

NEWS&VIEWS AUGUST 2020

High Court favours employer's position in landmark personal leave case

The High Court's common-sense judgment will be a welcome relief for employers of part-time and casual workers

The case of [Mondelez](#) has been divisive, mainly for its interpretation of leave entitlements. In particular, it has focused on employees who work **fewer than 38 hours per week or non-standard hours**.

Now, the High Court of Australia has handed down a decision which favours the employer's interpretation of leave entitlements. We expect this decision to finalise the issue unless the Government chooses to pass legislation to close some loopholes in the Fair Work Act.

Background to [Mondelez](#) decision

We last visited this decision in September 2019, just after the Full Federal Court handed down its judgment. [You can find more information in our News & Views article.](#)

Mondelez ran a food manufacturing operation and was in enterprise agreement negotiations with its workforce and associated unions. A sticking point was personal leave: the parties had negotiated that employees would be entitled to ten days of paid personal leave for each year of service.

But the parties interpreted the word **day** differently and the [Fair Work Act didn't provide any detailed definition](#). They eventually sought the Federal Court's intervention.

The Full Federal Court preferred the union's interpretation of day, deciding that personal leave was a type of income protection. It found that employees should be **paid for the hours they ordinarily would have worked** on the day they took the leave. The Full Court said calculation of personal leave should be based on a working day rather than a notional day. The upshot was that employees would be entitled to **10 calendar days of sick leave per year, regardless of the duration of their usual shifts and even if they didn't work full-time**.

This decision had significant implications for employees who weren't full-time and who weren't working regular hours. In other words, employees who were working more hours or fewer hours than 7.6 hours per day.

We were concerned that the decision would impact employers because:

- Personal leave would have to be **recalculated** for every employee based on the hours they would have worked (had they not taken leave)
- **Payrolling software** would have to be checked and potentially changed or reprogrammed to ensure all leave accruals complied with the decision
- They would have to work out whether any employees were entitled to **backpay**

A significant administrative burden loomed, with potential exposure to multiple **underpayment of wages claims**.

The employer and the Federal Government appealed the decision to the High Court of Australia.

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The High Court's decision

The High Court handed down its decision on **13 August 2020**.

The majority of the High Court upheld the appeals of the Federal Government and the employer, **overturning the Full Federal Court's decision**.

The Court found that the [Fair Work Act's reference to the word day](#) should mean a **notional** day rather than a **working** day. A notional day would consist of **one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period**.

In other words, the calculation method works out an average amount rather than a potentially inflated amount.

The Court also found that patterns of work didn't necessarily stick to two-week cycles. So an acceptable alternative method of calculation was to work out what hours an employee would ordinarily work in a year, and to arrive at a figure that was **1/26 of those ordinary hours**.

What does this decision mean for my organisation?

The big question is how this decision impacts employers.

All employers should now conduct an **urgent payroll review to reverse the previous changes to payrolling systems** following the Full Federal Court's decision.

The bad news is that this is inconvenient. The good news is that such a review is likely to benefit your organisation, with **significant payroll savings** if you have any staff working non-standard hours, for example, shift workers and part-time workers.

In our current stressed economy, which has been hit hard by the effects of the COVID-19 pandemic, this decision will provide much-needed relief for organisations already under significant pressure.

[Contact us](#) for urgent legal advice to find out more about how this decision affects your organisation, and what changes you need to implement.

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