

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA
APPLICANT

-v-

MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION,
CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN
AUSTRALIA AND THE AUSTRALIAN MINES & METALS
ASSOCIATION INC

RESPONDENTS

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
(CTH)

INTERVENOR

WESTERN AUSTRALIAN FARMERS FEDERATION, WA RETAILERS
ASSOCIATION (INC), WA SMALL BUSINESS ASSOCIATION, WA
HOTELS & HOSPITALITY ASSOCIATION (INC) UNION OF
EMPLOYERS, MOTOR TRADES ASSOCIATION OF WESTERN
AUSTRALIA (INC), HOUSING INDUSTRY ASSOCIATION,
COMBINED SMALL BUSINESS ALLIANCE OF WESTERN
AUSTRALIA (INC) and THE WEST AUSTRALIAN SMALL BUSINESS
AND ENTERPRISE ASSOCIATION INC

OTHER ORGANISATIONS

CORAM COMMISSION IN COURT SESSION
CHIEF COMMISSIONER A R BEECH
SENIOR COMMISSIONER J F GREGOR
COMMISSIONER S J KENNER

DATE WEDNESDAY, 1 JUNE 2005

FILE NO/S APPL 784 OF 2004

CITATION NO. 2005 WAIRC 01715

Result General Order issued

Representation

Applicant Mr D. Schapper and with him Ms C. Ozich (both of counsel)

Respondents Mr P. Wilding on behalf of the Minister for Consumer and Employment
Protection

Mr G. Blyth and later Mr P. Robertson on behalf of the Chamber of Commerce and Industry of Western Australia Inc
Mr R. Gifford on behalf of the Australian Mines and Metals Association (Inc)

Intervenor

Mr J. Stewart and with him Ms J. Rees on behalf of the Department of Employment and Workplace Relations acting as agent for the Minister of Employment and Workplace Relations

Other

Organisations

Mr P. Brunner (of counsel) on behalf of the Western Australian Farmers Federation, the WA Retailers Association (Inc) and the WA Small Business Association
Ms S. Howard on behalf of the WA Hotels & Hospitality Association (Inc) Union of Employers
Mr G. Miller on behalf of the Motor Trades Association of Western Australia (Inc)
Mr S. Collins on behalf of the Housing Industry Association
Mr O. Moon on behalf of the Combined Small Business Alliance of Western Australia (Inc)
Mr P. Achurch on behalf of The West Australian Small Business and Enterprise Association Inc

General Order

HAVING HEARD Mr D. Schapper and with him Ms C. Ozich (both of counsel) on behalf of the applicant, Mr P. Wilding on behalf of the Minister for Consumer and Employment Protection, Mr G. Blyth and later Mr P. Robertson on behalf of the Chamber of Commerce and Industry of Western Australia Inc, Mr R. Gifford on behalf of the Australian Mines and Metals Association (Inc), Mr J. Stewart and with him Ms J. Rees on behalf of the Department of Employment and Workplace Relations acting as agent for the Minister of Employment and Workplace Relations, Mr P. Brunner (of counsel) on behalf of the Western Australian Farmers Federation, the WA Retailers Association (Inc) and the WA Small Business Association, Ms S. Howard on behalf of the WA Hotels & Hospitality Association (Inc) Union of Employers, Mr G. Miller on behalf of the Motor Trades Association of WA (Inc), Mr S. Collins on behalf of the Housing Industry Association, Mr O. Moon on behalf of the Combined Small Business Alliance of Western Australia (Inc.) and Mr P. Achurch on behalf of The West Australian Small Business and Enterprise Association Inc, the Commission in Court Session, pursuant to the powers conferred on it under section 50(2) of the *Industrial Relations Act 1979* hereby makes a General Order in the terms set out in the schedule attached.

SCHEDULE

CLAUSE 1. APPLICATION

- 1.1 This General Order takes effect on 1 August 2005 and applies to each employee as defined in subsection 7(1) of the Industrial Relations Act, 1979 throughout the State of Western Australia.
- 1.2 This General Order does not apply to any employee who holds an office for which the remuneration payable is determined or recommended pursuant to the Salaries and Allowances Act 1975.
- 1.3 Any provisions relating to termination of employment, introduction of changes in production, program, organisation, structure or technology that are likely to have significant effects on employees or redundancy applying to an employee which are inconsistent with and provide more favourable conditions to an employee than those set out in this General Order whether by way of award, order or agreement of this Commission or by legislation or otherwise will apply to those employees to the extent of any such inconsistency.

CLAUSE 2. TERMINATION OF EMPLOYMENT

2.1 Statement of Employment

An employer shall, in the event of termination of employment, provide upon request to the employee who has been terminated a written statement specifying the period of employment and the classification or type of work performed by the employee.

2.2 Job Search entitlement

- (a) During the period of notice of termination given by the employer an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the employer.
- (b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or he or she shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

CLAUSE 3. INTRODUCTION OF CHANGE

3.1 Employer's Duty to Notify

- (a) Where an employer decides to introduce changes in production, program, organisation, structure or technology, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and, if an employee nominates a union to represent him or her, the union nominated by the employee.
- (b) "Significant effects" includes termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of a job opportunity, a promotion opportunity or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.

3.2 Employer's Duty to Consult over Change

- (a) The employer shall consult the employees affected and, if an employee nominates a union to represent him or her, the union nominated by the employee, about the

introduction of the changes, the effects the changes are likely to have on employees (including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out the dismissals), and the ways to avoid or minimise the effects of the changes (e.g. by finding alternate employment).

- (b) The consultation shall commence as soon as practicable after making the decision referred to in the “Employer’s Duty to Notify” clause.
- (c) For the purpose of such consultation the employer shall provide in writing to the employees concerned and, if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees, and any other matters likely to affect employees, provided that any employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer’s interests.

CLAUSE 4. REDUNDANCY

4.1 Definition

Business includes trade, process, business or occupation and includes part of any such business.

Redundancy occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.

Transmission includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and “transmitted” has a corresponding meaning.

Weeks’ pay means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:

- (a) overtime;
- (b) penalty rates;
- (c) disability allowances;
- (d) shift allowances;
- (e) special rates;
- (f) fares and travelling time allowances;
- (g) bonuses; and
- (h) any other ancillary payments of a like nature.

4.2 Consultation Before Terminations

- (a) Where an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer shall consult the employee directly affected and if an employee nominates a union to represent him or her, the union nominated by the employee.
- (b) The consultation shall take place as soon as is practicable after the employer has made a decision to which clause 4.2(a) applies and shall cover the reasons for the proposed terminations, measures to avoid or minimise the terminations and/or their adverse affects on the employees concerned.
- (c) For the purpose of the consultation the employer shall, as soon as practicable, provide in writing to the employees concerned and if an employee nominates a union to represent him or her, the union nominated by the employee, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that an employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

4.3 Transfer to lower paid duties

- (a) Where an employee is transferred to lower paid duties by reason of redundancy the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if the employee's employment had been terminated.
- (b) The employer may, at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.
- (c) The amounts must be worked out on the basis of:
 - (i) the ordinary working hours to be worked by the employee; and
 - (ii) the amounts payable to the employee for the hours including for example, allowances, loading and penalties; and
 - (iii) any other amounts payable under the employee's contract of employment.

4.4 Severance Pay

- (a) In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service: Provided that the entitlement of any employee whose employment terminates on or before 1 February 2006 shall not exceed 8 weeks' pay.

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

- (b) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.
- (c) For the purpose of this clause continuity of service shall not be broken on account of -
- (i) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding the obligations of this clause in respect of leave of absence;
 - (ii) any absence from work on account of leave granted by the employer; or
 - (iii) any absence with reasonable cause, proof whereof shall be upon the employee;

Provided that in the calculation of continuous service any time in respect of which any employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.

Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with clause 2(3) or (4) of the Long Service Leave Provisions published in Part 1 (January) of each volume of the Western Australian Industrial Gazette shall also constitute continuous service for the purpose of this clause.

4.5 Employee leaving during notice period

An employee whose employment is terminated by reason of redundancy may terminate his/her employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.

4.6 Alternative employment

- (a) An employer, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied if the employer obtains acceptable alternative employment for an employee.
- (b) This subclause does not apply in circumstances involving transmission of business as set out in clause 4.7.

4.7 Transmission of business

- (a) The provisions of clause 4 are not applicable where a business is before or after the date of this order, transmitted from an employer (in this subclause called "the transmittor") to another employer (in this subclause called "the transmittee"), in any of the following circumstances:

- (i) Where the employee accepts employment with the transmittee which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service of the employee with the transmittee; or
 - (ii) Where the employee rejects an offer of employment with the transmittee:
 - (a) in which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmitter; and
 - (b) which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service with the transmittee.
- (b) The Commission may vary 4.7(a)(ii) if it is satisfied that this provision would operate unfairly in a particular case.

4.8 Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in the “Consultation Before Terminations” clause, the employer shall notify Centrelink as soon as possible giving all relevant information about the proposed terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.

4.9 Employees exempted

This clause does not apply:

- (i) Where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice.
- (ii) Except for clause 4.2, to employees with less than one year's service.
- (iii) Except for clause 4.2, to probationary employees.
- (iv) To apprentices.
- (v) To trainees.
- (vi) Except for clause 4.2, to employees engaged for a specific period of time or for a specified task or tasks; or
- (vii) To casual employees.

4.10 Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, subclause 4.4 shall not apply to employers who employ less than 15 employees.

4.11 Incapacity to pay

An employer or a group of employers, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied on the basis of the employer's incapacity to pay.
