

CONFIDENTIAL ATTENTION: THE LICENSEE

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FULL FEDERAL COURT DECISION – PAID PERSONAL LEAVE

On 21 August 2019, a Full Court of the Federal Court ('FCFC') handed down their decision in the matter of *Mondelez v Automotive, Food, Metals Engineering, Printing and Kindred Industries Union (AMWU) [2019] FCAFC 138* ('Decision'). In this Decision the FCFC confirmed their interpretation of the paid personal leave entitlement under Section 96(1) of the *Fair Work Act 2019* (Cth) ('Fair Work Act').

In a 2-1 majority decision, the Court confirmed that all employees (excluding casuals) are entitled to **10 days of paid personal/carer's leave per year under the Fair Work Act, irrespective of the number of hours that they work per day or the number of days they work per week.**

This landmark decision has significant implications for how paid personal/carer's leave should now be accrued and paid to employees.

The Decision

This case concerned two full-time employees that worked at a confectionary factory in Claremont, Tasmania. The two employees worked an average of 3 shifts per week x 12 ordinary hours per shift and were employed under the *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017*.

The AMWU who represented the employees contended in this case that:

- For the purposes of Section 96(1) of the Fair Work Act a 'day' should be given its ordinary meaning of a 'calendar day' which is a 24-hour period¹.
- Paid personal leave under Section 96(1) is a protection, rather than a financial benefit².
- The employees should be paid for a day of absence based on the hours that they would have worked had they not been absent from work³.
- Section 96(1) of the Fair Work Act provides for 10 days of paid personal/carer's leave and therefore these employees were entitled to 10 days based on their ordinary working day of 12 hours (i.e. 10 days x 12 hours = 120 hours accrual per annum)⁴.

Mondelez Australia Pty Ltd (the employer) contended that:

- The 10 days of paid personal/carer's leave under Section 96(1) of the Fair Work Act should be construed according to its 'industrial meaning' of the word "day" referred to as a "notional day" construction⁵.
- Under the notional day construction, the proper approach is to average the weekly ordinary hours across the five-day working week (i.e. 36 ordinary hours divided by 5 = 7.2 hours per day). Therefore, the employees concerned would be entitled to 7.2 hours x 10 days = 72 hours accrual per annum⁶.

¹ *Mondelez v AMWU [2019] FCAFC 138* (21 August 2019) [35].

² *Ibid* [40]

³ *Ibid* [36]

⁴ *Ibid* [83]

⁵ *Ibid* [3]

⁶ *Ibid* [3]

The Court in a 2-1 majority decision rejected the employer's argument that a notional day construction should be adopted⁷ and found that:

- The correct interpretation was that an entitlement to a "day" of paid personal/carer's leave is an entitlement to be absent from work for the portion of a 24-hour period that would otherwise be allotted to work. Therefore, for these employees as their ordinary hours were 12 hours per shift, they are entitled to 10 days x 12 hrs = 120 hours of accrual per annum⁸.

The Decision is not consistent with the explanatory memorandum of the Fair Work Act and is not consistent with long standing industrial practice on how personal/carer's leave should be accrued and paid. The Decision may be subject to further appeal to the High Court or parliamentary intervention to amend the legislation.

The Decision **did not** deal with annual leave under the Fair Work Act. It remains to be seen as to whether this Decision potentially has implications for how annual leave may be calculated in the future. Annual Leave under the Fair Work Act is currently expressed in "weeks" rather than "days".

What should Members do?

As a result of this decision, Members need to be aware of the following:

- **As the Decision is referring to a minimum entitlement under the National Employment Standards in the Fair Work Act, the decision applies equally to venues who apply an Award as well as to those that apply an Enterprise/Collective Agreement.**
- **Full-time and Part-time employees are entitled to 10 days of personal/carers leave per annum regardless of how many days they work in the week and regardless of the number of hours they work per week.**
- **Personal/carer's leave for Full-time and Part-time employees should be accrued in days rather than hours.**
- **The Personal/carers leave entitlement should be based on the time the employee has worked for the employer. For example, every 5.2 weeks, an employee accrues an entitlement to another full day of leave.**
- **Where an employee takes personal/carer's leave, they are entitled to be paid for that day based on the hours they would have worked that day. E.g. Employee ordinarily works a 6 hour shift, the employee is required to be paid 6 hours for their day of absence.**
- **Where an employee takes a personal/carer's leave, a day needs to be deducted from their accrual balance. If the employee takes the equivalent of a half day of personal/carer's leave, half a day needs to be deducted from their accrual.**

AHA National Position

The AHA nationally are working with other peak employer groups and members of Parliament on this issue and will continue to advocate for change in light of this Decision.

If Members have any questions in relation to this decision, please contact Owen on 8232 4525.

OWEN WEBB

Manager – Workplace Relations

⁷ Ibid [201]

⁸ Ibid [203]