

## Full Federal Court rules on paid personal leave entitlement

*Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Known as the Australian Manufacturing Workers Union (AMWU) [2019] FCAFC 138*

In an alarming decision for employers, a Full Federal Court has determined that all permanent federal system employees are entitled to 10 days of personal/carer's leave for each year of service, regardless of whether they are full-time or part-time.

The case considered the meaning of section 96(1) of the *Fair Work Act 2009* (Cth) (FW Act), which provides that: *"For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave"*. At the outset of the 52-page decision, the Court fittingly noted that *"for a provision expressed so simply, its interpretation is surprisingly complex."*

The employer, Mondelez, operate a 36 hour week for full-time employees whereby some employees work their ordinary hours over three days (twelve hours per day), and other employees work their ordinary hours over five days (7.2 hours per day). The primary issue in the case was whether the employees who worked 3 x 12 hour days should be paid for 12 hours for days when they took personal/carer's leave, or 7.2 hours.

Mondelez argued that the reference to "day" at section 96(1) should be interpreted to mean a "notional day", being an employee's average weekly ordinary hours divided by five. In other words, the entitlement should be the same for all full-time employees, regardless of whether they worked their hours over five days, or three days. This would mean that employees who work 3 x 12 hour days would be entitled to payment for 7.2 hours when absent on personal/carer's leave.

The Federal Minister for Jobs and Industrial Relations intervened in the case and supported Mondelez's argument that the reference to "10 days" personal/carer's leave in section 96(1) is an amount of leave equivalent to an employee's ordinary hours of work (excluding overtime) in a two week period.

The union argued that the word "day" has its ordinary meaning of "calendar day", or a 24 hour period, and that section 96(1) provides an entitlement to be paid for the hours that would have been worked on that day, but for the employee's absence due to illness or responsibility as a carer.

In a 2-1 majority, the Court accepted the union's interpretation and held that section 96(1) of the FW Act provides an entitlement for all permanent employees to accrue 10 "working days" of personal/carer's leave for each year of service. The leave is calculated in working days, not hours. When an employee becomes entitled to take the leave (i.e. because of illness or caring responsibilities), a day (or part-day) is deducted from the accrued leave balance and the employee is entitled to be paid for all of the ordinary hours they would otherwise have worked on that working day (or part-working day).

Therefore, the employees of Mondelez who work ordinary weekly hours over 3 x 12 hour days are entitled to 10 x 12 hour days of paid personal/carer's leave per year (equating to 120 hours leave per year), and the employees who work ordinary weekly hours over 5 x 7.2 hour days are entitled to 10 x 7.2 hour days of paid personal/carer's leave per year (equating to 72 hours leave per year).

In considering the employer's argument that this approach would result in inequity among employees, the Court considered the construction of the personal/carer's leave entitlement in the National Employment Standards (NES) and found that its primary purpose is to provide income protection for employees during periods of illness, injury or unexpected emergency. The Court said that under the "working day" approach, *"each employee will be equally protected against his or her loss of earnings should the need to take leave arise. That does not seem inequitable."*

Although the primary issue in the case was how personal/carer's leave accrues and is paid for employees who have ordinary hours in excess of the "usual" full-time hours of 7.6 hours a day (or 7.2 hours in this case given the 36 hour week), the reasoning of the majority judgement has turned on its head the widely understood method of how personal/carer's leave accrues for part-time employees.

Before this decision, it had been understood that personal/carer's leave accrued for part-time employees on a pro rata basis, according to the employee's ordinary hours of work. This is consistent with section 96(2) of the FW Act, and the information provided in the Explanatory Memorandum to the

FW Act. This meant that part-time employees would accrue less than 10 days of personal/carer's leave a year.

It is not clear whether Mondelez and/or the Minister intend to seek leave to appeal the decision to the High Court of Australia. The Fair Work Ombudsman is currently updating its website to ensure that the information relating to the accrual and payment of personal/carer's leave is consistent with the Court's decision. The decision may also have implications for the accrual of paid annual leave.

In light of the decision, employers should review their practices for how personal/carer's leave is accrued and paid for shiftworkers and employees working part-time and/or a variable pattern of ordinary hours (such as where ordinary weekly hours are condensed into less than five days). It may be necessary to adjust payroll practices to ensure that personal/carer's leave accruals are correctly recorded and paid. Subject to a High Court appeal of the decision or an amendment to the FW Act, employers should ensure that all permanent employees accrue 10 days of personal/carers leave for each year of service.

For further information, please contact the Master Builders SA workplace relations team on 8211 7466 or [IR@mbasa.com.au](mailto:IR@mbasa.com.au)