

# HIGH COURT DECISION: PERSONAL/CARER'S LEAVE

## The High Court has overturned the contentious Mondelez Decision

Last year, Employer Assist issued an article on the Full Federal Court of Australia's controversial landmark decision in *Mondelez Australia Pty Ltd v AMWU* [2019] FCAFC 138 (Mondelez Decision) regarding the calculation of personal/carer's leave (Personal Leave) under the Fair Work Act 2009 (Act).

The Mondelez Decision has now been overturned by the High Court.

### Background on the Act

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.

Under section 99 of the Act, payment for Personal Leave taken is calculated by reference to an employee's "ordinary hours of work."

### The Mondelez Decision

Two employees of Mondelez Australia Pty Ltd (Mondelez) worked 36 ordinary hours (three x 12-hour shifts) per week.

In accordance with their enterprise agreement, they were entitled to 96 hours of paid Personal Leave per year of service being the average daily ordinary hours based on a standard five-day working week (eg. 38 hours per week/7.6 hours per day x 10 days = 76 hours of paid Personal Leave per year of service).

When the employees took paid Personal Leave, Mondelez would deduct 12 hours from their accrued Personal Leave balance. Based on this approach, the employees only accrued 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.

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). The effect of the Mondelez Decision was that the employees were entitled to accrue 10 days of Personal Leave per year of service paid at 12-hours a day.

The Mondelez Decision had significant cost implications (including back pay and contraventions of the Act) for employers who had not been accruing and/or deducting Personal Leave in line with the Mondelez Decision.

In response, Mondelez and the Australian Government sought leave to appeal the Mondelez Decision.

### High Court Decision

In *Mondelez Australia Pty Ltd v AMWU & Ors* [2020] HCA 29, the High Court overturned the Mondelez Decision rejecting the "working day" construction.

Instead, the High Court held that for the purpose of section 96(1) of the Act:

1. a "day" refers to a "notional day" consisting of one-tenth (1/10) of the equivalent of an employee's ordinary hours of work in a two week/fortnightly period; and
2. the expression "10 days" means an amount of Personal Leave accruing for every year of service equivalent to an employee's ordinary hours of work in a week over a two week/fortnightly period (ie. one-twenty-sixth (1/26) of the employee's ordinary hours of work in a year).



### What does this mean?

The High Court Decision has been welcomed by many employers as it aligns with the widely accepted method of accruing and deducting Personal Leave according to the employee's ordinary hours of work.

It is now clear that the entitlement to "10 days" of paid Personal Leave can be calculated as 1/26 of an employee's ordinary hours of work in a year.

For example, if an employee works:

1. 38 hours per week, they will receive 76 hours of Personal Leave per year of service (ie. [38 hours x 52 weeks]/26); or
2. 20 hours per week, they will receive 40 hours of Personal Leave per year (i.e. [20 hours x 52 weeks]/26), being an amount equal to 2 weeks (ie. 10 notional days) Personal Leave for that employee.

Employers who adjusted their method of accrual and deduction of Personal Leave following the Mondelez Decision can readjust to align with method set out in the High Court Decision.

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

### AAAA Member Benefits

Employer Assist provides AAAA members with advice on workplace relations and employment law matters.

Please contact Employer Assist on 1300 735 306 or [aaaa@employerassist.com.au](mailto:aaaa@employerassist.com.au) if you have any questions about the content of this article or if you require any assistance with your business.

