to a valid reason for dismissal.

**[86]** I have taken into account the reasons for Mr Moiler’s dismissal. I am satisfied that there was a valid reason for Mr Moiler’s dismissal that related to his conduct. The valid reason concerns Mr Moiler failing to notify his absence from the period Monday 10 March 2025 to Monday 17 March 2025, and Mr Moiler leaving the shift and site before the end of shift and without first seeking permission and being dismissed by the supervisor on Monday 17 March 2025. My finding that there was a valid reason weighs against an overall conclusion that Mr Moiler’s dismissal was harsh, unjust or unreasonable.

**Whether Mr Moiler was notified of that reason (section 387(b)) and whether Mr Moiler was given an opportunity to respond to any reason related to his capacity or conduct (section 387(c))**

**[87]** A Full Bench of the Commission in *Mark Bartlett v Ingleburn Bus Services Pty Ltd t/as Interline Bus Service*<sup>152</sup> explained that the relevant principles as to the meaning and application of section 387(b) and (c) was well established.<sup>153</sup> The Full Bench summarised those principles in the terms set out below:

*(1) Each of the matters specified in s 387, including those in paragraphs (b) and (c), must be taken into account as matters of significance, to the extent that they are relevant to the particular case at hand, and given due weight.*

*(2) Proper consideration of s 387(b) requires a finding to be made as to whether the applicant has been notified of “that reason” – that is, the reason for dismissal relating to the capacity or conduct of the applicant found to be valid under s 387(a) – prior to the decision to dismiss being made.*

*(3) Proper consideration of s 387(c) requires a finding to be made as to whether the applicant has been given a real opportunity to respond to the reason for dismissal. As a matter of logic, unless the applicant has been notified of the reason, it is difficult to envisage that it could be found that the applicant has been afforded an opportunity to respond to that reason.*

*(4) Once findings are made in relation to s 387(b) and (c), they may then be weighed together with the other matters required to be taken into account in order to form a conclusion as to whether the applicant’s dismissal was harsh, unjust or unreasonable. Where it is found that the applicant was not notified of the reasons for dismissal and/or was not given an opportunity to respond, a relevant consideration as to the weight to be assigned to this is whether this meant that the applicant was deprived of the possibility of a different outcome in terms of avoiding his or her dismissal.*

**[88]** The Full Bench went on to make a further observation and found that “*where a denial of procedural fairness has been found, the usual approach is that it will not be treated of significance only if it is firmly established that it could have made no difference to the outcome*”.<sup>154</sup>

**[89]** On application of those principles, I am satisfied that Mr Moiler was not notified of the reason for his dismissal relating to his conduct that has been found to be valid under section 387(a). I am satisfied that Mr Moiler was not given an opportunity to respond to any reason related to his conduct.

**[90]** At the start of shift on Tuesday 18 March 2025, Mr Moiler met with Mr Rue. On the material before me, it appears at that meeting Mr Rue told Mr Moiler that he was suspended from work, asked to attend a meeting scheduled for 1:00 p.m. on Wednesday 19 March 2025, told that he could bring a support person along and given a letter, which confirmed those matters.<sup>155</sup> It is clear that Mr Moiler was advised of his suspension and that the Respondent had concerns with his conduct. That meeting did not notify Mr Moiler of the reason for his dismissal relating to his conduct that has been found to be valid under section 387(a), or provide Mr Moiler with an opportunity to respond to any reason related to his conduct.

**[91]** The next relevant event was the meeting held at 1:00 p.m. on Wednesday 19 March 2025. I have made findings of fact about that meeting. Importantly, the decision to dismiss Mr Moiler had been made prior to this meeting. That was the evidence of Mr Rue.<sup>156</sup> In those circumstances, I am satisfied that Mr Moiler was not notified of the reason for his dismissal relating to his conduct that has been found to be valid under section 387(a) or given an opportunity to respond to any reason related to his conduct **prior to the decision to dismiss being made**. As was explained by a Full Bench of the Commission in *Crozier v Palazzo Corporation Pty Ltd*<sup>157</sup> (which concerned provisions under previous legislation):

*As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG (3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.*

[92] There is an additional reason that relates to section 387(c) only. The reasons for Mr Moiler's dismissal included that Mr Moiler is said to have: (a) made racist comments towards other staff members, (b) engaged in bullying behaviour towards other staff members, (c) refused to follow instructions from management including regarding the need to train other staff, and (d) displayed a hostile attitude towards staff members. That was the evidence of Mr Rue.<sup>158</sup> These are not matters that were raised with Mr Moiler when he was advised of his suspension on Tuesday 18 March 2025, in the meeting held on Wednesday 19 March 2025 where he was advised of his dismissal, or even in the letter of dismissal. As much was accepted by Mr Rue.<sup>159</sup> For that reason, I am further satisfied that Mr Moiler was not given an opportunity to respond to any reason related to his conduct.

[93] I have taken into account the matters specified at section 387(b) and (c). My finding that Mr Moiler was not notified of that reason, and Mr Moiler was not given an opportunity to respond to any reason related to his conduct weighs in favour of a conclusion that Mr Moiler's dismissal was harsh, unjust or unreasonable. In assigning weight to these matters, I am satisfied that Mr Moiler was deprived of the possibility of a different outcome. Take Mr Moiler's absence from work as an example. If the Respondent had put Mr Moiler on notice that it was considering terminating his employment in clear and explicit terms and then given Mr Moiler a real opportunity to respond before making any decision to terminate, it may have been possible that Mr Moiler would have been able to fully explain the difficulties that he had with communicating in this period, that he was unaware of the request that he contact Mr Ryan, and that he was unaware of the Facebook messenger calls from Mr Ryan. It is possible that the outcome may not have been dismissal if Mr Moiler had been afforded procedural fairness before his dismissal. The same can be said with respect to the allegations of verbal abuse towards Mr Brown, the unidentified employee, the other employees and the additional reasons referred to in the paragraph above. It is possible that the outcome may not have been dismissal if Mr Moiler had been given a real opportunity to respond to these allegations prior to his dismissal. It is possible that in responding to these allegations that the Respondent may have accepted Mr Moiler's denial of these allegations, or taken the view that any such misconduct by Mr Moiler did not justify dismissal given the fact that he had not previously received a written warning for matters relating to his performance or conduct.

**Any unreasonable refusal by the Respondent to allow Mr Moiler to have a support person to assist at any discussions relating to the dismissal: Section 387(d)**

[94] This matter concerns any unreasonable refusal by the employer to allow the dismissed employee to engage the assistance of a support person. It does not impose a positive obligation on the employer to suggest that the employee may wish to engage the assistance of a support person.

[95] Mr Moiler was invited to bring a support person to the meeting held on Wednesday 19 March 2025. Mr Petty attended that meeting with Mr Moiler.

[96] There was no unreasonable refusal by the Respondent to allow Mr Moiler to have a support person to assist at any discussions relating to the dismissal. This matter weighs against a conclusion that Mr Moiler's dismissal was harsh, unjust or unreasonable.

**If the dismissal related to unsatisfactory performance by Mr Moiler – whether Mr Moiler had been warned about that unsatisfactory performance before the dismissal: Section 387(e)**

[97] Mr Moiler's dismissal did not relate to unsatisfactory performance. This matter is not relevant to the circumstances of this application.

**The degree to which the size of the Respondent's enterprise would be likely to impact on the procedures followed in effecting the dismissal: Section 387(f)**

[98] The Respondent is not a small enterprise. It has a large workforce.<sup>160</sup> The procedures to be followed in effecting dismissal should include very basic principles of procedural fairness.

[99] I have found that the Respondent failed to afford Mr Moiler procedural fairness in effecting the dismissal. The size of the Respondent's enterprise is a matter that I have taken into account in considering the procedures followed in effecting Mr Moiler's dismissal and my ultimate conclusion as to whether Mr Moiler's dismissal was harsh, unjust or unreasonable.

**The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would likely to impact on the procedures followed in effecting Mr Moiler's dismissal: Section 387(g)**

[100] At the time of Mr Moiler's dismissal, the Respondent employed a dedicated human resource management specialist. That was Ms Stewart. Ms Stewart obtained external legal advice in respect of Mr Moiler's dismissal.<sup>161</sup> This is a matter that I have considered in considering the procedures followed in effecting Mr Moiler's dismissal and my conclusion as to whether Mr Moiler's dismissal was harsh, unjust or unreasonable.

**Any other relevant matters that the FWC considers relevant: Section 387(h)**

[101] There are two matters that require consideration pursuant to section 387(h).

[102] The first matter is whether dismissal is proportionate to the gravity of Mr Moiler's misconduct.

[103] Mr Moiler's misconduct included failing to notify his absence from the period Monday 10 March 2025 to Monday 17 March 2025. The failure to notify occurred in circumstances where Mr Moiler did not have ready access to Wi-Fi and was unable to make telephone calls on the telephone at the station. I have found that these difficulties were not insurmountable. However, Mr Moiler did experience difficulties in notifying his absence. This failure to notify also occurred in circumstances where I have found that Ms Shay Grant did notify Mr Moiler's

absence for the previous week. In doing so, I have found that Ms Taylor was told that Mr Moiler was out of town, that his Ute had broken down and was awaiting repair and that “*Dad will be back at work next week*”. Ms Taylor relayed that message to Mr Rue as Mr Moiler “*expects to be back at work next week*”. It is those facts that lead me to find that the Respondent knew that Mr Moiler was experiencing difficulties and that he would not return to work until Monday 10 March 2025, at the earliest. Based upon what Mr Rue was told by Ms Taylor (“*expects to be back at work next week*”) it should have been apparent to Mr Rue that there was the possibility that Mr Moiler would not be back at work on Monday 10 March 2025.

**[104]** My overall assessment is that there was poor communication on the part of Mr Moiler. However, it is not the case that there was no communication from Mr Moiler. Mr Moiler’s poor communication meant the Respondent was unsure when, and if, Mr Moiler would return to work. I think that explains why Mr Ryan called Mr Moiler on Facebook messenger on Monday 10 March 2025 and again on Wednesday 12 March 2025. The fact that such calls were made in a period where Mr Moiler had not notified his absence suggests that the Respondent understood that Mr Moiler may attempt to return to work after Monday 10 March 2025.

**[105]** Such poor communication also occurred in a workplace where workplace behaviour and conduct at the abattoir appears to have been managed by a high degree of informality. I reiterate that I was not taken to a single policy or procedure that specified how Mr Moiler was required to notify his absence. Given the size of the Respondent, I find that surprising.

**[106]** Mr Moiler’s misconduct also included leaving the shift and site before the end of shift and without first seeking permission and being dismissed by the supervisor on Monday 17 March 2025. Unlike Mr Moiler’s misconduct in failing to notify his absence from the period Monday 10 March 2025 to Monday 17 March 2025, there is little by way of mitigation with respect to this issue. Mr Moiler should not have left the shift and site in the circumstances. As already explained, I accept that there are obvious issues that arise if a production worker simply decides to leave work before the end of shift without telling anyone. These are matters that I have taken into account when assessing whether dismissal is proportionate to the gravity of Mr Moiler’s misconduct.

**[107]** The final factor that I have taken into account is Mr Moiler’s disciplinary history. Mr Moiler was employed by the Respondent for a period just short of eight years. I have found that Mr Moiler had not been issued with a written warning for performance or conduct concerns prior to his dismissal. I have found that Mr Moiler had been spoken to by his supervisor about his conduct at work, including his language. However, I have found that such conversations did not amount to a verbal warning. Based on those findings, I am satisfied that throughout Mr Moiler’s near eight years of employment with the Respondent that he had not received a single warning for concerns relating to his performance or conduct.

**[108]** The above finding also demonstrates that Mr Moiler’s misconduct were isolated events. The evidence does not indicate that Mr Moiler has repeatedly failed to notify absences from work, or that Mr Moiler had repeatedly left the shift and site before the end of shift and without first seeking permission and being dismissed by the supervisor.

[109] Taking all of those matters into account, I am satisfied that dismissal is disproportionate to the gravity of Mr Moiler's misconduct. This is a matter that weighs in favour of a conclusion that Mr Moiler's dismissal was harsh, unjust or unreasonable.

[110] The second matter is consideration of the consequences of dismissal on Mr Moiler's personal and economic circumstances. Written submissions were made for Mr Moiler going to these matters. In summary terms, it was submitted that Mr Moiler left school at the age of 15 to work at an abattoir and that he has worked in the meat industry for the past 25 years. It was submitted that there are no other comparable employment opportunities in the meat industry in or around Cowra. This submission was contested by the Respondent.<sup>162</sup> It was submitted on behalf of Mr Moiler that he had been unable to find alternative employment and that the dismissal had caused significant financial hardship for Mr Moiler.<sup>163</sup> Mr Moiler put on no evidence about any of these matters. It fell to me to ask some questions of Mr Moiler at the hearing to gain some detail about some of these matters. As a result of my questions, it appears that, at least as of the date of the hearing, Mr Moiler had not looked for employment because he was injured.<sup>164</sup>

[111] I do not intend to make a finding that the consequences of dismissal on Mr Moiler's personal and economic circumstances is a matter that weighs in favour of a conclusion that Mr Moiler's dismissal was harsh, unjust or unreasonable based on submissions alone. Evidence should have been put on by Mr Moiler about these matters if an argument was to be made on this ground. That would have given the Respondent a proper opportunity to consider and test any such evidence, and enable the Commission to properly evaluate any such evidence.

#### **Overall conclusion whether Mr Moiler's dismissal was harsh, unjust or unreasonable**

[112] I have taken into account and made findings with respect to each of the matters in section 387 that are relevant to the circumstances of this application.

[113] I have found there is one such matter that weighs against a conclusion that Mr Moiler's dismissal was harsh, unjust or unreasonable. That being, there was a valid reason for Mr Moiler's dismissal related to his conduct.

[114] I have found that there are three such matters that weighs in favour of a conclusion that Mr Moiler's dismissal was harsh, unjust or unreasonable. Those matters are: (1) Mr Moiler was not notified of the reason, (2) Mr Moiler was not given an opportunity to respond to any reason related to his conduct, (3) dismissal was disproportionate to the gravity of Mr Moiler's misconduct. I give little weight to the fact that there was no unreasonable refusal by the Respondent to allow Mr Moiler to have a support person present to assist in any discussions relating to dismissal. I give that little weight because the denial of procedural fairness significantly outweighs the fact that there was no such unreasonable refusal. In weighing up the denial of procedural fairness, I have taken into account the size of the Respondent's enterprise and that the Respondent had a dedicated human resource management specialist and that person sought external legal advice.

[115] Having considered and weighed each of the relevant matters in section 387 of the FW Act both individually and collectively, I am satisfied that Mr Moiler's dismissal was harsh, unjust or unreasonable. Consequently, and consistent with my findings made above with respect

to section 385(a), (c) & (d) of the FW Act, I find that Mr Moiler was unfairly dismissed. My consideration as to remedy is set out below.

## Remedy

[116] The question whether to order a remedy in a case where a dismissal has been found to be unfair is a discretionary one.<sup>165</sup>

[117] Mr Moiler's claim for reinstatement was opposed by the Respondent.<sup>166</sup>

[118] A Full Bench of the Commission in *Thinh Xuan Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter*<sup>167</sup> held "Subsection 390(3) underscores the primacy of reinstatement as a remedy for an unfair dismissal as the discretion to order a remedy of compensation may only be exercised if the Commission is satisfied that reinstatement is 'inappropriate'... The relevant question in determining whether to grant the remedy of reinstatement of an employee in relation to a dismissal that is found to have been 'unfair' is whether reinstatement is appropriate in the particular case".

[119] The Full Bench went on to observe that "*The most common argument advanced in support of the proposition that reinstatement is inappropriate is the proposition, variously expressed, that there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship.*"<sup>168</sup>

[120] The Respondent opposed Mr Moiler's reinstatement on similar grounds. In very summary terms, the Respondent submitted that there was significant fear if Mr Moiler was to return to the workplace.<sup>169</sup> That fear appears to be based on Mr Moiler's behaviour.<sup>170</sup> A concern was also expressed about the impact that any reinstatement may have on morale at the abattoir.<sup>171</sup>

[121] The Full Bench then extracted<sup>172</sup> a widely cited passage from a judgment of the Full Court of the Industrial Relations Court in *Perkins v Grace Worldwide (Aust) Pty Ltd*, where the Court held:

*Trust and confidence is a necessary ingredient in any employment relationship... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.*

*At the same time, it must be recognised that, where an employer, or a senior officer of an employer, accuses an employee of wrongdoing justifying the summary termination of the employee's employment, the accuser will often be reluctant to shift from the view that such wrongdoing has occurred, irrespective of the Court's finding on that question in the resolution of an application under Division 3 of Part VIA of the Act.*

*If the Court were to adopt a general attitude that such a reluctance destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement impracticable, an employee who was terminated after an accusation of*

*wrongdoing but later succeeded in an application under the Division would be denied access to the primary remedy provided by the legislation. Compensation, which is subject to a statutory limit, would be the only available remedy. Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of a loss of confidence in the employee.*

*Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of the employer, or some other person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who is required to handle highly confidential information. But those are relatively uncommon situations. In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.*

*It may be difficult or embarrassing for an employer to be required to re-employ a person the employer believed to have been guilty of wrongdoing. The requirement may cause inconvenience to the employer. But if there is such a requirement, it will be because the employee's employment was earlier terminated without a valid reason or without extending procedural fairness to the employee. The problems will be of the employer's own making. If the employer is of even average fair-mindedness, they are likely to prove short-lived. Problems such as this do not necessarily indicate such a loss of confidence as to make the restoration of the employment relationship impracticable.*

**[122]** The Full Bench distilled the propositions concerning the impact of a loss of trust and confidence that are set out below on the question of whether reinstatement is appropriate.

- *Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.*
- *Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.*
- *An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.*

- *The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.*
- *The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.*

[123] Finally, the Full Bench held that “ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party”.<sup>173</sup>

[124] I am not satisfied that the fear expressed by Ms Stewart and the Respondent about Mr Moiler's reinstatement is soundly or rationally based. Those fears appear to be based on Mr Moiler's behaviour. I have found that several of the reasons for Mr Moiler's dismissal either had not been made out or did not occur in the manner alleged by the Respondent. For example, I have found that Mr Moiler did not verbally abuse Mr Brown. Rather, Mr Moiler expressed his frustration at the delay and expressed the opinion that the delays were caused by management. In speaking to Mr Brown, Mr Moiler did swear, but did not raise his voice. I have found that Mr Moiler got into an argument with an unidentified employee, and that he was swearing and using a loud voice, but not yelling. I have found that Mr Moiler told this unidentified employee and other employees to hurry up, and in doing so, that Mr Moiler swore. I do not accept that Mr Moiler's behaviour, which occurred on the kill floor where the production workers frequently and commonly swear (or at least did at the time of Mr Moiler's dismissal) gives rise to a sound or rational basis for the fear expressed by Ms Stewart and the Respondent. I do not accept that Mr Moiler's behaviour renders reinstatement inappropriate.

[125] The same can be said with respect to the reasons for dismissal that include allegations that Mr Moiler had (a) made racist comments towards other staff members, (b) engaged in bullying behaviour towards other staff members, (c) refused to follow instructions from management including regarding the need to train other staff, and (d) displayed a hostile attitude towards staff members. I have found on the evidence before me that Mr Moiler did not engage in any such conduct. I was not satisfied on the evidence before me that Mr Moiler engaged in misconduct with respect to the allegation concerning drugs. I made no findings of misconduct with respect to the other examples where the Respondent says that Mr Moiler received a verbal warning. Given those are my findings, I do not accept that any of those instances of Mr Moiler's behaviour gives rise to a sound or rational basis for the fear expressed by Ms Stewart and the Respondent. I do not accept that Mr Moiler's behaviour renders reinstatement inappropriate.

[126] I have made adverse findings against Mr Moiler with respect to Mr Moiler's failure to notify his absence, and Mr Moiler leaving the shift and site before the end of shift without first seeking permission and being dismissed by the supervisor. I have found that such conduct gives rise to a valid reason for dismissal. However, none of that conduct involves conduct that gives rise a sound or rational basis for the fear expressed by Ms Stewart and the Respondent. I do not accept that those are matters that renders reinstatement inappropriate.

[127] There is no evidence and I am not satisfied that the reinstatement of Mr Moiler would have any impact on morale at the abattoir.

[128] I am fortified in my view that reinstatement is appropriate in light of the changes that Ms Stewart explained have been made at the abattoir. Ms Stewart explained that there had been an almost full management restructure at the abattoir, and formal processes, modern compliance and governance standards are now being met, and there had been a change to the culture. Reduced to one sentence summary of this decision, I have found that Mr Moiler was unfairly dismissed and have ordered his reinstatement because he deserves a second chance. It appears that Mr Moiler will return to a workplace with a new management team, formal processes and a new culture. It will be up to Mr Moiler to make the most of his second chance. I am satisfied that formal processes and a new culture will greatly assist in ensuring that appropriate standards of behaviour and conduct are met at the abattoir, including by Mr Moiler.

[128] I am satisfied that it is appropriate to grant a remedy. Pursuant to section 391(1) of the FW Act, I am satisfied that an order of reinstatement is appropriate in all the circumstances.

[129] Pursuant to section 391(2) of the FW Act, I am satisfied that it is appropriate in all the circumstances to make an order to maintain the continuity of Mr Moiler's employment with the Respondent, and the period of Mr Moiler's continuous service with the Respondent.

[130] Section 391(3) of the FW Act provides that an order to restore lost pay may be made. Such an order is conditional upon it being appropriate to make such an order. In determining an amount to be ordered, I am required by section 391(4) of the FW Act to take into account:

*(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and*

*(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.*

[131] I consider it appropriate to make an order to restore lost pay. However, there was very little to no material put before me with respect to the matters that section 391(4) requires me to take into account. Accordingly, I am unable to presently determine any such amount. I will issue further directions to obtain sufficient material so that I can take into account the matters specified at section 391(4) of the FW Act. I will further add that there will be a significant deduction from any amount of lost pay that is ordered. That deduction is made in circumstances where my ultimate conclusion that dismissal was harsh, unjust or unreasonable was finely balanced, especially given that I have found there was a valid reason for Mr Moiler's dismissal.

## **Conclusion**

[132] I find that Mr Moiler's dismissal was harsh, unjust or unreasonable. I find that Mr Moiler was unfairly dismissed. I am satisfied that an order of reinstatement and an order to maintain continuity is appropriate. I am satisfied that an order to restore lost pay is appropriate,

however, I am not able to make such an order on the material that was put before me. An order and further directions will be issued separately to this decision.



COMMISSIONER

*Appearances:*

Ms Cathy-May Gill, For the Applicant

Ms Samantha Freeman, For the Respondent

*Hearing details:*

Sydney by Video using Microsoft Teams

2025

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<sup>1</sup> Digital Hearing Book (**DHB**) pages 9, 51.

<sup>2</sup> DHB page 51.

<sup>3</sup> DHB, page 52.

<sup>4</sup> DHB, page 52.

<sup>5</sup> PN961.

<sup>6</sup> PN961.

<sup>7</sup> DHB pages 9, 10, 51.

<sup>8</sup> PN522, PN524, PN982.

<sup>9</sup> DHB page 79.

<sup>10</sup> DHB page 81.

<sup>11</sup> DHB pages 63 – 64.

<sup>12</sup> DHB page 64.

<sup>13</sup> PN398 – PN403.

<sup>14</sup> DHB page 74.

<sup>15</sup> PN443.

<sup>16</sup> PN444 – PN448.

<sup>17</sup> DHB pages 75 – 76.

<sup>18</sup> PN1300 – PN1304.

<sup>19</sup> PN1306.

<sup>20</sup> DHB, page 23.

<sup>21</sup> DHB, page 23.

<sup>22</sup> PN219 – PN220.

<sup>23</sup> DHB, page 29.

<sup>24</sup> PN137.

<sup>25</sup> DHB, page 23.

<sup>26</sup> PN142, PN155.

<sup>27</sup> PN148.

<sup>28</sup> PN147 – PN148, PN157 – PN158.

<sup>29</sup> PN162.

<sup>30</sup> DHB, page 23.

<sup>31</sup> DHB, page 23.

<sup>32</sup> PN165.

<sup>33</sup> PN197 – PN198.

<sup>34</sup> PN186, PN199, PN201.

<sup>35</sup> PN186, PN190.

<sup>36</sup> DHB page 23, PN179 – PN180.

<sup>37</sup> PN202, PN205.

<sup>38</sup> PN233.

<sup>39</sup> PN233.

<sup>40</sup> PN227.

<sup>41</sup> PN245.

<sup>42</sup> PN210, PN226.

<sup>43</sup> PN242 – PN243.

<sup>44</sup> PN264.

<sup>45</sup> PN612 – PN614.

<sup>46</sup> DHB pages 27 – 28.

<sup>47</sup> PN826 – PN828.

<sup>48</sup> DHB, page 17.

<sup>49</sup> DHB, page 18.

<sup>50</sup> DHB, page 19.

<sup>51</sup> DHB, page 20. The reference to Thursday may be a reference to Thursday 13 March 2025.

<sup>52</sup> PN615 – PN621.

<sup>53</sup> PN627 – PN628.

<sup>54</sup> PN629 – PN634, PN657.

<sup>55</sup> PN659 – PN665.

<sup>56</sup> DHB, page 28. PN628, PN666, PN779.

<sup>57</sup> DHB, page 31.

<sup>58</sup> DHB, page 30.

<sup>59</sup> DHB, pages 82 – 98.

<sup>60</sup> PN1032 – PN1034, PN1073 – PN1075.

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- <sup>61</sup> PN1046 – PN1053.
- <sup>62</sup> PN1054 – PN1090.
- <sup>63</sup> PN1061 – PN1069.
- <sup>64</sup> DHB, page 27.
- <sup>65</sup> DHB, page 19.
- <sup>66</sup> PN629 – PN634, PN657.
- <sup>67</sup> DHB, pages 19 – 20.
- <sup>68</sup> PN741 – PN744.
- <sup>69</sup> DHB, page 19.
- <sup>70</sup> DHB, page 27.
- <sup>71</sup> PN739 – PN781.
- <sup>72</sup> PN770 – PN772.
- <sup>73</sup> PN1487 – PN1488, PN1491.
- <sup>74</sup> PN1491.
- <sup>75</sup> *Roland Barber v Veolia Recycling and Recovery Pty Ltd* [\[2025\] FWCFCB 141](#) at [30] - [32].
- <sup>76</sup> DHB, pages 82 – 83.
- <sup>77</sup> DHB, page 86.
- <sup>78</sup> PN624.
- <sup>79</sup> PN239.
- <sup>80</sup> DHB, pages 79 – 80.
- <sup>81</sup> PN1171 – PN1174.
- <sup>82</sup> PN1230.
- <sup>83</sup> PN903, PN1141, PN1203 – PN1204.
- <sup>84</sup> PN266 – PN267.
- <sup>85</sup> PN466 – PN476.
- <sup>86</sup> PN1127 – PN1130.
- <sup>87</sup> PN312 - PN313, PN1156 – PN1157.
- <sup>88</sup> PN271 – PN272, PN302, PN1154 – PN1158.
- <sup>89</sup> PN1160.
- <sup>90</sup> DHB, page 69.
- <sup>91</sup> DHB, page 69.
- <sup>92</sup> PN326, PN366,.
- <sup>93</sup> PN358.
- <sup>94</sup> PN328, PN964, PN993
- <sup>95</sup> PN963 – PN964.
- <sup>96</sup> PN320 – PN321.
- <sup>97</sup> PN323 – PN324.
- <sup>98</sup> DHB, pages 100 – 101.
- <sup>99</sup> PN970.
- <sup>100</sup> PN970.
- <sup>101</sup> PN971.
- <sup>102</sup> PN972 – PN975.
- <sup>103</sup> DHB, pages 69 – 70.
- <sup>104</sup> PN355.

- <sup>105</sup> PN378.
- <sup>106</sup> PN338 – PN348.
- <sup>107</sup> PN347.
- <sup>108</sup> PN1551 – PN1552.
- <sup>109</sup> PN395.
- <sup>110</sup> PN393 – PN394.
- <sup>111</sup> PN390.
- <sup>112</sup> PN392.
- <sup>113</sup> PN369.
- <sup>114</sup> PN370.
- <sup>115</sup> PN395.
- <sup>116</sup> PN357 – PN358, PN362 – PN366, PN381 – PN386.
- <sup>117</sup> PN368.
- <sup>118</sup> PN1280.
- <sup>119</sup> PN1284.
- <sup>120</sup> PN1285 – PN1286.
- <sup>121</sup> PN1287.
- <sup>122</sup> DHB, page 74.
- <sup>123</sup> DHB, pages 71 – 72.
- <sup>124</sup> PN1296.
- <sup>125</sup> PN1295.
- <sup>126</sup> PN1300 – PN1304.
- <sup>127</sup> DHB, page 64.
- <sup>128</sup> DHB, page 80.
- <sup>129</sup> PN1145.
- <sup>130</sup> PN526 – PN528.
- <sup>131</sup> DHB, page 80.
- <sup>132</sup> PN999.
- <sup>133</sup> PN999.
- <sup>134</sup> DHB, page 80, PN994, PN1317 – PN1318, PN1322 – PN1325.
- <sup>135</sup> [\[2013\] FWCFB 6191](#).
- <sup>136</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [50].
- <sup>137</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [50].
- <sup>138</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51], *Glenn Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#) at [54].
- <sup>139</sup> [\[2020\] FWCFB 1373](#).
- <sup>140</sup> At [26].
- <sup>141</sup> DHB, pages 82 – 83.
- <sup>142</sup> PN1202.
- <sup>143</sup> PN1368 – PN1369.
- <sup>144</sup> Exhibit R5.
- <sup>145</sup> PN1455 – PN1456, PN1507.
- <sup>146</sup> PN1522 – PN1530.
- <sup>147</sup> PN465.

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<sup>148</sup> PN248.

<sup>149</sup> PN1300 – PN1304.

<sup>150</sup> PN1591 – PN1596.

<sup>151</sup> PN1608 – PN1609.

<sup>152</sup> [\[2020\] FWCFB 6429](#).

<sup>153</sup> At [19].

<sup>154</sup> At [25].

<sup>155</sup> DHB, page 71, PN398 – PN403.

<sup>156</sup> PN1295.

<sup>157</sup> (2000) 98 IR 137.

<sup>158</sup> PN1304.

<sup>159</sup> PN1306.

<sup>160</sup> DHB, page 52, PN1627.

<sup>161</sup> DHB, pages 99 – 100.

<sup>162</sup> PN1652.

<sup>163</sup> DHB, page 26, 43 – 44.

<sup>164</sup> PN511 – PN512.

<sup>165</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#) at [9].

<sup>166</sup> PN1589, PN1608 – PN1609, PN1627, PN1652.

<sup>167</sup> [\[2014\] FWCFB 7198](#) at [10].

<sup>168</sup> At [20].

<sup>169</sup> DHB, page 103, PN1589, PN1608 – PN1609.

<sup>170</sup> PN1589.

<sup>171</sup> PN1627.

<sup>172</sup> At [21].

<sup>173</sup> At [28].