

**COVID-19 GENERAL ORDER PURSUANT TO SECTION 50 OF THE ACT
THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00203

CORAM : COMMISSION IN COURT SESSION
CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER T EMMANUEL
COMMISSIONER D J MATTHEWS
COMMISSIONER T B WALKINGTON

HEARD : BY WRITTEN SUBMISSIONS

DELIVERED : TUESDAY, 14 APRIL 2020

FILE NO. : APPL 16 OF 2020

BETWEEN : COMMISSION'S OWN MOTION
Applicant

AND

(NOT APPLICABLE)
Respondent

CatchWords : Industrial law (WA) – General Order under s 50 – COVID-19 pandemic – Flexibility for leave arrangements – Enabling businesses to retain employees – Objects of the Industrial Relations Act 1979 – Unpaid pandemic leave, annual leave on half pay, annual leave in advance – Comparisons with Fair Work Commission modern awards

Legislation : *Industrial Relations Act 1979*, s 6, s 26, s 50
Minimum Conditions of Employment Act 1993, Part 4, s 17D(1)(b)

Result : General Order issued

Representation:

- Ms C Purcell and Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations
- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)
- Ms M Hammat and Dr T Dymond on behalf of UnionsWA

- Ms E Clements on behalf of the Western Australian Local Government Association

Case(s) referred to in reasons:

Statement – [2020] FWCFB 1760

Decision – [2020] FWCFB 1837

Termination Change and Redundancy General Order (2005 WAIRC 01715)

Reasons for Decision

Background

- 1 The COVID-19 pandemic has had an unprecedented impact on the world, Australia as a whole and on Western Australia. Governments in Australia have responded in a number of ways. They have imposed severe restrictions on people's movement and physical contact, including access to businesses. Many businesses are closed or are requiring employees to work remotely.
- 2 The BankWest Curtin Economics Centre Research Brief COVID-19 No. 1, *Job Keepers and Job Seekers* predicts that around 1.13 million workers will lose their jobs in the next 12 months, with half of these losses occurring within the next three months if trade restrictions continue. This estimate is said to be conservative and within the context of the current trading restrictions. If more restrictions are put in place, including closing construction and mining sites, there will be far greater job losses.
- 3 The Accommodation and Food Services industry is likely to be most affected with predicted job losses of 467,400. This is followed by the Arts and Recreation Services at 126,000; Transport, Postal and Warehousing at 119,900; Construction at 118,400; Other Services at 100,800; Retail Trade at 75,700; Professional, Scientific and Technical Services at 50,300, and Rental, Hire and Retail Services at 25,700 (BankWest Curtin Economics Centre Research Brief COVID-19 No. 2 – *Potential Job Losses in the COVID-19 Pandemic*).
- 4 Many of the industries likely to be very heavily affected by these job losses are in the small business, non-incorporated sector within the scope of the State industrial relations system.

Protecting employment

- 5 In this context, on Friday, 3 April 2020, the Commission in Court Session published a notice (Notice) indicating the Commission's provisional intention to issue a General Order in accordance with s 50(2) of the *Industrial Relations Act 1979* (WA) (the Act) to provide measures designed to assist employers and employees by enabling more flexible arrangements for leave to be taken. The Commission's aim in proposing to issue the General Order was to assist businesses to continue to operate and to preserve employment and continuity of employment for the benefit of those businesses, their employees and the economy generally. This is both for the immediate benefit, while the measures taken by governments are in place, and in the medium term when businesses attempt to return to normal operation. It is necessary that those businesses have access to and retain in employment those employees who will support the future operations of those businesses.
- 6 The Notice also refers to the Statement issued by the Fair Work Commission on 1 April 2020 ([2020] FWCFB 1760) and the detailed information provided there. We noted the provisional views expressed by the Fair Work Commission and the proposed variations to certain modern awards. We also noted the report for the Fair Work Commission by Professor Jeff Borland, *Benefits from greater flexibility in employment arrangements*.
- 7 Interested persons, including those named in s 50(2) of the Act, were invited to make submissions on the Commission's proposed General Order by midday on Thursday, 9 April

2020. The terms of that proposed General Order provided flexibility and leave options to be available to employees for:

- a) Unpaid pandemic leave of up to two weeks if the employee is required by government or medical authorities or acting on medical advice to self-isolate or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic, in circumstances where the employee is required to work at premises operated by an employer;
- b) Double annual leave at half pay, by agreement between the employer and employee; and
- c) Annual leave to be taken in advance, by agreement between the employer and employee.

8 The measures were proposed as temporary only, and the General Order was proposed as applying until 30 June 2020 and it could be extended.

9 We also note that the Fair Work Commission issued a Decision ([2020] FWCFB 1837) on 8 April 2020. It confirms, in large part, the provisional views it had expressed in its Statement of 1 April 2020. We note that the context of that Decision is in a system of modern awards and the legislative structure and objectives for those awards. In that regard, the Western Australian awards are different. This affects how we intend to approach the mechanisms for providing the flexibility we earlier proposed and in terms of the General Order we intend to issue.

10 Further, the Fair Work Commission proposed and ultimately provided for two weeks' unpaid pandemic leave and double annual leave at half pay. It decided to restrict its flexibility measures for a range of reasons particular to its legislation and the terms of modern awards. On the other hand, we proposed to add to those two issues for the consideration of interested persons, the opportunity for employees to take annual leave in advance with the agreement of their employer. We decided to add this flexibility on the basis that whilst it is not provided for in the Fair Work Commission's Decision, a number of modern awards contain such provisions as do some State awards and industrial agreements, but most importantly, such a measure for flexibility would, we believe, assist in meeting the objective we have set.

Submissions

11 Submissions were received from the Minister for Industrial Relations (the Minister), the Chamber of Commerce and Industry of Western Australia (Inc) (the Chamber), UnionsWA and the Western Australian Local Government Association (WALGA). We express our thanks to the Minister, the Chamber and UnionsWA for conferring. This has assisted in narrowing the issues and has led to a substantial degree of agreement between those parties.

12 All of the submissions have also very sensibly and helpfully taken account of matters dealt with by the Fair Work Commission in its Decision. We adopt many of those changes as being equitable and sensible and refer to them later.

13 WALGA made submissions in respect of the Local Government Officers' (Western Australia) Interim Award 2011 and the Municipal Employees (Western Australia) Interim Award 2011.

Apart from some matters which are dealt with later in these Reasons, WALGA made some helpful submissions in respect of detail. It noted also that the Local Government Officers' (Western Australia) Interim Award 2011 already allows employees leave in advance at the discretion of the employer and therefore does not support the application of the proposed General Order to the extent that it seeks to vary the Local Government Officers' Award to include a new provision granting annual leave in advance.

Consideration

- 14 Having considered all of the circumstances and the submissions made to us, we are of the view that it is important that the Commission act to assist industry by providing the increased flexibility in employment for the immediate future. Therefore, we intend to issue a General Order.
- 15 However, we make some changes to the form and content we proposed in the Notice. As we noted in the Notice, we also encourage the parties to awards and industrial agreements to negotiate with a view to resolving terms and conditions most suited to the needs of their particular industries and enterprises. The Commission will expedite the process of reflecting any agreements reached or determining any disputes. However, for the purpose of covering most employees and employers in the private sector in the State jurisdiction, the General Order will provide consistent conditions across the board. It will prevail to the extent of any inconsistency with a term of an award or industrial agreement, except where the term is more beneficial to the employee.

The Statutory Scheme

The Commission's power

- 16 The Commission's powers to make General Orders are set out in s 50 – **General Orders, nature of and making**. Subsections (2) to (4) are relevant and they provide:
- (2) Subject to this Act, the Commission may, of its own motion or on the application of UnionsWA, the Chamber, the Mines and Metals Association or the Minister –
 - (a) make General Orders relating to industrial matters in accordance with and subject to this Division; and
 - (b) add to, vary, or rescind any General Order so made.
 - (3) A General Order may be made to apply generally to employees throughout the State whether or not they are employed under and subject to awards or industrial agreements or may be limited to employees –
 - (a) who are employed under and subject to awards or industrial agreements; or
 - (b) who are not so employed,
 but shall not apply to any employee whose conditions of employment may not be determined by the Commission.
 - (4) A General Order applying to or with respect to employees of the kind referred to in subsection (3)(a) may add to or vary all awards and industrial agreements or may be limited in its effect to such awards and industrial agreements or awards or industrial agreements as may be specified in the General Order.
- 17 Therefore, the options include making a General Order to amend each specified award or industrial agreement or to make a stand-alone General Order.

Objects of the Act

- 18 We have also taken account of the objects of the Act. Section 6 sets out a range of objects including ‘to promote goodwill in industry and in enterprises within industry’ (s 6(a)); ‘to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises’ (s 6(af)); and ‘to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises’ (s 6(ag)). All of these objects are met by the spirit and the terms of the General Order.

The requirements of s 26

- 19 In making this decision, we have had regard to the various considerations set out in s 26 of the Act, including the interests of the persons concerned directly and otherwise, and of the whole community. We have taken account of the state of the national and state economies, in particular the impact of the COVID-19 pandemic on those persons, the community and the economies, and of what we consider to be the benefits to those persons, groups and institutions to which the flexibilities we intend to provide are aimed. The purpose of the General Order is to provide the flexibility in the interests of all of those aspects identified in s 26(1)(a) to (e) of the Act.

Scope of the General Order

- 20 In the Notice, we set out a Schedule B – Awards, which were mainly private sector awards. It was proposed that the General Order would formally vary those awards. We note the submissions supporting the General Order’s scope being expanded to cover all private sector employees in the State system, whether they are covered by awards or not. We agree with those submissions, and consider that it would be equitable to include all employees in the private sector. The Commission’s powers under s 50(3) enable it to do so. Other General Orders of the Commission, such as the Termination, Change and Redundancy General Order ([2005] WAIRC 01715) have such a broad scope.
- 21 In respect of public sector employees, we note that arrangements are in place through the Public Sector Labour Relations Circular 6/20 – *Leave arrangements for COVID-19* and therefore the General Order should not apply to public sector employees.
- 22 In the circumstances, rather than the General Order attaching a list of awards to which it applies, the scope of the General Order will be to all private sector employees in the State system, whether covered by an award or not. It will sit alongside the awards and, where an award contains a more beneficial term than the General Order, the award will apply. Otherwise where there is conflict between the terms of the General Order and the award, the terms of the General Order will apply.
- 23 This has a number of benefits particularly given the varying structures and terms of State awards as compared with modern awards of the Fair Work Commission. It will also mean that there is no formal variation of each award which would require a further variation to remove those conditions when they cease to have effect, or to vary their terms if it becomes necessary to do so, during the term of operation of the General Order. In those circumstances, a stand-

alone Schedule to the General Order setting out the conditions is the most effective way of dealing with these extraordinary circumstances.

Duration of the General Order

- 24 UnionsWA, the Chamber and the Minister agree that the term of the General Order ought to be until 31 July 2020, rather than 30 June 2020 as we initially proposed. There are a number of good reasons for doing so. There is no certainty as to how long the current circumstances surrounding COVID-19 will apply. The extended term of the General Order will allow for a reasonable period of certainty given the constantly changing and uncertain circumstances. It will provide a reasonable period of operation for the parties and the Commission to review its effectiveness should there be consideration to extending the term, and by the time the General Order issues, it will have less than three months in which to operate. In the circumstances, we intend to extend the term of the General Order to 31 July 2020. That will also assist those who are making submissions to the State Wage Case, as well as the Commission, in finalising that matter where the legislative timeframe for that decision is 1 July 2020 (s 50A(1) of the Act).

Unpaid pandemic leave

- 25 A number of issues are raised in the submissions, arising from the Fair Work Commission's Decision. The first is that in the first subclause, there is provision that the employee 'may elect' to take up to two weeks' unpaid leave. We accept the submissions and the rationale set out in the Fair Work Commission's Decision that the words 'may elect' ought to be amended to 'is entitled' so as to avoid confusion. Where a person is required to self-isolate and the other conditions are met, then the employee ought to have an entitlement. This is consistent with wording used in Part 4 of the *Minimum Conditions of Employment Act 1993 (WA)* which uses the term 'entitled' in respect of an employee's rights to paid and unpaid leave.
- 26 In the same paragraph of the proposed General Order, there is reference to an employee 'acting on medical advice'. There is almost unanimous agreement that this ought to read 'acting on advice of a medical practitioner'. For the reasons set out in the Fair Work Commission's Decision, we are of the view that this is an appropriate change and will adopt it.
- 27 We also note the concerns expressed and the Fair Work Commission's Decision that the first paragraph refers to 'where the employee is required to work at premises operated by an employer'. This phrase is confusing because not all employees are required to work at an employer's premises. It will be deleted.
- 28 We also consider that an employer and employee ought to be able to agree to a period of unpaid pandemic leave greater than two weeks. The entitlement is up to two weeks, but if the employer and employee agree to a greater period, they should not be limited.

Annual leave at half pay

- 29 There is general agreement that a provision ought to be included which allows the employee and employer to agree to leave that would commence before the expiration date of the General Order but conclude after its expiration. We think that this is a sensible suggestion.

Granting annual leave in advance

- 30 There is general agreement that some uncertainty in the proposed clause would be removed if a provision is included that, if an employee's employment terminates before the employee has accrued an entitlement to all of the period of paid annual leave taken in advance, then the employer may deduct from any monies due to the employee on termination, an amount equal to the amount that was paid to the employee for any part of the period of annual leave taken in advance to which the entitlement has not accrued. We note that s 17D(1)(b) of the *Minimum Conditions of Employment Act 1993* also provides for employers to deduct any amount from other payments due to the employee. We adopt this proposal as sensible and equitable.
- 31 Also, there should be provision for leave commenced before the expiration of the General Order to continue to operate for the period agreed between the parties.

Conclusion

- 32 We thank those who have made submissions for their prompt and helpful responses. Minutes of the Proposed General Order now issues. Should any person wish to speak to the Minutes, they are to do so in writing before 2.00 pm today. It would be helpful given the urgency of the matter if they would confer with the other persons who made submissions to see if agreement can be reached.