



# Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Single Copy \$1.00 Annual Subscription \$25.00

Sub-Part 1.

WEDNESDAY, 24th JANUARY, 1979

Vol. 59—Part 1.

## LONG SERVICE LEAVE—

(As Consolidated at a Hearing before the Commission in Court Session on December 15 1977)\*

### 1.—Right to Leave.

A worker shall, as herein provided, be entitled to leave with pay in respect of long service.

### 2.—Long Service.

(1) The long service which shall entitle a worker to such leave shall, subject as herein provided, be continuous service with one and the same employer.

(2) Such service shall include service prior to the first day of April, 1958, if it continued until such time but only to the extent of the last twenty completed years of continuous service.

(3) (a) Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called "the transmitter") to another employer (herein called "the transferee") and a worker who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transferee—the period of the continuous service which the worker has had with the transmitter (including any such service with any prior transmitter) shall be deemed to be service of the worker with the transferee.

(b) In this subclause "transmission" includes transfer, conveyance, assignment or succession whether voluntary or by agreement or by operation of law and "transmitted" has a corresponding meaning.

(4) Where, over a continuous period, a worker has been employed by two or more companies each of which is a related company within the meaning of Section 6 of the Companies Act 1961 the period of the continuous service which the worker has had with each of those companies shall be deemed to be service of the worker with the company by whom he is last employed.

Section 6 reads—

(1) For the purposes of this Act, a corporation shall, subject to the provisions of subsection (3) of this section, be deemed to be a subsidiary of another corporation, if,

(a) that other corporation—

(i) controls the composition of the board of directors of the first mentioned corporation;

(ii) controls more than half of the voting power in the first mentioned corporation; or

(iii) holds more than half of the issued share capital of the first mentioned corporation excluding any part thereof which carries no right to participate beyond a specified amount in a distribution of either profits or capital; or

- (b) the first mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary.
- (2) For the purpose of subsection (1) of this section, the composition of a corporation's board of directors shall be deemed to be controlled by another corporation if that other corporation by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove all or a majority of the directors; and for the purposes of this provision that other corporation shall be deemed to have power to make such an appointment if—
- (a) a person cannot be appointed as a director without the exercise in his favour by that other corporation of such a power; or
  - (b) a person's appointment as a director follows necessarily from his being a director or other officer of that other corporation.
- (3) In determining whether one corporation is subsidiary of another corporation—
- (a) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;
  - (b) subject to paragraphs (c) and (d) of this subsection, any shares held or power exercisable—
    - (i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity): or
    - (ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary which is concerned only in a fiduciary capacity; shall be treated as held or exercisable by that other corporation;
  - (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned corporation or of a trust deed for securing any issue of such debentures shall be disregarded; and
  - (d) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c) of this subsection) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is so exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.
- (4) A reference in this Act to the holding company of a company or other corporation shall be read as a reference to a corporation of which that last-mentioned company or corporation is a subsidiary.
- (5) Where a corporation—
- (a) is the holding company of another corporation;
  - (b) is a subsidiary of another corporation;
  - (c) is a subsidiary of the holding company of another corporation,
- that first-mentioned corporation and that other corporation shall for the purposes of this Act be deemed to be related to each other.
- (5) Such service shall include—
- (a) any period of absence from duty on any annual leave or long service leave;
  - (b) any period of absence from duty necessitated by sickness or injury to the worker but only to the extent of fifteen working days in any year of his employment;
  - (c) any period following any termination of the employment by the employer if such termination has been made merely with the intention of avoiding obligations hereunder in respect of long service leave or obligations under any award in respect of annual leave;

(d) any period during which the service of the worker was or is interrupted by service—

- (i) as a member of the Naval, Military or Air Forces of the Commonwealth of Australia other than as a member of the British Commonwealth Occupation Forces in Japan and other than as a member of the Permanent Forces of the Commonwealth of Australia except in the circumstances referred to in section 31 (2) of the Defence Act, 1903-1956, and except in Korea or Malaya after 26th June, 1950;
- (ii) as a member of the Civil Construction Corps established under the National Security Act, 1939-1946;
- (iii) in any of the Armed Forces under the National Service Act, 1951 (as amended).

Provided that the worker as soon as reasonably practicable on the completion of any such service resumed or resumes employment with the employer by whom he was employed immediately before the commencement of such service.

(6) Service shall be deemed to be continuous notwithstanding—

- (a) the transmission of a business as referred to in paragraph (3) of this subclause;
- (b) the employment with related companies as referred to in paragraph (4) of this subclause;
- (c) any interruption of a class referred to in paragraph (5) of this subclause;
- (d) any absence from duty authorised by the employer;
- (e) any standing-down of a worker in accordance with the provisions of an award, industrial agreement, order or determination under either Commonwealth or State law;
- (f) any absence from duty arising directly or indirectly from an industrial dispute if the worker returns to work in accordance with the terms of settlement of the dispute;
- (g) any termination of the employment by the employer on any ground other than slackness of trade if the worker be re-employed by the same employer within a period not exceeding two months from the date of such termination;
- (h) any termination of the employment by the employer on the ground of slackness of trade if the worker is re-employed by the same employer within a period not exceeding six months from the date of such termination;
- (i) any reasonable absence of the worker on legitimate union business in respect of which he has requested and been refused leave;
- (j) any absence from duty after the coming into operation of this clause by reason of any cause not specified in this clause unless the employer, during the absence of within fourteen days of the termination of the absence notifies the worker in writing that such absence will be regarded as having broken the continuity of service, which notice may be given by delivery to the worker personally or by posting it by registered mail to his last recorded address, in which case it shall be deemed to have reached him in due course of post.

Provided that the period of absence from duty or the period of any interruption referred to in placita (d) to (j) inclusive of this paragraph shall not (except as set out in paragraph (5) of this subclause) count as service.

### 3.—Period of Leave.

(1) The leave to which a worker shall be entitled or deemed to be entitled shall be as provided in this subclause.

(2) Subject to the provisions of paragraphs (5) and (6) of this subclause:—

Where a worker has completed at least fifteen years' service the amount of leave shall be—

- (a) in respect of fifteen years' service so completed—thirteen weeks' leave;
- (b) in respect of each ten years' service completed after such fifteen years—eight and two-thirds weeks' leave;
- (c) on the termination of the worker's employment—
  - (i) by his death;
  - (ii) in any circumstances otherwise than by his employer for serious misconduct;

in respect of the number of years' service with the employer completed since he last became entitled to an amount of long service leave, a proportionate amount on the basis of thirteen weeks for fifteen years' service.

(3) Subject to the provisions of paragraph (6) of this subclause, where a worker has completed at least ten years' service but less than fifteen years' service since its commencement and his employment is terminated—

(i) by his death; or

(ii) in any circumstances, otherwise than by his employer for serious misconduct;

the amount of the leave shall be such proportion of thirteen weeks' leave as the number of completed years of such service bears to fifteen years.

(4) In the cases to which paragraphs (2)(c) and (3) of this subclause apply the worker shall be deemed to have been entitled to and to have commenced leave immediately prior to such termination.

(5) A worker whose service with an employer commenced before 1st October, 1964, and whose service would entitle him to long service leave under this clause shall be entitled to leave calculated on the following basis:—

(a) For each completed year of service commencing before the 1st October, 1964, an amount of leave calculated on the basis of thirteen weeks' leave for twenty years' service; and

(b) for each completed year of service commencing on or after the 1st October, 1964, an amount of leave calculated on the basis of thirteen weeks' leave for fifteen years' service.

Provided that such worker shall not be entitled to long service leave until his completed years of service entitle him to the amount of long service leave prescribed in either paragraph (2) (a) or paragraph (2) (b) of this subclause as the case may be.

(6) A worker to whom paragraphs (2) (c) and (3) of this subclause apply whose service with an employer commenced before 1st October, 1964, shall be entitled to an amount of long service leave calculated on the following basis:—

(a) For each completed year of service commencing before the 1st October, 1964, an amount of leave calculated on the basis of thirteen weeks' leave for twenty years' service; and

(b) for each completed year of service commencing on or after 1st October, 1964, an amount of leave calculated on the basis of thirteen weeks' leave for fifteen years' service.

#### 4.—Payment for Period of Leave.

(1) A worker shall, subject to paragraph (3) of this subclause, be entitled to be paid for each week of leave to which he has become entitled or is deemed to have become entitled the rate of pay applicable to him at the date he commences such leave.

(2) Such rate of pay shall be the rate applicable to him for the standard weekly hours which are prescribed by this award (or agreement), but in the case of casuals and part-time workers shall be the rate for the number of hours usually worked up to but not exceeding the prescribed standard.

(3) Where by agreement between the employer and the worker the commencement of the leave to which the worker is entitled or any portion thereof is postponed to meet the convenience of the worker, the rate of payment for such leave shall be at the rate of pay applicable to him at the date of accrual, or, if so agreed, at the rate of pay applicable at the date he commences such leave.

(4) The rate of pay—

(a) shall include any deductions from wages for board and/or lodging or the like which is not provided and taken during the period of leave;

(b) shall not include shift premiums, overtime, penalty rates, special rates, disability allowances, fares and travelling allowances or the like.

(5) In the case of workers employed on piece or bonus work or any other system of payment by results the rate of pay shall be calculated by averaging the worker's rate of pay for each week over the previous three monthly period.

## 5.—Taking Leave.

(1) In a case to which placita (a) and (b) of paragraph (2) of subclause (3) apply:—

- (a) Leave shall be granted and taken as soon as reasonably practicable after the right thereto accrues due or at such time or times as may be agreed between the employer and the worker or in the absence of such agreement at such time or times as may be determined by the Special Board of Reference having regard to the needs of the employer's establishment and the workers' circumstances.
- (b) Except where the time for taking leave is agreed to by the employer and the worker or determined by the Special Board of Reference the employer shall give to a worker at least one month's notice of the date from which his leave is to be taken.
- (c) Leave may be granted and taken in one continuous period or if the employer and the worker so agree in not more than three separate periods in respect of the first thirteen weeks' entitlement and in not more than two separate periods in respect of any subsequent period of entitlement.
- (d) Any leave shall be inclusive of any public holidays specified in this award (or agreement) occurring during the period when the leave is taken but shall not be inclusive of any annual leave.
- (e) Payment shall be made in one of the following ways:—
  - (i) In full before the worker goes on leave;
  - (ii) at the same time as his wages would have been paid to him if the worker had remained at work, in which case payment shall, if the worker in writing so requires, be made by cheque posted to an address specified by the worker; or
  - (iii) in any other way agreed between the employer and the worker.
- (f) No worker shall, during any period when he is on leave, engage in any employment for hire or reward in substitution for the employment from which he is on leave, and if a worker breaches this provision he shall thereupon forfeit his right to leave hereunder in respect of the unexpired period of leave upon which he has entered, and the employer shall be entitled to withhold any further payment in respect of the period and to reclaim any payments already made on account of such period of leave.

(2) In the case to which paragraph (2) (c) or paragraph (3) of subclause (3) applies and in any case in which the employment of the worker who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon termination of his employment otherwise than by death pay to the worker, and upon termination of employment by death pay to the personal representative of the worker upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he is entitled or deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

## 6.—Granting Leave in Advance and Benefits to be Brought into Account.

(1) Any employer may by agreement with a worker allow leave to such a worker before the right thereto has accrued due, but where leave is taken in such case the worker shall not become entitled to any further leave hereunder in respect of any period until after the expiration of the period in respect of which such leave had been taken before it accrued due.

(2) Where leave has been granted to a worker pursuant to the preceding paragraph before the right thereto has accrued due, and the employment subsequently is terminated, the employer may deduct from whatever remuneration is payable upon the termination of the employment such amount as represents payment for any period for which the worker has been granted long service leave to which he was not at the date of termination of his employment or prior thereto entitled.

(3) Any leave in the nature of long service leave or payment in lieu thereof under a State Law or a long service leave scheme not under the provisions hereof granted to a worker by his employer in respect of any period of service with the employer shall be taken into account whether the same is granted before or after the coming into operation hereof and shall be deemed to have been leave taken and granted hereunder in the case of leave with pay to the extent of the period of such leave and in the case of payment in lieu thereof to the extent of a period of leave with pay equivalent thereof of the entitlement of the worker hereunder.

## 7.—Records to be Kept.

(1) Each employer shall, during the employment and for a period of twelve months thereafter, or in the case of termination by death of the worker for a period of three years thereafter, keep a record from which can be readily ascertained the name of each worker, and his occupation, the date of the commencement of his employment and his entitlement to long service leave and any leave which may have been granted to him or in respect of which payment may have been made hereunder.

(2) Such record shall be open for inspection in the manner and circumstances prescribed by this award (or agreement) with respect to the time and wages record.

## 8.—Special Board of Reference.

(1) There shall be constituted a Special Board of Reference for the purpose hereof to which all disputes and matters arising hereunder shall be referred and the Board shall determine all such disputes and matters.

(2) There shall be assigned to such Board the functions of—

(a) the settlement of disputes of any matters arising hereunder;

(b) the determination of such matters as are specifically assigned to it hereunder.

(3) The Board of Reference shall consist of one representative or substitute therefore nominated from time to time by the Confederation of Western Australian Industry (Incorporated) and one representative or substitute nominated from time to time by the Trades and Labor Council of Western Australia together with a chairman to be mutually agreed upon by the organisations named in this paragraph.

## 9.—State Law.

(1) The provisions of any State Law to the extent to which they have before the coming into operation hereof conferred an accrued right on a worker to be granted a period of long service leave in respect of a completed period of fifteen or more years' service or employment or an accrued right on a worker or his personal representative to payment in respect of long service leave shall not be affected hereby and shall not be deemed to be inconsistent with the provisions hereof.

(2) The entitlement of any such worker to leave in respect of a period of service with the employer completed after the period in respect of which the long service leave referred to in paragraph (1) of this subclause accrued due shall be in accordance herewith.

(3) Subject to paragraphs (1) and (2) of this subclause, the entitlement to leave hereunder shall be in substitution for and satisfaction of any long service leave to which the worker may be entitled in respect of employment of the worker by the employer.

(4) An employer who under any State Law with regard to long service leave is exempted from the provisions of that law as at the first day of April, 1958, shall in respect of the workers covered by such exemptions be exempt from the provisions hereof.

## 10.—Exemptions.

The Special Board of Reference may subject to such conditions as it thinks fit exempt any employer from the provisions hereof in respect of its employees where there is an existing or prospective long service scheme which, in its opinion, is, viewed as a whole, more favourable for the whole of the employees of that employer than the provision hereof.

## \* Editors Note.

The Judgment and General Order as prescribed by Section 94A was published in 58 W.A.I.G. Part 1 Sub Part 2 at Page 116.

There was no Schedule of Exemptions.