High Court Clarifies Approach to Calculation of Leave Entitlements

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In an eagerly anticipated decision, a majority of the High Court has overturned the decision of the full Federal Court in *Mondelez v AMWU*,[1] clarifying what is the correct approach to the calculation of personal leave entitlements under the *Fair Work Act 2009* (Cth) (**FW Act**).[2]

Decision of the Full Federal Court of Australia

In the decision under appeal, a majority of the full Federal Court held that under section 96(1) of the FW Act, permanent employees are entitled to 10 '**working** days' of paid personal/carer's leave (**sick leave**) for each completed year of service, with 'working day' referring to the portion of a 24-hour period that would otherwise be allocated to work by the employee.

To illustrate, the Mondelez employees to whom these proceedings related worked three 12 hour shifts each week, giving a total of 36 hours each week. With the 'working day' interpretation that was accepted by the full Federal Court, these employees were entitled to 120 hours of sick leave per year, being 10 days of sick leave at 12 hours per day.

As can be seen from the above example, the main consequence of the 'working day' interpretation was that it provided part-time employees and many shift workers with a substantially greater entitlement to sick leave when compared to their entitlement under the long-accepted 'pro-rata' approach.

Decision of the High Court

Kiefel CJ, Nettle and Gordon JJ (and Edelman J in a separate judgment) upheld the appeals of Mondelez and the Federal Government, finding that the word 'day' in section 96(1) refers to a 'notional day', rather than a 'working day' as was accepted by the full Federal Court. Accordingly, the entitlement to '10 days' of sick leave under this section refers to an employee's ordinary hours of work over a two-week period, or 1/26th of the employee's ordinary hours of work in a year, rather than 10 '**working** days'.

Using the example above, under this 'notional day' interpretation that has been accepted by the High Court, the employees are entitled to 72 hours of sick leave per year, with each day of sick leave being taken at the rate of 12 hours per day.

The majority found that the 'notional day' interpretation:

(a) Supports the stated objectives of the FW Act to provide employers and employees with fairness, flexibility, certainty and stability;

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[1] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2019] FCAFC 138

[2] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29.

(b) Aligns with the description of the entitlement to sick leave as provided in the Explanatory Memorandum to the *Fair Work Bill 2008*, and accords with other uses of the word 'day' in the FW Act; and

(c) Is consistent with the legislative history of the entitlement to sick leave, particularly by reference to the previous *Workplace Relations Act 1996* (Cth).

There was a clear concern amongst the majority that the 'working day' interpretation would create unfairness and uncertainty, giving rise to '*absurd results*' that are contrary to the objectives of the FW Act, its legislative history and other extrinsic materials.

Consequences for Employers

The decision has clarified that sick leave accrues and is paid based on an employee's ordinary hours of work, rather than the number of days worked. More specifically, it has provided certainty with respect to the value of the entitlement to sick leave under the FW Act – with the '10 days' under section 96(1) equating to an employee's ordinary hours of work over a two-week period or 1/26th of the employee's ordinary hours of work in a year. It is also important to note that with this 'notional day' interpretation, the amount of sick leave that is accrued by an employee does not vary according to the employee's pattern or spread of hours of work, as was the position under the 'working day' interpretation.

Moving forward, employers should review their current employment documentation (particularly their employment agreements and leave policies), as well as their payroll practices and procedures, to ensure that sick leave entitlements have been (and will continue to be) treated in a manner consistent with the High Court's decision. It may also be necessary for employers to train their HR and payroll teams to ensure they are aware of the implications of this decision and the correct rules surrounding the accrual and payment of sick leave under the FW Act.

Addisons' employment law team can assist employers with reviewing and updating their employment documentation and can provide training to employers with respect to compliance with their leave obligations under the FW Act.

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