WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2021 WAIRC 00111
CORAM	:	INDUSTRIAL MAGISTRATE J. HAWKINS
HEARD	:	WEDNESDAY, 10 FEBRUARY 2021
DELIVERED	:	FRIDAY, 23 APRIL 2021
FILE NO.	:	M 109 OF 2020
BETWEEN	:	MARK RYAN **CLAIMANT** AND WA PALLETS PTY LTD **RESPONDENT**
CatchWords	:	INDUSTRIAL LAW – Whether Employee resigned or terminated – Whether retraction of resignation – Permitted deductions upon resignation where failure to provide notice – Interpretation of cl 14.2 of the *Timber Industry Award 2010* (Cth) and s 326(1)(a) and s 326(1)(b) of the *Fair Work Act 2009* (Cth)
Legislation	:	*Corporations Act 2001* (Cth) *Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA)
Instruments	:	*Timber Industry Award 2010* (Cth)
Case(s) referred to in reasons:	:	***Kwik-Fit (GB) Ltd v Lineham*** [1992] ICR 183 ***Birrell v Australian National Airlines Commission*** [1984] FCA 419 ***Ngo v Link Printing Pty Ltd*** (1999) 94 IR 375 ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)*** [2010] FCA 652 ***Re Minister for Employment and Workplace Relations*** [2008] AIRCFB 1000; (2008) 177 IR 364 ***Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*** [2015] FCA 1196 ***Mildren v Gabbusch*** [2014] SAIRC 15 ***Miller v Minister of Pensions*** [1947] 2 All ER 372

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Result	**:**	Claim dismissed

Representation:

Claimant	**:**	Mr P. Mullally (agent) from Workclaims Australia
Respondent	**:**	Mr S. Heathcote (of counsel) from APX Law

REASONS FOR DECISION

Introduction

1 Mr Mark Ryan (Mr Ryan) was employed by WA Pallets Pty Ltd (WAP) on 12 June 2019, as a machine operator.[1]

2 There is no dispute that the employment relationship between the parties came to an end. The dispute relates to how, when, and why that relationship came to an end and what amounts Mr Ryan was entitled to be paid at the end of his employment. Mr Ryan says the employment relationship came to an end on 1 July 2020 when he was dismissed by Mr Jeb Cole (Mr Cole), a managing director of WAP. WAP says that Mr Ryan's employment relationship came to an end on 30 June 2020 when he resigned from his employment without notice.

3 This claim also concerns the final payments Mr Ryan received at the end of his employment and in particular the deduction of two weeks wages from his final entitlements. Mr Ryan claimed that WAP has contravened the FW Act and the Award by failing to pay his entitlements in full up to 1 July 2020.[2] Mr Ryan claims he is owed the following:

- wages for 45 hours work in the week leading up to 1 July 2020, being 45 hours at his base hourly rate of $22, being $990;
- annual leave for 4.15 weeks, being $3,649; and
- payment of two weeks' wages in lieu of notice, being $1,672.

4 In addition, Mr Ryan also seeks payment of interest and a penalty be imposed upon WAP.

5 During the trial, the parties agreed that WAP would pay Mr Ryan's claim for wages ($990) and annual leave (the agreement was that Mr Ryan was owed $3,508.19 in annual leave). The issue that remained was the entitlement to payment of two weeks wages in lieu of notice ($1,672).

6 By consent, it was therefore ordered that WAP pay to Mr Ryan the sum of $2,826.91 being made up as follows:

- $3,508.19 (agreed annual leave) + $990 (agreed wages) = $4,498.19 less $1,672 (disputed deduction of two weeks' wages) = $2,826.91.

7 Accordingly, the issue of WAP's entitlement to deduct two weeks' wages in lieu of notice ($1,672) or Mr Ryan's entitlement to payment of two weeks' wages in lieu remains to be determined. To determine this issue requires determining whether Mr Ryan resigned without notice on 30 June 2020 or whether he was dismissed without notice on 1 July 2020.

8 WAP maintains that Mr Ryan's conduct on 30 June 2020 was problematic and that he was verbally abusive and threatening in the workplace. When confronted about this behaviour by

Mr Cole, WAP says Mr Ryan resigned from his employment, requested an Employment Separation Certificate (Certificate) and walked off the job prior to the usual finishing time.

9 However, Mr Ryan says he did not resign on 30 June 2020. Rather he says that he was dismissed when he came to work on 1 July 2020.

10 There is no dispute that on 1 July 2020, Mr Ryan came to the workplace. There is however a dispute as to whether Mr Ryan attended the workplace at the usual commencement time and whether he had been given permission by Mr Cole to commence work at that time. There is no dispute that when Mr Ryan attended the workplace he and Mr Cole had a discussion. During that discussion Mr Ryan was given a letter from WAP dated 30 June 2020, which suggested he was being disciplined for his behaviour in the workplace on 30 June 2020. When given that letter there is no dispute that Mr Ryan took the letter and was then asked by Mr Cole to go home. Mr Ryan submits this constituted a dismissal, whereas WAP says by then, Mr Ryan had resigned on 30 June 2020.

11 WAP says that as Mr Ryan resigned on 30 June 2020 without giving notice, it was entitled, pursuant to cl 14.2 of the Award and s 324(1)(c) of the FW Act, to withhold an amount not exceeding the amount he would have been paid in respect to the period of notice required to serve out his notice.

12 Relevantly, cl 14.2 of the Award states:

> *... If an employee fails to give the required notice the employer may withhold from any moneys due to the employee on termination under this award or the NES* [National Employment Standard]*, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.* (emphasis added)

13 The alternative position of WAP is that even if I am satisfied that Mr Ryan's employment was terminated by WAP on 1 July 2020, Mr Ryan is still not entitled to any payment in lieu of notice as he was dismissed for serious misconduct.

14 Mr Ryan disputes he resigned but, rather, maintains he was terminated without notice on 1 July 2020 when he was told by Mr Cole to go home. Alternatively, Mr Ryan argues that even if he did resign, WAP is precluded from deducting any amounts from his final entitlement and relies on s 326 of the FW Act. Mr Ryan submits that cl 14.2 of the Award is unlawful, as it permits a deduction 'directly or indirectly for the benefit of' WAP and that such deduction was 'unreasonable in the circumstances'.

15 For the reasons that follow I am satisfied that WAP was entitled to deduct $1,672 from Mr Ryan's final entitlements.

Issues To Be Determined

16 The issues for determination are as follows:

(a) Did Mr Ryan resign on 30 June 2020 or was he dismissed on 1 July 2020?

(b) If Mr Ryan resigned on 30 June 2020, was WAP entitled, pursuant to cl 14.2 of the Award, to withhold $1,672 (an amount equal to two weeks' wages) from Mr Ryan's final entitlements?

(c) Alternatively, if Mr Ryan was dismissed on 1 July 2020, was his dismissal for serious misconduct?

(d) If Mr Ryan was dismissed for serious misconduct is he entitled to any payment in lieu of notice?

Evidence

17 The only witness called by Mr Ryan was himself.

18 WAP relied on the evidence from the following:

- Mr Cole;
- Ms Lisa Gendall (Ms Gendall), office manager and Director of WAP; and
- Mr Leon McKenzie (Mr McKenzie), yard manager of WAP.

19 To a large extent the determination of this matter concerns which version of events that occurred on 30 June 2020 and 1 July 2020 is accepted. There is a great divergence between the parties as to what occurred and the sequence of events.

Summary Of Evidence And Assessment Of Credibility

20 The first area of disparity is what occurred on 30 June 2020. WAP maintain that Mr Ryan was abusive to a female co-worker on 30 June 2020. Mr Ryan disputed he was abusive to anyone on 30 June 2020.

21 Mr Ryan's evidence was contrary to the evidence of Ms Gendall and Mr McKenzie. Mr McKenzie's evidence was that on 30 June 2020 he was approached by Ms Simone Lydon (Ms Lydon), another employee of WAP. Mr McKenzie explained that Ms Lydon told him that Mr Ryan had abused her and threatened her (no objection was taken to this hearsay evidence). Mr McKenzie explained that he took Ms Lydon to the office area to try to settle her down and determine what had happened. As they were walking through the office from the back door, Mr McKenzie indicated that Mr Ryan entered through the front door of the office. Mr McKenzie described Mr Ryan as looking angry, looking at Ms Lydon and calling her a 'slut'.[3] It was at that point that Mr McKenzie said he pulled Mr Ryan aside. Mr McKenzie suggested that Mr Ryan continued to call Ms Lydon a 'cunt' and a 'slut'.[4] Mr McKenzie explained that he tried to calm Mr Ryan down but Mr Ryan was not listening and was talking over the top of him. He said Mr Ryan used words to the effect that:

> *He didn't give a fuck about anything or anyone and he won't bow down to no slut or their boyfriend. I will hammer them, you tell them I have been to jail and I know people.*[5]

22 Mr McKenzie said that he asked Mr Ryan to go back to work and his response was, 'fuck it'.[6]

23 Ms Gendall's evidence corroborates the version of events given by Mr McKenzie. She explained that on 30 June 2020 as she walked into 'Unit 10', she discovered Ms Lydon crying and asked her what was wrong. She explained that Ms Lydon indicated that Mr Ryan had threatened her and that she was considering whether she should resign (again, no objection to this hearsay evidence was taken).

24 Mr Cole's evidence is also consistent with Mr McKenzie's evidence and Mr Cole explained he was advised by Ms Gendall of Mr Ryan's interaction with Ms Lydon. As a result, he spoke to Mr Ryan and asked him what had happened. Mr Cole indicated that Mr Ryan said words to the effect, 'I am not going to let some slut talk to my son like that, that bitch better watch her back'.[7]

25 Mr Cole explained that it was at or about this point that he had decided to give Mr Ryan a written warning for serious misconduct in the workplace regarding threatening to physically harm another employee.

26 Mr Ryan completely denied this version of events. In cross-examination, Mr Ryan denied that he had an argument with Ms Lydon, threatened her or used abusive language towards her. In effect, Mr Ryan denied that the incident occurred whatsoever. Rather, he suggested the only reason that he approached Ms Gendall or Mr Cole on 30 June 2020 was to discuss his son's, Mr Dion Ryan (Mr D. Ryan), workload.

27 This of course is at odds with the evidence given by WAP's witnesses.

28 Further, Mr Cole and Ms Gendall's evidence was that later on 30 June 2020 Mr Ryan did approach Ms Gendall in her office. Ms Gendall maintained that Mr Ryan told her that he and Mr D. Ryan were resigning as he was worried about his son's mental health. Ms Gendall indicated that Mr Ryan pointed his finger at her, said that the workplace was a 'fucking joke', that he could not work there anymore and demanded that she give him the Certificate.[8] Ms Gendall stated that because of Mr Ryan's demeanour, she felt intimidated and asked him to speak to Mr Cole. She explained that shortly after as she was sitting at her desk in the office, she heard Mr Ryan and Mr Cole talking. She explained that she heard Mr Ryan yelling, and she saw him walk away. Mr Cole then entered her office and told her that Mr Ryan has resigned, and they need to complete the Certificate.

29 Mr Cole's evidence was consistent with Ms Gendall's evidence. He explained that subsequent to the incident concerning Ms Lydon, he had been told by Ms Gendall that Mr Ryan had resigned, that he had behaved aggressively, pointing and yelling at her, and that he had requested the Certificates for both he and his son. Mr Cole explained that he immediately went to find Mr Ryan and found him outside the office. He explained that he told Mr Ryan he could not speak to anyone in the workplace in that manner, to which he says that Mr Ryan said WAP needed to stop making his son work so much. Mr Cole explained that he said, as Mr D. Ryan was an adult, he could speak for himself. Mr Cole suggested that this enraged Mr Ryan, and it was at that point that Mr Ryan requested the Certificate. Mr Cole explained that he told Mr Ryan that Ms Gendall would prepare it for him, at which point Mr Ryan turned and walked away.

30 In cross-examination Mr Ryan denied that, firstly, he had had any discussion with Ms Gendall except to ask the whereabouts of Mr Cole. This is at odds with and inconsistent with paragraph 9 of his witness statement, wherein he suggests that he only went to the office to speak with Ms Gendall to discuss Mr D. Ryan's workload.[9] Confusingly, Mr Ryan then suggested that what he said in paragraph 9 of his witness statement and his oral evidence were both true.

31 Further, Mr Ryan denied that, in discussions with Mr Cole on 30 June 2020, he asked for the Certificate for himself and Mr D. Ryan.

32 Despite at the outset of his evidence maintaining that what was stated in his witness statement was true and correct, during cross-examination Mr Ryan suggested that what took place in paragraph 10 occurred on 1 July 2020.

33 There was also a divergence between Mr Ryan and WAP in respect to Mr Ryan's starting and finishing times.

34 Mr Ryan was questioned in respect to his start and finish times whilst employed with WAP. Mr Ryan suggested that the starting time varied between 5.00 am to 7.00 am. This was inconsistent with the evidence of WAP's witnesses, who made clear that the starting time was always 5.00 am and the finishing time was 1.00 pm.

35 In respect to the time that Mr Ryan left on 30 June 2020, Mr Cole's evidence was that it was between 11.30 am to 12.00 pm. Likewise, Ms Gendall gave clear and unequivocal evidence that

she recalled seeing Mr Ryan walk away and recalls thinking that it was not the end of his shift. Her memory was that Mr Ryan left at 11.00 am. Mr McKenzie, likewise, recalls seeing Mr Ryan walk away on 30 June 2020 before the shift had ended. Mr Ryan, however, suggested he had not left work early on 30 June 2020.

36 In paragraph 12 of Mr Ryan's witness statement, he suggests that he came to work on 1 July 2020 an hour later than his usual start time, being 6.00 am, and suggested he had sent a text to Mr Cole to inform him that he was starting at 7.00 am.

37 Despite producing text messages between himself and Mr Cole that are alleged to have occurred on 1 July 2020, Mr Ryan produced no text message that he referred to at paragraph 12 of his witness statement wherein he stated:

> *I sent a text to Jeb to inform him that I was starting at 7.00am.*

38 As to what was said between Mr Ryan and Mr Cole on 1 July 2020, there is also divergence. Mr Cole suggested he was surprised that Mr Ryan had returned to the workplace on 1 July 2020 as he considered Mr Ryan had resigned the day before. Nonetheless, Mr Cole confirmed that on 1 July 2020 he did speak to Mr Ryan and asked him how he felt about what had occurred on 30 June 2020. Mr Cole suggested Mr Ryan said words to the effect that he was not happy and 'this is that slut's fault'[10] (referring to Ms Lydon). Mr Cole said Mr Ryan asked if he could come back to work and that he would not talk to anyone. Ms Gendall corroborated this evidence. Her evidence was that she had heard Mr Ryan say to Mr Cole, words to the effect, 'I just want to come back to work and I won't speak to anyone'.[11]

39 Mr Cole's evidence was that following Mr Ryan stating that he wanted to return to work, Mr Cole thought that Mr Ryan may have reflected on his actions of 30 June 2020. He explained that he then handed Mr Ryan the written warning letter dated 30 June 2020. Mr Cole explained that when the warning letter was given to Mr Ryan, Mr Ryan scrunched it up and went silent. At this point Mr Cole asked Mr Ryan to go home. Mr Cole explained there was then a discussion as to whether or not Mr Cole was firing Mr Ryan. Mr Cole maintains that he told Mr Ryan he did not have to because Mr Ryan had resigned the day before.

40 That warning letter reads as follows:

> *Dear Mark,*
>
> ***Warning Letter***
>
> *I am writing to you about your performance during your employment with WA Pallets Pty Ltd t/as West Coast Pallets.*
>
> *On 30th June, 2020 you met with your supervisor Jeb Cole at this meeting you were advised that your performance had been unsatisfactory, and that immediate improvement is required. In particular you were advised that threatening behavior towards other staff, bullying in any form of aggressive behavior does not align with our company values and will not be tolerated at this workplace.*
>
> *After considering the situation it is expected that your performance improves and specifically that you pay attention to your communication techniques within the workplace.*
>
> *I propose that we meet again on the week of 7th July, 2020 to review your progress. If you wish to respond to this formal warning letter please do so by contacting me on … or by replying in writing.*

41 Mr Cole was carefully cross-examined with respect to the terms of that warning letter and its effect on the issue of termination. He maintained that he gave the warning letter to Mr Ryan at 7.38 am on 1 July 2020. He denied that when he handed the letter to Mr Ryan he was treating Mr Ryan as an employee. He explained that the misconduct referred in the letter related to

Mr Ryan's behaviour on 30 June 2020. This is consistent with the evidence of Ms Gendall who maintains that, following the incident concerning Ms Lydon, Mr Cole instructed her to prepare a written warning for Mr Ryan on 30 June 2020.

42 Mr Cole was also cross-examined in respect to a set of text messages that were exchanged between Mr Ryan and Mr Cole on the afternoon of 1 July 2020. In that set of text messages Mr Ryan writes:

> *You have breached various laws. I have spoken to a lawyer and ombudsman, I have a case.* [A]*pplications are in progress.*
>
> *Two weeks notice, my wages …, it's up to you which direction this takes.*

43 Mr Cole responds:

> *Hi Mark, you have breached your employment contract by serious misconduct. You threatened an employee and 3 people witness it. You were given a verbal warning and then a written warning which you refused to accept your aggressive and threatening behaviour will not be tolerated at this workplace. We've already spoken to fairwork and you are not entitled to anything more than what leave and pay is outstanding which is nothing. Please don't contact us again unless it's through a third party. Feel free to have your lawyer contact us if they need clarification on the events or need documents of the …*

44 Mr Cole was challenged that these comments were not consistent with his evidence that Mr Ryan had resigned on 30 June 2020 but, rather, were more consistent with Mr Cole having dismissed Mr Ryan for serious misconduct. Mr Cole's explanation for his text message was that it followed on from himself and Ms Gendall just having spoken to the Fair Work Commission to discuss their legal options. He explained the Fair Work Commission suggested that he did not have to rely on Mr Ryan quitting but could rely on Mr Ryan's serious misconduct.

45 Mr Cole was also challenged on why Mr Ryan was not given his Certificate on 30 June 2020. There is no real dispute that Mr Ryan did not receive his Certificate until on or about 2 July 2020. Mr Cole maintained that issuing Mr Ryan the Certificate was not on the forefront of his mind given Mr Ryan's aggressive behaviour on 30 June 2020.

46 Mr Cole was fulsome in his evidence. He was not shaken in cross-examination and I found his explanation plausible.

47 Mr Ryan, Mr Cole and Ms Gendall were questioned in respect to the issue of the sale of a motorbike to Mr Ryan. There is no dispute between Mr Ryan and Mr Cole that Mr Ryan purchased a motorbike from Mr Cole during the course of his employment. What is in dispute is whether or not Mr Ryan paid cash of $3,500 for the motorbike or whether or not he was repaying that sum by deductions from his pallet bonus. Mr Ryan maintains he paid cash for the motorbike, whereas Mr Cole and Ms Gendall were adamant that no cash was exchanged and that amounts were being deducted from Mr Ryan's pallet bonus, and that a substantial amount remained outstanding.

48 As to whether or not there was an agreement to purchase the motorbike was not strictly relevant to the issues in dispute in this matter but had some peripheral relevance to the issue of credibility. However, given this Court is not required to determine whether such a contract existed and whether such a repayment occurred I do not consider it assists in my assessment of credibility, and give that evidence no weight.

49 The key issue in dispute between the parties is whether Mr Ryan resigned on 30 June 2020 or whether he was dismissed on 1 July 2020 for serious misconduct. That requires assessing the

credibility of the witnesses. I am not satisfied that Mr Ryan is a reliable witness. Rather, I consider that he sought to tailor his evidence to suit the claim made. His oral evidence was inconsistent with his witness statement. In oral testimony, he suggested that on 30 June 2020, the only conversation he had with Ms Gendall was to enquire as to Mr Coles' whereabouts. This is despite paragraphs 6 to 9 of his witness statement stating that he went to the office to discuss his son's workload and that Ms Gendall cut him off.

50 Further, paragraph 10 of his witness statement reads:

> *I then went and met with Jeb Cole the other owner of the business. I said I wanted to talk about Dion's hours and workload, but he too refused and answered aggressively and said that I always had a problem …*

51 In his oral testimony he suggested that the discussion referred to in paragraph 10 of his witness statement did not take place on 30 June 2020. Rather, he says it took place on 1 July 2020. If that is the case it is not consistent with what he then said occurred in paragraph 10 of his witness statement.[12]

52 Mr Ryan was not prepared to concede that he had a conflict with any other employees on 30 June 2020. This is in stark contrast to the evidence of WAP's witnesses. Mr McKenzie's evidence, which was clear and unequivocal, cannot be attacked on the basis of a close tie to either Mr Cole or Ms Gendall. Mr McKenzie was unshaken in his evidence and I found him an impressive witness. He was very clear that not only had it been reported to him on 30 June 2020 that Mr Ryan had been abusive and threatening to Ms Lydon but that indeed Mr Ryan had called Ms Lydon a 'cunt' and a 'slut' in his presence. Ms Gendall, who was also an impressive witness corroborated Mr McKenzie's evidence as to Mr Ryan's abusive behaviour towards Ms Lydon.

53 Further, both Mr Cole and Ms Gendall were clear in their evidence that Mr Ryan, on 30 June 2020 asked for his Certificate. Ms Gendall was clear that Mr Ryan had said that he quit.

54 Unlike Mr Ryan's evidence, WAP's witnesses' evidence was consistent. They consistently confirmed that the start time for work was 5.00 am and the finish time was 1.00 pm. Whereas Mr Ryan sought to suggest that the starting time for work was variable and that he had been given permission previously to come to work late and indeed referred to a text message he had sent to Mr Cole on 1 July 2020 stating that he would be at work late. Not only was this inconsistent with the weight of the evidence but no such text was produced by Mr Ryan.

55 Further, Mr Cole and Ms Gendall were clear in their evidence that on 30 June 2020, Mr Ryan, after having been aggressive to Ms Lydon, was likewise aggressive to Ms Gendall.

56 All three of WAP's witnesses confirmed that Mr Ryan left work on 30 June 2020 before completing his shift.

57 Further, in respect to the events on 1 July 2020, Mr Cole and Ms Gendall's evidence is consistent that they both heard Mr Ryan say words to the effect that he wanted to come back to work and that he would not talk to anyone. This is consistent with Mr Ryan having resigned on 30 June 2020. There is no dispute that Mr Ryan was handed, at that point, a warning letter that had been prepared on 30 June 2020 by Mr Cole to gauge Mr Ryan's reaction. Rather than contrition, Mr Cole says Mr Ryan appeared angry, screwed up the letter and at that point was asked by Mr Cole to leave. Mr Ryan does not dispute he was handed the letter but says he put it in his pocket and when he did so was told to go home.

58 For the reasons above, I do not consider Mr Ryan is a reliable witness. His evidence at trial was inconsistent with his witness statement and on virtually all matters in dispute was in direct

conflict with the evidence of WAP's witnesses. Further to a large extent he was indirect and at times argumentative in his evidence.

59 In contrast for the reasons expressed above, I found all three witnesses of WAP to be careful and considered witnesses and find their evidence reliable.

60 Accordingly, where Mr Ryan's evidence is inconsistent with WAP's witnesses, I prefer the evidence of WAP's witnesses.

Issue 1 – Did Mr Ryan Resign On 30 June 2020 Or Was He Dismissed On 1 July 2020?

61 Mr Ryan's resignation was verbally expressed in clear and unambiguous terms to Ms Gendall on 30 June 2020. The words used by Mr Ryan was that he 'can't work here anymore' following which he demanded the Certificate.[13] Shortly thereafter he again requested the Certificate from Mr Cole and left the workplace prior to completing his shift. In demanding his Certificate and using words to the effect that he 'can't work here anymore' and leaving the workplace during work hours, I am satisfied that, when judged objectively, Mr Ryan was clearly and unambiguously terminating his employment.

62 A resignation, if verbally expressed in clear unambiguous terms, subject to any contractual terms, can be an effective resignation.[14] This intention was further corroborated by Mr Ryan's conduct when he returned to the workplace on 1 July 2020 well beyond the time for commencement of his shift and asked if he could 'come back [to work] and he won't talk to anyone'.[15]

63 The remaining issue is whether special circumstances apply which suggest that Mr Ryan withdrew or retracted his resignation. It is generally accepted that if notice of termination is given in a state of emotional turmoil in the heat of the moment then it may be withdrawn if swiftly retracted.[16]

64 In this case, if the words used by Mr Ryan on 1 July 2020 ('he wants to come back [to work] and he won't talk to anyone') amounted to a retraction of his resignation, the question remains as to whether that retraction was made swiftly.

65 I am satisfied that this retraction was not made swiftly. ***Ngo v Link Printing Pty Ltd***[17] held that where an employee gave notice and went home and returned the following day on time for his shift, was insufficient to be characterised a swift retraction.

66 In this case, Mr Ryan's retraction occurred on 1 July 2020, the day after he had resigned and at a time well beyond the commencement of his shift. It therefore cannot be characterised as a swift retraction.

67 I, therefore, find that Mr Ryan resigned from his employment on 30 June 2020 and did not retract that resignation on 1 July 2020.

68 I am satisfied that Mr Ryan, having resigned on 30 June 2020 without giving notice, is not entitled to payment of two weeks' wages in lieu of notice. Having found Mr Ryan resigned without notice, it is unnecessary to determine the alternative issues in respect to serious misconduct.

Issue 2 – Was WAP Entitled To Withhold Any Amounts Owing To Mr Ryan Upon His Resignation?

69 WAP maintains it has the right to withhold an amount equivalent to two weeks' wages, as Mr Ryan resigned without giving notice. WAP relies upon cl 14.2 of the Award which, as previously stated, provides as follows:

> ***Notice of termination by an employee***
>
> *The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any moneys due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.* (emphasis added).

70 Further, WAP submits that such a deduction is permitted pursuant to s 324 of the FW Act. Section 324 of the FW Act deals with permitted deductions and states as follows:

> ***324 Permitted deductions***
>
> *(1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:*
>
> *...*
>
> *(c) the deduction is authorised by or under a modern award ...*

71 Mr Ryan, however, argues that by operation of s 326 of the FW Act, cl 14.2 of the Award is unlawful. Section 326 of the FW Act states in summary as follows:

> Unreasonable Deductions for the Benefit of the Employer
>
> *(1) A term of a modern award ... has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:*
>
> *(a) directly or indirectly for the benefit of the employer or a party related to the employer; and*
>
> *(b) unreasonable in the circumstances.*

72 The construction of a statute begins with consideration of the ordinary meaning of the text having regard to the context in which the text appears and the general purpose and policy of the legislation.[18]

73 Mr Ryan points to no authority where similar provisions to cl 14.2 of the Award have been found unlawful, pursuant to s 326 of the FW Act. Clearly s 324 of the FW Act allows for permitted deductions under an Award. Indeed, the standard modern Award termination clause devised by the Australian Industrial Relations Commission[19] provides that if an employee fails to give the required notice, the employer has the right to withhold pay to the maximum amount equal to the amount the employee would have received under the NES.[20]

74 Further, as Stewart et al, Creighton and Stewart's Labour Law (6th ed, 2016) [23.02]:

> *... modern awards now expressly permit an employer to withhold some moneys otherwise due on termination, though only up to the amount the employee would have received for any period of notice they have failed to give under the award.*

75 The purpose of notice periods was discussed by Gray J in ***Birrell v Australian National Airlines Commission***[21] (***Birrell***) where he stated:

> *The purpose of providing in a contract for a period of notice of termination is to enable the party receiving the notice to make other arrangements. An employee given notice by his or her employer has a period of time in which to seek another job; an employer who receives notice has time to arrange for a substitute employee.*

76 Gray J, in ***Birrell***, went on to mention that the primary protective purpose of such notice periods is to prevent the harsh injustice of an employer having to pay wages to an employee at the employee's behest. I, therefore, accept WAP's submissions that the history of clauses like cl 14.2 of the Award is to protect the interests of the party who is entitled to receive notice.

77 Neither party could point to any case law which has specifically found that cl 14.2 of the Award, or similar such clauses, are unlawful due to the application of s 326 of the FW Act.

78 The type of deduction at issue in this matter is the deduction of the equivalent of payment of notice in lieu.

79 Mr Ryan sought to rely on the decision of ***Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)***[22] (***AEU***) to support the contention that cl 14.2 of the Award is unlawful. That case concerned the ability of the employer to deduct amounts from teachers' wages for supplies and equipment provided to them by the employer. It was therefore dealing with an entirely different type of deduction to that under cl 14.2 of the Award and for that reason is distinguishable.

80 Accordingly, I am not satisfied that when the text, context, and purpose of s 326 of the FW Act is considered that it applies to cl 14.2 of the Award.

81 However, even if I had been so satisfied, I do not consider the deduction was unreasonable. During the trial it was largely conceded by WAP that the deduction was for the benefit of WAP. However, WAP maintained the deduction was not unreasonable.

82 In respect to the issue of whether a deduction was unreasonable, Mr Ryan relied on the decision on ***AEU***. Bromberg J, in ***AEU***, made clear that this was 'a question of fact and degree', and referred to likely relevant factors.[23] Those factors however were addressing a mischief or type of deduction very different to that under cl 14.2 of the Award and are therefore of limited guidance. Nonetheless, in summary those factors are as follows:

- Consideration must be given to the purpose of the deductions and whether an employee has gained a benefit from a deduction out of their remuneration.
- An assessment of benefit is also relevant and whether an employer has benefitted at the expense of an employee. A benefit to an employer is not, of itself, a reason to find a deduction was unreasonable.
- The quality of assent given by an employee to the deduction scheme and, in particular, whether or not there was coercion or duress.
- Whether or not the deduction scheme has limited the genuine choice of an employee to freely apply his or her remuneration in the manner the employee genuinely chooses.
- Consideration of the requirement under s 324(1)(a) of the FW Act requiring any deduction to be pursuant to an employee's written authority. Although Bromberg J called for a 'harmonious construction', this was in respect to s 324(1)(a) (which deals with contracts of employment) and s 326(1)(c) of the FW Act. In this case, of course, the Court is not dealing with such written authority but the deduction being authorised under the Award (s 324(1)(c) of the FW Act).
- Any assessment of unreasonableness of a deduction is simply not an outcomes-based assessment and that wide import is to be given to the phrase 'in the circumstances'.

83 Despite having found these factors of limited guidance to the assessment of reasonableness in respect to the deduction referred to in cl 14.2 of the Award, even when applying them, I am not satisfied that the deduction is unreasonable. As made clear in ***AEU***, the assessment of unreasonableness in the circumstances is not an outcome-based assessment and the words 'in the circumstances' need to be given wide import.

84 There was clear evidence from Mr Cole that Mr Ryan, in failing to provide notice in lieu, caused WAP productivity losses. Mr Cole explained that if Mr Ryan had served out his period of notice he would have been able to teach a new employee how to operate the machine he operated in his employment. Mr Cole explained this caused him both financial and productivity losses.

85 The deduction is provided for in the Award and is a common clause in modern awards. There is no evidence that cl 14.2 of the Award arose through coercion or duress. Nor is there any evidence that cl 14.2 of the Award results from WAP taking advantage of Mr Ryan.

86 Accordingly, I am not satisfied that cl 14.2 of the Award is subject to s 326 of the FW Act. Further, I am not satisfied that the deduction by WAP was unreasonable in the circumstances.

87 I am therefore satisfied that WAP was permitted, pursuant to cl 14.2 of the Award, to deduct $1,672 from Mr Ryan's final entitlements. Having said that, ultimately the discretion to deduct two weeks' wages for failure to give notice from Mr Ryan's final entitlements lies with WAP. Often employment relationships come to an end in unsatisfactory ways for both parties, but I note that overall Mr Cole saw Mr Ryan as good at his job. It clearly is always open to WAP to reverse its decision in respect to this deduction.

88 Nonetheless, because of the concessions made and referred to at paragraph 6 of these reasons and the orders made on 10 February 2021, I will order that the remainder of Mr Ryan's claim as it relates to payment in lieu of notice be dismissed.

89 I will hear from the parties in respect to the claim for imposition of penalties and costs.

Orders

90 The Claim for payment in lieu of notice is dismissed.

J. HAWKINS
INDUSTRIAL MAGISTRATE

[1] There is no dispute that WAP was a trading and financial company carrying on business in Australia and incorporated under the *Corporations Act* 2001 (Cth). Therefore, WAP was a '***national systems employer***' and Mr Ryan was a '***national systems employee***', under the FW Act. Schedule 1 sets out the jurisdiction and procedure of this Court in respect to the FW Act. Schedule 1 is incorporated into these reasons.

[2] The relevant instruments that apply to the employment relationship are:

- Mr Ryan's employment contract;
- the *Fair Work Act* 2009 (Cth) (FW Act); and
- the *Timber Industry Award 2010* (Cth) (Award).

[3] Witness Statement of Leon McKenzie dated 28 January 2021 [7].

[4] Witness Statement of Leon McKenzie dated 28 January 2021 [8].

[5] Witness Statement of Leon McKenzie dated 28 January 2021 [10].

[6] Witness Statement of Leon McKenzie dated 28 January 2021 [11].

[7] Witness Statement of Jeb Cole dated 28 January 2021 [8].

[8] Witness Statement of Lisa Gendall dated 28 January 2021 [35].

[9] Schedule 2 [6] - [11].

[10] Witness Statement of Jeb Cole dated 28 January 2021 [20].

[11] Witness Statement of Lisa Gendall dated 28 January 2021 [45].

[12] See sch 2.

[13] Witness Statement of Lisa Gendall dated 28 January 2021 [35].

[14] ***Kwik-Fit (GB) Ltd v Lineham*** [1992] ICR 183, 191 (Wood J).

[15] Witness Statement of Jeb Cole dated 28 January 2021 [20].

[16] ***Birrell v Australian National Airlines Commission*** [1984] FCA 419 (Gray J).

[17] (1999) 94 IR 375.

[18] ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355; ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)*** [2010] FCA 652.

[19] See ***Re Minister for Employment and Workplace Relations*** [2008] AIRCFB 1000; (2008) 177 IR 364.

[20] Hor J and Keats L, *Managing Termination of Employment: A Fair Work Guide*, (2009) 296.

[21] [1984] FCA 419.

[22] [2015] FCA 1196.

[23] ***Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*** 2015 FCA 1196 [176].

Schedule 1: Jurisdiction, Practice And Procedure Of The Western Australian Industrial Magistrates Court Under The *Fair Work Act 2009* (Cth)

Jurisdiction and burden of proof

[1] An employee, an employee organization or an inspector may apply to an eligible State or Territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FW Act.

[2] The IMC, being a court constituted by an industrial magistrate, is an '***eligible State or Territory court***': FW Act s 12 (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); *Industrial Relations Act 1979* (WA) s 81, s 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FW Act s 544.

[4] The civil penalty provisions identified in s 539 of the FW Act include contravening a term of the NES and failing to pay in full an amount owed under the FW Act: FW Act s 44(1), s 323 respectively.

[5] An obligation upon an '***employer***' is an obligation upon a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FW Act s 12, s 14, s 42, s 47. A NES entitlement of an employee is an entitlement of an '***employee***' who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed ... by a national system employer*': FW Act s 13, s 42, s 47.

Contravention

[6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for '*an employer to pay* [to an employee] *an amount ... that the employer was required to pay*' under the modern award (emphasis added): FW Act s 545(3)(a).

[7] The civil penalty provisions identified in s 539 of the FW Act includes:

- The Core provisions (including s 44(1) and s 45) set out in pt 2 - 1 of the FW Act: FW Act s 61(2), s 539.

[8] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

- An employer to pay to an employee an amount that the employer was required to pay under the FW Act: FW Act s 545(3).

[9] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FW Act. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FW Act: ***Mildren v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[10] In an application under the FW Act, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'.

In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[11] In the context of an allegation of the breach of a civil penalty provision of the FW Act it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336:

> *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences* [362].

Schedule 2 – Witness Statement Of Mr Mark Ryan Dated 19 January 2021

Ryan

IN THE INDUSTRIAL MAGISTRATE'S COURT

M109/2020

MARK RYAN

Claimant

and

WA PALLETTS PTY LTD

Respondent

WITNESS STATEMENT OF THE CLAIMANT IN SUPPORT OF HIS CLAIM FOR UNPAID ENTITLEMENTS UNDER THE NES AND THE TIMBER INDUSTRY AWARD 2010

MARK RYAN to state as follows:

1. I am the claimant in these proceedings.

2. I have made a claim for unpaid entitlements due to me under the NES when my employment was terminated by the respondent on the 1st July 2020. This witness statement is my evidence with respect to that claim.

3. I was employed by the respondent in the role of Machine Operator between the 12th June 2019 and the 1st July 2020 when I was summarily dismissed by the respondent. My employment was governed by the *Timber Industry Award 2010* and the NES under the *Fair Work Act 2009.*

4. As I have stated I worked for the company for just over a year. I was reliable and my work attendance was perfect. I still had about a week of sick leave remaining when the employment ended.

5. I would always stay at work until my job was finished for the day. This caused me to be paid overtime.

6. I had a couple of disagreements during the employment, but overall I was happy in the work and operated the pallet machine.

7. My son Dion also worked for the company. He was in another shed in the business. I worked away from him in the main shed.

8. Dion had mentioned to me that his hours and workload was gradually increasing to such a point that he was finding it hard to cope.

9. For this reason on the 30th June 2020 I approached Lisa one of the owners and the office manager of the business to discuss this. I asked her if we could discuss Dion's workload. She refused and cut me off stating that I always had a problem.

10. I then went and met with Jeb Cole the other owner of the business. I said I wanted to talk about Dion's hours and workload, but he too refused and answered aggressively and said that I always had a problem and walked away from me. I followed and tried to talk to him, but he didn't want to listen. I was aggressively told to go home by Jeb which I did. I certainly did not quit my job as is now alleged by the respondent.

11. The next day being the 1st July 2020 when I arrived at work I was confronted by Jeb immediately. He said he wanted to talk to me. I went into his office with him and he said he had a written warning for me from yesterday. I was extremely surprised and asked what it was for. He said that it is all in the letter which he handed to me. I started to open it but he stopped me and said that I could open it at home. He said that my separation certificate would be ready at the end of the day. I immediately asked: "are you sacking me". He replied yes, go home.

12. I came into work that day an hour later than my usual start time of 6.00am. I sent a text to Jeb to inform him that I was starting at 7.00am. I was able to do this because the company did not have a regular start time for

everyone and in that week I had already worked 45 hours. I did not come in late to ask for my job back as stated by the respondent.

13. I went out and said good bye to the boys and left and went home.

14. The 1st July 2020 was pay day. I had done 45 hours work that week. The company did not pay me for that or anything else.

15. I was upset by the failure to pay as I was left without pay and my entitlements.

16. I did exchange texts with Jeb Cole regarding this. In a text on the 1st July 2020 he said that I was dismissed due to my aggressive behaviour and serious misconduct.

17. I was not given any warning that there was something wrong with my behaviour. I had no opportunity to defend myself. My warning letter stated that we would meet again on the 7th July 2020 so I was confused when I read that as to why I was fired on the day.

18. There was not a good reason to fire me. I certainly didn't deserve to be deprived of my wages, holiday pay and a payment for not giving me notice.

19. I am currently in receipt of Centrelink payments as I am a Job Seeker. I am looking for work but have not been successful.

20. Lisa one of the directors of the respondent has taken out a VRO against me. I have not had any contact with her other than attending a conference in the Industrial Magistrate's Court for these proceedings.

21. My rate of pay was $22 per hour. This means that my base rate for a 38 hour week was $836.

22. The day that I was dismissed was a pay day. In the preceding week I had worked 45 hours and this was my wages entitlement for that pay day. I was paid nothing. I therefore claim $990.

23. I had not been given annual leave during the employment. At the end of the employment I had worked 1 year and 2 weeks. My annual leave entitlement is therefore 4.15 weeks being $3469.40.

24. I was not given written notice of the termination and I was not paid any money in lieu of notice. I am entitled to 2 weeks' notice which equates to $1672.

25. In addition to the payments which I claim which were deliberately not paid to me, I seek the imposition of penalties for each breach of the NES, and the Award.

Dated this 19th January 2021.

MARK RYAN