

PERSONAL/CARER'S LEAVE DECISION AND APPEAL: THE MEANING OF DAY

The Full Federal Court of Australia has handed down a landmark decision in *Mondelez Australia Pty Ltd v AMWU [2019] FCAFC 138*

The decision concerned the meaning of the word “day” for the purpose of the 10-day personal/carer’s leave (Personal Leave) entitlement in the Fair Work Act 2009 (Act).

The Full Court found that the meaning of “day” is a “working day” (ie. the number of **ordinary hours actually worked** by an employee during a 24 hour period) and rejected Mondelez’s contention that the entitlement must be construed according to a “notional day” or the average weekly ordinary hours divided by five (eg. 38 hours per week / 5 days = 7.6 hours per day).

The decision has caused confusion for employers as it deviates from a commonly understood approach for calculating Personal Leave. In response the Australian Government has announced that it will seek leave, in the High Court, to appeal the decision.

Background

Section 96 of the Act, states:

- (1) *For each year of service with his or her employer, an employee is entitled to **10 days** of paid personal/carer’s leave.*
- (2) *An employee’s entitlement to paid personal/carer’s leave **accrues progressively** during a year of service **according to the employee’s ordinary hours of work**, and accumulates from year to year.*

Two employees of Mondelez Australia Pty Ltd (Mondelez), a Cadbury manufacturing plant in Tasmania, who worked 12-hour shifts three times per week, were entitled to 96 hours of paid Personal Leave per year of service under their enterprise agreement.

When the employees took paid Personal Leave, Mondelez would deduct 12 hours from their

accrued Personal Leave balance. Based on this approach, the employees would only accrue enough Personal Leave over the course of a year to be absent for eight days of 12-hour shifts.

The dispute between the parties was whether Mondelez’s calculation of Personal Leave was inconsistent with the Act and whether the employees were instead entitled to accrue 10 days of Personal Leave per year of service paid at 12-hours a day.

Argument

Mondelez argued that the entitlement to 10 days Personal Leave under the Act is calculated by reference to a “notional day” being the average daily ordinary hours based on a standard five-day working week (eg. a full time employee who works 38 hours per week would accrue 76 hours of paid Personal Leave over the course of a year).

Based on this approach, Mondelez believed the employees’ entitlement to 96 hours of paid Personal Leave per year of service under the enterprise agreement was more beneficial compared to the Act.

The Australian Manufacturing Workers Union (Union) who represented the employees argued that the employees should be entitled to be absent from work without loss of pay for 10 “calendar days” (ie. a 24-hour period) of Personal Leave per year. Meaning that the employees should be paid for the hours that they would have worked on that day but for the Personal Leave.

The Decision

The majority of the Full Court did not accept either party’s interpretation of “day” but held:

...in s 96(1) of the FW Act, “day” is used in the specific context of an authorised absence



from work. In that context, its natural and ordinary meaning is not a bare 24 hour period, but the portion of a 24 hour period that would otherwise be allotted to working. A “day” consisting of the portion of a 24 hour period that would otherwise be allotted to working may conveniently be described as a “working day”. The natural and ordinary meaning of “10 days of paid personal/carer’s leave” in s 96(1) is authorised absence from work for ten such “working days”....

The effect of this decision is that the Mondelez employees should be entitled to accrue 10 days of Personal Leave per year of service paid at 12-hours a day.

Appeal

Mondelez and the Australian Government have confirmed that they will seek leave to appeal the decision.

Subject to the outcome of an appeal, the decision has significant costs implications (including back pay claims). Employer Assist will keep members updated on the status of the appeal.

In the meantime, employers should review their processes for accruing and paying Personal Leave considering the decision. This will be most relevant for employers who engage shift workers or employees working more than 7.6 ordinary hours per day.

This article is intended for information purposes only and should not be regarded as legal advice. Please contact Employer Assist for specific advice.

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