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Court says personal leave is by the "day", not the hour, and that "randomness is inherent in the concept of personal/carer's leave"

On 21 August 2019, the Full Court of the Federal Court handed down a decision clarifying that personal leave under the NES is calculated in units of days and part-days (not hours). Tim Lange, Partner, Professor Andrew Stewart, Consultant, and Mark Caile, Lawyer, review the decision and the implications for employers.

The decision of the Full Court of the Federal Court in *Mondelez v AMWU* [2019] FCAFC 138 has (for now) resolved a persistent debate about how personal leave (or "personal/carer's leave" as it is more formally known is to be calculated under the National Employment Standards (NES). The ruling also has significant implications for the calculation of an entitlement to annual leave under the NES.

Legislative framework

Section 96(1) of the *Fair Work Act 2009* (Cth) (FW Act) states that "an employee is entitled to 10 days of paid personal/carer's leave" for each year of service with his/her employer. However, the FW Act does not define a "day" for this purpose. Further complexity is created by inconsistent provisions within the FW Act. For example, s 96(2) states, "paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work".

Section 99 also states that if an employee takes a period of paid personal leave, the employee must be paid at their base rate of pay for their "ordinary hours of work in the period".

Under the previous *Workplace Relations Act 1996* (WR Act), an employee accrued personal leave at the rate of $^{1}/_{26th}$ of nominal hours worked in a year (equating to two weeks of personal/carer's leave per annum for a full-time employee).

The dispute in *Mondelez*

In October 2017, the food manufacturer Mondelez applied to the Fair Work Commission (FWC) for approval of an enterprise agreement which stated that employees accrued up to 96 hours' paid personal leave per annum if they were employees who worked 12-hour shifts. The Agreement provided for employees who did not work 12-hour shifts to accrue 80 hours of paid personal leave per year. The FWC queried whether or not these accrual rates satisfied the NES for employees who worked 12-hour shifts, as part of a working week comprising 36 ordinary hours. Mondelez argued that an accrual rate of 96 hours per year exceeded the NES entitlement to "10 days" for employees who worked 12-hour shifts, because for workers on a 36-hour week, "10 days" in the NES should be read as meaning 10 periods of 7.2 hours each, or 72 hours of leave per year.

After the FWC refused to convene a Full Bench to deal with the issue, Mondelez applied to the Full Court of the Federal Court for declarations that:

1. If a particular employee was rostered to work a 12-hour shift, and was absent on personal leave for the whole day, then 12 hours' leave would be deducted from her accrual of paid personal leave, and
2. The entitlement under the enterprise agreement (for 96 hours personal leave accruing per year for employees who work 12-hour shifts, and 80 hours per year for others) was more beneficial than the entitlement to paid personal leave under the NES.

The Minister for Small and Family Business, the Workplace and Deregulation (Minister) intervened in the case in support

of Mondelez. The application was opposed by the Australian Manufacturing Workers Union (AMWU), and by two of its members who work at the Cadbury plant operated by Mondelez in Claremont, Tasmania.

The arguments about the meaning of a "day"

Mondelez argued that the word "day" in the NES has an "industrial meaning", referring to a "notional working day". According to Mondelez's approach, this would mean the value of a "day" for each employee was the average daily ordinary hours of that employee, assuming they worked a five-day week. Essentially, that would be "the average weekly ordinary hours divided by five". This would have been broadly consistent with the approach adopted by many employers.

In practice, Mondelez's approach would mean that:

- For a full-time employee on a 38-hour week, 10 days leave would be equivalent to 76 hours.
- For an employee who was full-time, but worked shifts with variable lengths, the employee could exhaust their annual entitlement in less than 10 days if their time off happened to fall on days with longer shifts.
- Conversely, such an employee could take more than 10 days off on leave, by spreading their 76 hours across their shorter shifts.

The Minister argued that "10 days" equated to an individual employee's ordinary hours of work in a two-week period. For a part-time employee who worked only 30 ordinary hours per fortnight, the Minister's approach would mean they accrued 30 hours' paid personal leave per year.

The majority decision suggested that the Minister's argument and that of Mondelez significantly overlapped, and as a result only identified the substantial difference between those two positions in a limited way. That may have contributed to the Minister's argument (which was essentially based on consistency between the relevant provisions of the Act) being somewhat lost amongst the 'industrial history' and various hypothetical scenarios that were an inevitable focus of the Court grappling with the Mondelez position.

The AMWU argued that personal leave needs to be measured in units of "days", and that a "day" is equal to a "calendar day" (that is, a full 24-hour period).

The decision of the majority in *Mondelez*

The majority of the Full Court of the Federal Court, Justices Bromberg and Rangiah, did not entirely accept any of the approaches put forward by the parties. A key driver for their decision was an acceptance that "randomness is inherent in the concept of personal/carer's leave" (because the capacity to access that leave is contingent on illness or incapacity), but that the amount of leave can be determined by reference to fractions of a day. They concluded that a "day" of personal leave referred to a "working day". A "working day" was said to be based on the portion of a 24-hour period that would otherwise have been allotted to work if the person had not taken leave. The result is that:

- The unit of measurement for paid personal leave is **days** and **fractions of days**.
- If an employee takes personal leave for the whole period of a day on which they would otherwise have worked ordinary hours, then the employee would have 1 day of paid personal leave deducted from their accrual. It does not matter whether they were rostered for 7.2 ordinary hours, 4 ordinary hours, or 12 ordinary hours that day.
- For employees who take personal leave for some but not all of a day, the deduction from their leave balance would be a fraction of a day, measured by the proportion of their scheduled ordinary hours that they fail to work.

The majority stressed that the purpose of paid personal leave is to act as a form of income protection for employees during periods of illness or emergency. On the interpretation proposed by Mondelez, employees working longer shifts would exhaust their leave entitlement in a fewer number of days, and thus lose income, sooner than those working shorter shifts.

The majority also contrasted the language used in the FW Act, in expressing an entitlement in terms of a number of days, with the WR Act, under which the accrual and taking of leave was clearly and unequivocally tied to the number of hours worked.

The dissenting opinion

In a relatively brief judgment, Justice O'Callaghan concluded that the word "day" in s 96(1) operated "as a unit of time directly referable to, or expressed as, ordinary hours of work". O'Callaghan J accepted the arguments of Mondelez that personal leave was to be calculated in hours under the NES.

Implications of the majority approach

In practice, many payroll systems calculate leave entitlements as a fraction of hours worked. The issue is acute for

employers of employees who have different ordinary hours on different days, although for employees whose hours do not vary from day to day, the decision in *Mondelez* is unlikely to create substantial difficulty.

Where an employee has taken personal leave on a day on which they were due to work more than an average number of ordinary hours, it is possible that they may have been debited more than a working day's worth of leave. If that employee has subsequently exhausted their personal leave entitlement and had to take unpaid leave, or access another form of leave (such as annual leave), they may have been disadvantaged. Such an employee may be entitled to pursue a claim for any income lost as a result.

The FW Act also requires accurate records to be kept of "the balance of the employee's entitlement to … leave". Continued recording of leave balances in hours may expose employers to liability for breach of that obligation, as well as a presumption of underpayment, at least until payroll system providers are able to accommodate a change.

If the majority's approach is correct, it also follows that a "day" of personal leave has no predictable value that can be ascertained without reference to the particular day on which it is taken. This is because, according to the majority, 1 day of leave will be equal to the ordinary hours the employee would have worked if they did not take the leave. This means the value of 1 day is determined by every individual employee's ordinary hours of rostered work **on the day the leave is taken**. This creates some substantial issues.

First, the ability to account for a variable value of personal leave (and likely annual leave) balances is limited, and involves inherent inaccuracies. This impacts not only on ordinary and prudent provisioning for that liability, but also on valuation of accrued employee entitlements under standard accounting practices, including for transactions that depend on an identifiable value being attributed to that liability.

Second, the result cannot be easily reconciled with enabling irregular-pattern workers to cash out leave under s 101(2)(c) of the FW Act. This states that if a term of an enterprise agreement or modern award allows personal leave to be cashed out, the payout must equal "the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone". But if that amount would vary according to the hours expected to be worked on the days in question, it is hard to see how any cash-out could be calculated. The majority in *Mondelez* acknowledged this problem, but suggested (without purporting to resolve the issue) that either personal leave could not be cashed out for workers with varying shift lengths, or that any cash-out would need to be calculated by reference to the maximum number of hours the employee might have worked on each day covered by the arrangement.

The result may, additionally, unnecessarily discourage employers from exploring and adopting more flexible forms of work that do not accord with a regular pattern (including following employee requests for flexible work). The principal step to resolve the issues highlighted by the majority decision will lie in review of payroll systems. If the necessary rectification can occur in those systems, the decision would not represent an additional impediment to continuing and extending flexible forms of work.

Annual leave

The NES provides for relevant employees to accrue 4 weeks paid annual leave each year. The approach of the majority in *Mondelez v AMWU* will be relevant to interpretation of those provisions as well. The decision to interpret "10 days" as not being divisible into hours supports the conclusion that "4 weeks" annual leave likewise needs to be calculated in terms of weeks, and not broken down into hours, as payroll systems commonly do.

Possible options open to Mondelez and the Minister

For Mondelez, there is an option to apply to the High Court for special leave to appeal. An application for special leave to appeal must be filed within 28 days after the judgment was pronounced. Accordingly, the deadline for Mondelez to lodge its application will be 18 September 2019. If an appeal is lodged and leave granted by the High Court, a decision could be expected some time in 2020.

Business groups are also likely to lobby the Morrison Government to amend the FW Act to enshrine the interpretation proposed by the Minister in this case. It remains to be seen whether any such proposal is forthcoming – and if it is, whether it can secure the necessary support in the Senate.

Conclusion

Subject to any potential decision upon appeal, or statutory intervention, the majority's judgment in *Mondelez* is now the law on how personal leave accrues and is paid under the FW Act. The decision is broadly consistent with previous judicial and FWC approaches to the issue, which the majority relied on in reaching their decision. For many employers, however, it will necessitate a change in how they are calculating their employees' entitlements to personal leave, and perhaps also

annual leave.

Employers should seek legal advice specific to their circumstances if they believe they may have miscalculated the entitlements of full-time or part-time employees with working hours that vary from day to day.

Key Takeaways

The key takeaway points from this case for employers include:

- Personal leave accrues and is taken in increments of days and part-days, not hours (as many payroll systems currently assume).
- Employees who take personal leave for all of a given day should have one day debited from their entitlement and be paid for all the ordinary (non-overtime) hours they would have worked on that day, regardless of the number of hours involved.

For employees who take personal leave for some but not all of a day, the deduction from their leave balance is equal to a fraction of a day, measured by the proportion of their scheduled ordinary hours that they fail to work.