Article Information

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Service: Employment & Labour

The High Court has handed down its decision in Mondelez and good sense has prevailed

Earlier today, the High Court handed down its decision in Mondelez v AMWU [2020] HCA 29. The High Court's decision means a "day" of personal leave is an average day for the worker not the specific day of absence. This interpretation of personal leave under section 96(1) of the Fair Work Act 2009 (Cth) is consistent with the way many payroll systems already provide for personal leave to accrue and be paid and avoids difficult changes to Employer payroll processes.

Mondelez v AMWU [2020] HCA 29.

The highly anticipated decision comes after the earlier Full Court of the Federal Court took a different and impractical view of personal leave requirements. The Full Federal Court's construction, if followed, would have required a significant change in the leave accrual systems commonly used by employers, as it required that leave accrue in days, not hours. The decision was opposed by the Minister for Jobs and Industrial Relations, who intervened in the proceedings in support of Mondelez.

Background to the Full Federal Court proceedings

Mondelez commenced proceedings against the AMWU in the Federal Court seeking declarations that its method for adjusting accruals and paying personal/carer's leave under its enterprise agreement complied with, and was more beneficial than, section 96 of the *Fair Work Act 2009* (Cth)(**the FW Act**).

Under clause 24 of Mondelez's enterprise agreement, employees working 12 hour shifts received 96 hours of paid personal leave per annum. When employees working 12 hour shifts took personal leave for a single 12-hour shift, Mondelez deducted 12 hours from their accrued leave balance. Consistent with this approach, over the course of one year of service, the employees accrued a quantum of leave which was sufficient to cover absence for eight, 12 hour shifts. Under Mondelez's construction of s 96(1) of the FW Act, the 96 hours of personal leave per annum in their enterprise agreement was 24 hours better per year than the minimum required under s 96(1) of the FW Act. Mondelez's full-time employees each worked an average of 36 hours per week or 7.2 hours per day.

Mondelez's construction was based on the "industrial meaning" of the word "day". That meaning is said to be a "notional day", which is calculated based on an employee's average daily ordinary hours over an assumed five-day working week. The average day being 7.2 hours (equivalent to a 36 hour week). By contrast, the AMWU contended that a day meant a "working day", and as the employees worked 12-hour shifts, section 96 of the FW Act required that employees accrue 10 days of 12 hours of paid leave, totalling 120 hours a year.

Much to the concern of employers, the Full Federal Court favoured the AMWU's construction, agreeing that the entitlement to a day's 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. The decision would have had significant implications around how leave is accrued (whether in days or hours), as well as how much leave employees accrue.

Mondelez successfully appealed against the Full Federal Court's decision, with the High Court finding that the decision "*would give rise to absurd results and inequitable outcomes, and would be contrary to the legislative purposes of fairness and flexibility in the FW Act, the extrinsic materials and the legislative history*". For example, the Full Federal Court's construction would lead to the following outcomes:

- An employee whose hours are spread over fewer days with longer shifts would be entitled to more paid personal/carer's leave than an employee working the same number of hours per week spread over more days.
- A part-time employee who works 12 ordinary hours per week as a single shift would accrue 120 hours of leave (ten absences of 12 hours) – almost double the 72 hours of leave a full-time employee working 36 ordinary hours per week over five 7.2 hour days would accrue in a year.
- A person who was employed one day per week by a number of employers would be entitled to ten days of paid personal/carer's leave from each employer.

Adopting instead the construction favoured by Mondelez and the Minister, the High Court declared as follows:

> *"The expression '10 days' in s 96(1) of the* Fair Work Act 2009 *(Cth) means an amount of paid personal/carer's 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, or 1/26 of the employee's ordinary hours of work in a year. A 'day' for the purposes of s 96(1) refers to a 'notional day', consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly) period."*

Consistent with this approach, an employee who worked 36 ordinary hours per week over three 12 hour shifts would accrue the same amount of annual leave as an employee who worked ordinary hours over five 7.2 hour shifts per week.

The majority placed significant emphasis on the importance of reading section 96 in its statutory context, the section of the Explanatory Memorandum of the *Fair Work Bill 2008* dealing with that provision, and the predecessor to section 96 under the *Workplace Relations Act 1996*. Additionally, the majority noted that Mondelez's 'notional day' construction conforms more broadly with the treatment of annual leave under the FW Act, which accrues progressively according to an employee's ordinary hours of work, and are cashed out in the same way.Although the High Court's decision will be a welcomed relief for many employers, employers with enterprise agreements or employment contracts which contain more beneficial entitlements to personal leave must continue to comply with their obligations under those agreements. To the extent that there is any uncertainty around whether an enterprise agreement or employment contract provides for a lesser entitlement than section 96 (1) of the FW Act, employers should seek legal advice.

- The High Court's decision represents a return to the construction of section 96(1) of the *Fair Work Act 2009* (Cth) which treats a "day" as an average day. For a standard full-time worker who works 38 hours per week, that means 7.6 hours.
- Employers with enterprise agreements or employment contracts which contain entitlements to personal leave which are more beneficial than the National Employment Standards (**NES**) (including section 96(1)) must ensure that they continue to comply with those standards.
- Employers who are unsure if their enterprise agreement or employment contracts comply with the NES, or who took action following the Full Federal Court's decision to change their practices concerning the accruing and paying of personal leave, should seek legal advice.

For advice on how these changes will affect your business please contact a member of Piper Alderman's Employment Relations team.