

## NEWS&VIEWS SEPTEMBER 2019

### Significant changes in personal and carers leave calculations

**Employees who work non-standard hours may have a greater entitlement to personal leave after a landmark decision of the Full Federal Court in August 2019.**

For years, employers have enjoyed a stable interpretation of personal leave calculations for:

- Part-time employees; and
- Employees whose daily work hours are more than 7.6 hours per day

However, in August 2019, the Full Federal Court handed down a landmark decision that dramatically changed employee personal leave entitlements

Before the decision, section 96(1) of the *Fair Work Act* (the Act) gave an employee ten **days** of paid personal/carers leave for each year of service. This entitlement accumulated from year to year.

Now, the decision impacts how sick and personal leave is accrued and calculated for employees with non-standard work hours. In other words, employees who work more or less than 7.6 hours per day. It will also affect the software used by employers for making these calculations.

**Here's what you need to know.**

### Background – Mondelez Case

The decision concerned Mondelez, a food manufacturer which was negotiating an enterprise agreement with its workforce.

The Full Federal Court reviewed the proposed enterprise agreement. In particular, it considered employee entitlements of ten days of paid personal leave for each year of service. There was an argument about the interpretation of the word **day** under the Act.

Section 99 of the Act requires an employee to be paid personal leave at their base rate of pay for ordinary hours of work.

Unfortunately, the Act doesn't define the word *day*. This case was very much about what the word *day* means, which is why it's an important decision.

The employer argued that the word *day* is a **notional** day and that it is really a reference to the employee's average daily ordinary hours, based on a five-day working week.

It argued that the Act didn't make allowances for part-time employees or other workers who worked more than 7.6 hours per day. For example, an employee working 38 hours over four days would get the same accrued entitlement as an employee working 38 hours over five days.

The union argued that the word *day* had a **natural** meaning.

The entitlements should be calculated by reference to the hours the employees would have worked on the particular day they were absent from work on personal or carers leave

## The Court's decision

The Court majority favoured the union's interpretation.

It said personal leave existed as a type of income protection and so employees should be paid for the hours they ordinarily would have worked on the day they took the personal or carers leave.

### It said:

*... no employee who is unable to work because of illness or injury will lose income.*

The Court found that under the Act, leave didn't only accrue for full days. Part days could also accrue. So for a part day of personal leave, an equivalent part day should be deducted from the employee's leave balance.

In other words, the Court decided that paid personal leave should be calculated on a **working** day rather than a **notional** day.

## Implications for employers

The method of calculating leave for full-time employees working standard hours will remain unchanged.

For employees working non-standard hours (more or less than 7.6 hours a day), there are significant implications. These workers include part-time employees, shift-workers and other employees working more than 7.6 hours per day.

The employer may appeal the decision to the High Court of Australia. The Commonwealth Government may seek to intervene. Alternatively, the Government may move to close the loophole. It could amend the Act to clarify the meaning of the word day as it applies to leave entitlements.

However, unless or until that happens, the Court's decision is law. **Your organisation must comply.**

### Employers must:

- Calculate personal leave for **every** employee based on the employee's working day. That is, the hours the employee would have worked had they not taken personal or carers leave
- Check on payroll software to ensure this change is reflected in how leave accrues for each employee
- Consider whether any employees are entitled to backpay

## Where to from here

This decision could have far-reaching consequences for Australian employers, including an urgent need for payroll software updates. Failing to implement changes could expose your organisation to underpayment of wages claims. The value of these claims would depend on the percentage of your workforce performing non-standard working hours. It's a significant decision and needs immediate attention.

We encourage you to **get in touch for urgent legal advice** to explore how your organisation is affected.

In the meantime, we'll keep you informed of news about how the Government's plans, whether there has been a High Court appeal, and any other developments.

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