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HIGH COURT DECISION:
PERSONAL LEAVE

INTRODUCTION

On 13 August 2020 the High Court delivered what is both a pragmatic and theoretically considered decision about the method of accruing and taking personal leave under the *Fair Work Act*. The decision confirms what has been (until the original Federal Court's decision) the widespread understanding of the operation of the personal leave entitlement within the *Fair Work Act*.

The decision is relevant for employers of shift workers who work longer shifts, but across fewer days per week. Given the shifts and spread of hours arrangements available under the terms of the Graphic Arts Printing and Publishing Award, and as contained within various enterprise agreements, this issue could have had considerable consequences for our industry if it was upheld.

The original decision of the Federal Court created a situation whereby an employee whose hours are spread over fewer days with longer shifts would have been entitled to more paid personal leave than an employee working the same number of hours per week spread over more days. Further, the decision had the same implications for all part-time employees who, while working less than 38 hours a week, were accruing personal leave at the same rate as their full-time counterparts.

BACKGROUND

The case focused on workers at the Mondelez owned Cadbury factory in Claremont, Tasmania. The company has employees who perform 12-hour shifts, across three shifts per week. The relevant enterprise agreement contained a term allowing those shift workers 96 hours of personal leave per year. A shift worker would be paid 12 hours if they took a personal leave day.

A dispute arose over the calculation of personal leave and whether the method applied by the company was consistent with the entitlement under the Act. The Australian Manufacturing Workers Union (AMWU) argued that because the employees worked 12-hour shifts, “a day” should be read as meaning 12 hours. Effectively, the AMWU argued those employees were entitled to 120 hours of paid personal leave a year, rather than 76 hours.

Although this argument was inconsistent with industry practice and the general understanding and purpose of the Act, a majority of the Federal Court (2:1) agreed with the AMWU’s view.

Mondelez appealed the decision to the High Court. The issue raised enough of a concern that the Minister for Industrial Relations joined the appeal process and leave to appeal was sought and granted on 7 July 2019, and the formal hearing before the High Court occurred in December 2019.

HIGH COURT APPEAL

The issues before the High Court was whether a "day" in "10 days" in s 96(1) of the *Fair Work Act* refers to:

i. A "**notional day**", consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period, **OR**

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ii. A "**working day**", consisting of the portion of a 24-hour period that would otherwise be allotted to working and thereby authorising an employee to be absent without loss of pay on ten working days per year.

In overturning the Federal Court decision, a majority of the High Court (4:1) rejected the AMWU's "working day" argument and instead held that what is meant by a "day" or "10 days" must be calculated on a notional day by reference to an employee's ordinary hours of work.

The High Court outlined in its judgment that accepting the AMWU's view "would give rise to absurd results and inequitable outcomes, and would be contrary to the legislative purposes of fairness and flexibility in the Fair Work Act, the extrinsic materials and the legislative history."

HIGH COURT DECISION
The High Court determined that:

- "10 days" in s 96(1) of the *Fair Work Act* is two standard five-day working weeks.
- One "day" refers to a "notional day" consisting of 1/10th of the equivalent of an employee's ordinary hours of work in a two-week period.
- Because patterns of work do not always follow two-week cycles, the entitlement to "10 days" of paid personal/carer's leave should be calculated as 1/26th of an employee's ordinary hours of work in a year.

IMPLICATION AND CONSIDERATIONS FOR TRMC MEMBERS
Personal leave accrues progressively according to ordinary hours worked at a rate of 1/26th for all full-time and part-time employees, with leave being deducted progressively on the basis of ordinary hours taken as leave. For example, permanent employees who work 38 ordinary hours a week will accrue and be entitled to receive 76 ordinary hours of personal leave per year, and an employee who works 24 ordinary hours per week will receive 48 ordinary hours of personal leave per year.

There are several considerations to be taken from the High Court decision:

- The decision settles the interpretation to be applied to s.96 of the *Fair Work Act* relating to the calculation method of personal leave accrual.

- Personal leave accrues progressively according to ordinary hours worked at a rate of 1/26th for all full-time and part-time employees, with leave being deducted progressively on the basis of ordinary hours taken as leave. For example, permanent employees who work 38 ordinary hours a week will accrue and be entitled to receive 76 ordinary hours of personal leave per year, and an employee who works 24 ordinary hours per week will receive 48 ordinary hours of personal leave per year.

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- Those businesses with employees working across variable shift rosters now have a consistent approach to the accrual and application of personal leave. Employees are entitled to leave based on a 'notional day' and not on the actual hours worked.

- The decision reiterates the stated objectives of the *Fair Work Act* being of fairness, flexibility, certainty and stability for **both** employers and employees.

- Legislation, when poorly drafted, is open to potential challenge and interpretation even a decade after its enactment. Industrial history, meaning, custom and practice does not and should not be allowed to disappear as if it never existed. If this occurs, parties attempt to take views that suit their purposes.

- Any members who changed personal leave calculation methods because of the original Federal Court decision should now revisit them and look to make appropriate amendments and updates as a result of this now settled position.

Members with any related queries should feel free to contact our GM – IR, Policy and Governance, Charles Watson, by email charles@thermc.com.au or phone: 0428 568 032 to discuss.