

WHAT'S IN A "DAY"? – HIGH COURT MAJORITY OVERTURNS *MONDELEZ* PERSONAL/CARER'S LEAVE DECISION

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Labour, Employment, and Workplace Safety Alert

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A 4-1 majority of the High Court of Australia (with Gaegler J dissenting) has overturned the controversial *Mondelez* decision, confirming what has been the widespread understanding of the operation of personal/carer's leave entitlement. The High Court held that where the Fair Work Act provides for an employee's entitlement to "10 days" paid personal/carer's leave, a "day" refers to a "notional day" consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period.

In this alert, we explain the original circumstances, what the Courts found and what this means for your business.

BACKGROUND

The Federal Court of Australia

The two employees at Mondelez's Cadbury plant each work 36 hours per week averaged over a four week cycle, and worked those hours in 12 hour shifts. The relevant Enterprise Agreement (EA) stated that employees working 12 hour shifts are entitled to 96 hours of paid personal leave per annum, which is sufficient to cover eight 12-hour shifts.

In August 2019 the majority of a Full Federal Court held that 'day' in Section 96(1) referred to a portion of a 24 hour period that would otherwise be allotted to work. This effectively meant that employees working 12 hour shifts should be entitled to 120 hours of paid personal leave per annum under the National Employment Standards (NES), meaning that the EA covering the two employees was less beneficial than their entitlement under the NES.

The High Court of Australia

Before the High Court, the Minister for Jobs and Industrial Relations submitted that the expression '10 days' refers to the number of ordinary hours of work over a period of two working weeks.

The Union argued that the expression '10 days' should be taken at its ordinary meaning. This is that personal leave accrues in 'days' over a year of service, and that a 'day' is a portion of a 24 hour period that would be allotted to work, as held by the majority at the Full Federal Court.

WHAT DID THE COURT FIND?

Using textbook principles of statutory interpretation, the majority of the High Court considered the stated objectives of the Fair Work Act of fairness, flexibility, certainty and stability and decided that a "day" or "10 days"

must be calculated by reference to an employee's ordinary hours of work. It held that the purpose of s 96 is to protect employees against loss of earnings, and it does that by reference to their ordinary hours of work.

As a result, the amount of leave accrued does not vary according to their pattern of hours of work. Where an employee works, for example, a 36 hour week (as in this case), the employee will be entitled to 72 hours personal/carer's leave per annum, regardless of whether, for example, the 36 hours is worked across 3, 4, or 5 days.

The Majority considered that the "working day" construction put forward by the Union would lead to inequalities between employees with different work patterns, and would be unfair.

EFFECT OF THE DECISION

This High Court decision clarifies that full and part time employees will progressively accrue personal leave on a pro-rata basis of 1/26 of their ordinary hours of work in a year, with a day for the purposes of s 96(1) consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly period).

This case particularly impacts employers of part time employees and shift workers.

The previous Full Federal Court decision had substantial cost implications for employers of workers who completed longer shifts, particularly in the healthcare, mining and construction industries. This decision means that workers who complete longer shifts over fewer days per week are not entitled to more sick leave than workers on regular hours, and preserves equality between workers on different rosters.

Likewise, the decision had the same implications for all part time employees who, while working less than 38 hours a week, were accruing personal/carer's leave at the same rate as their full time counterparts.

The shift workers at Mondelez who worked 36 hours per week in 12 hour shifts were entitled to 120 hours of paid personal leave per annum under the previous Full Federal Court ruling. This decision means that they are instead entitled to 72 hours of paid personal leave per annum under the NES though their relevant EA meant that they could still access 96 hours of paid personal leave per annum, above the NES minimum standard. Despite this, the effect of this decision means that employees not covered by an EA are subject to this High Court interpretation of a 'day' of leave, and shifts the minimum standards that employers will have to adhere to in agreements with employees.

WHAT DO EMPLOYERS NEED TO DO?

Where employers have amended or created new contracts, payroll systems and agreements in accordance with the Federal Court's decision in August 2019, these will need to be reviewed and updated.

This decision again confirms what has been (until the Federal Court's decision) the widespread understanding of the operation of the personal/carer's leave entitlement in the Fair Work Act.

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