IN THE HIGH COURT OF AUSTRALIA, MELBOURNE REGISTRY
ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

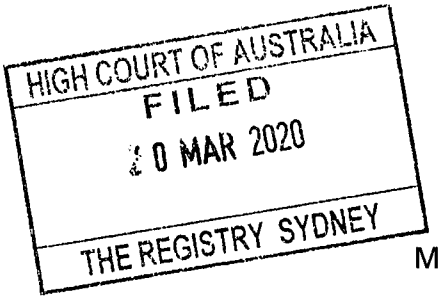
No M160 of 2019

BETWEEN:

MONDELEZ AUSTRALIA PTY LTD
Appellant

- and -

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS UNION (AMWU)
First respondent



NATASHA TRIFFITT
Second respondent

BRENDON MCCORMACK
Third respondent

MINISTER FOR JOBS AND INDUSTRIAL RELATIONS
Fourth respondent

Mondelez's reply to the AMWU Parties' submission dated 28 February 2020

Stuart Wood AM QC
Tel: (03) 9225 6719
Fax: (03) 9225 7967
swood@vicbar.com.au

Dimitri Ternovski
Tel: (03) 9225 8958
Fax: (03) 9225 8395
d@ternovski.com

Date of document: 20 March 2020
Filed on behalf of: The appellant
Prepared by:
Ai Group Workplace Lawyers
51 Walker Street, North Sydney NSW 2060

Telephone: (02) 9466 5521
Facsimile: (02) 9466 5593
Email: stephen.smith@aigroup.com.au
DX: N/A
Contact: Stephen Smith

I Publication on the internet

1. This submission is in a form suitable for publication on the internet.

II Reply to the AMWU Submission

The Average Day Construction is open on the text of s 96(1)

2. The AMWU Parties submit that the Average Day Construction "strains the language" of s 96 and is simply not "available on the text". They ask — "what is a 'standard 5-day working week'?" and submit that the statute does not "conceive" of this concept. And they continue to insist that the Majority Construction is textually superior because it reflects the single natural and ordinary meaning of the word "day" in the context of a period of leave — being a "working day".[1]

3. These submissions should be rejected.

4. *First*, as Mondelez has pointed out in its primary submission:

> [T]he Average Day Construction is itself premised on treating the word "day" in s 96(1) as meaning a "working day". On the Average Day Construction, that word refers to an *average working day*. In contrast, on the Majority Construction, it means a *discrete working day*, in the sense of working hours falling within a single discrete occasion when an employee would ordinarily be required to work. The real constructional dispute between the parties is therefore not whether the word "day" means a "working day" but what *kind* of "working day" s 96 is referring to — an *average* working day or a *discrete* working day.[2]

The AMWU Submission fails to grapple with this point.

5. Further, s 106E — which contemplates that a "day" of leave has different meanings for different kinds of leave under the FW Act — supports the proposition that both of the above meanings are available under the Act.

6. *Secondly*, far from being some novel idea invented by Mondelez, the "standard five-day working week" has been a critical concept underpinning Australian employee entitlements for over 70 years. In the 1945 *Five-Day Working Week Case*, the

---

1 Submissions of the First to Third Respondents (28 February 2020) (**AMWU Submission**) [18]–[25].

2 Mondelez's Submission (31 January 2020) (**Mondelez's Submission**) [29].

Commonwealth Court of Conciliation and Arbitration established a principle that the then-standard 44 ordinary hours per week should be worked over five days if certain conditions were satisfied.[3] In 1947, the Court created Saturday penalty rates for shiftworkers.[4] By then, a "five-day working week" was already enjoyed by a "great" and "increase[ing]" number of employees.[5] Later that year, the Court reduced the standard working week to 40 hours,[6] further accelerating the adoption of a five-day working week. These and subsequent decisions establish the standard five-day working week as the default that underpins the entitlements (such as penalty rates) for those employees whose working hours deviate from that default.

10 7. But one does not need to be a scholar of legal history to understand that a five-day working week — and its converse, the "weekend" — are universally understood ideas in Australian society. The FW Act must be construed against that background.

8. *Thirdly*, the proposition that, in the context of leave, the word "day" may be a shorthand for a number of hours is neither novel nor surprising. The WR Act expressly measured personal/carer's leave in hours. Yet it contained examples that regarded this hourly entitlement as being equivalent to "10 days",[7] thus treating a "day" as a shorthand for a number of hours. This explains why Parliament felt able to re-express the entitlement in "days" rather than "hours" while intending — as the EM makes clear — "not [to] change the quantum of the entitlement".[8]

20 **The anomalies and inequities of the Majority Construction are real**

9. The AMWU Parties try to dismiss and downplay the anomalies of the Majority Construction. *First*, they disparagingly dismiss Mondelez's example rosters as "outlier arrangements" and "highly unlikely work patterns" that can be ignored.[9]

---

3 *Re Five-Day Working Week* (1945) 54 CAR 34, 36.

4 *Re Rates of Pay for Work Performed on Saturdays and Sundays* (1947) 58 CAR 610.

5 Ibid 613, 623.

6 *Re Standard Hours* (1947) 59 CAR 581.

7 See, eg WR Act s 246(2), 249(2).

8 EM xi. Cf AMWU Submission [8], [16], [61]–[67].

9 AMWU Submission [38], [57].

10. This remarkable position — which blithely marginalises whole swathes of the Australian workforce that happen to be inconvenient for the AMWU Parties' argument — is unlikely to reflect Parliament's intention. It is unlikely that Parliament was unconcerned about workers on roster patterns that involve working different number of ordinary hours on different days, such as:

    a. part-time employees working some full days and some part days;

    b. full-time shiftworkers working shifts of different lengths; or

    c. full-time day workers working shorter hours one day a week under a flexitime arrangement.

11. Nor is Parliament likely to have ignored part-time workers having multiple jobs.

12. *Secondly*, the AMWU Parties submit that the problem that the Majority Construction presents for the cashing out provision in s 101[10] can be ignored because cashing out is not "inevitable" but is available only if the relevant industrial instrument allows it. They seek to defend both of the majority's solutions to the s 101 problem, being that an employee who works different hours on different days is either ineligible to cash out their leave or alternatively must be paid on the basis that they would have taken the cashed out leave on the day when they had the greatest number of ordinary hours. The former result is dismissed as insignificant because there is no universal right to cash out personal/carer's leave. The latter result is said to be acceptable because it is advantageous to the employee.[11]

13. These submissions should be rejected. Contrary to the AMWU Parties' assertion, Mondelez's argument does not assume that cashing out is "inevitable". What it assumes is that Parliament intended the cashing out provision to operate in a way that is fair and rational rather than unfair and arbitrary. It is unfair and arbitrary that a worker employed under an industrial instrument that permits cashing out of personal/carer's leave should lose the ability to cash out merely because they switch to a different roster pattern, such as a flexitime arrangement. It is also unfair and

---

10 See Mondelez's Submission [48]–[57].

11 AMWU Submission [37]–[38].

arbitrary that the value of that employee's leave balance — an **accrued** entitlement that is capable of being cashed out — should vary wildly, both up and down, when the employee's roster pattern changes. Parliament is unlikely to have intended a construction that produces these arbitrary and unfair outcomes.

14. *Thirdly*, the AMWU Parties persist in their assertion that personal/carer's leave is not a "financial benefit". Once this is understood, they submit, the "correct comparison" when assessing the fairness of leave allocation is "between the number of *absences from work* that ... two employees may take in circumstances of illness or injury without loss of ordinary time earnings". This leads to the conclusion that the outcomes produced by the Majority Construction are fair and equitable.[12]

15. These submissions should also be rejected. As Mondelez's primary submission explains,[13] personal/carer's leave is plainly a *financial* benefit — it is an entitlement to be *paid* a certain amount in certain circumstances. The entitlement does not cease to be a *financial* benefit merely because for some workers — those who are not employed under an instrument that permits cashing out — the benefit is contingent on the occurrence of particular events rather than being unconditional.

16. Further, the AMWU Parties' simply assume as a given that a fair allocation of personal/carer's leave would give all employees the same number of *absences* without loss of pay. Yet as Mondelez's analysis[14] shows, this allocation is actually anything but fair because it means that two employees who work the same total weekly hours at the same rate of pay get different levels of "cover" against sickness, injury or caring responsibilities merely because their rosters are arranged differently or because they split their hours across multiple employers.

17. Mondelez gives the examples of Employees A and B who both work 30 ordinary hours per week, with A working five 6-hour days per week and B working three 10-hour shifts per week.[15] On the Average Day Construction, both Employee A and

---

12 AMWU Submission [44]–[46], [51]–[57] (original emphasis).

13 Mondelez's Submission [44].

14 Mondelez's Submission [46].

15 Ibid.

Employee B can be sick for the same contiguous period — a fortnight — without loss of pay. This result is fair. On the Majority Construction, Employee A can be sick for a fortnight without loss of pay but Employee B can be sick for over three weeks without loss of pay.[16] This result is unfair and arbitrary.

18. Similarly, it is fair that two employees who work the same total weekly ordinary hours should get the same total quantum of leave regardless of whether they work those hours with one employer or across multiple employers. And it is unfair and arbitrary that an employee who splits their hours across two jobs should get double the amount of leave of an employee who works the same hours in a single job.

19. Thus, the anomalies and inequities of the Majority Construction on which Mondelez relies are both real and serious. They cannot be ignored or dismissed.

The Average Day Construction does not cause anomalies for rostered overtime

20. The AMWU Parties submit that the Average Day Construction leads to the "awkward" result that an employee who takes personal/carer's leave for the ordinary hours component of their shift is required to attend work for any rostered overtime.[17]

21. This submission too should be rejected. *First*, the personal/carer's leave entitlement is primarily concerned with protecting employees against loss of pay, rather than authorising them to be absent from work without committing a breach of contract.[18]

22. *Secondly*, s 99 makes clear that only ordinary time earnings are protected; absence for rostered overtime is therefore unpaid on any construction of s 96.

23. *Thirdly*, it is difficult to imagine a situation where it would be a lawful and reasonable command for the employer to require an employee to attend work for the rostered overtime component of their shift when the employee is taking personal/carer's leave for the ordinary hours component. Thus, the employee will not require leave to be absent for the rostered overtime component without breaching their contract.

---

16 Because Employee B works three shifts per week and is entitled to ten absences on the Majority Construction.

17 AMWU Submission [32]–[35].

18 Cf s 22 of the FW Act, which distinguishes between "leave" and "authorised absence".

Annexure — Additional Statutory Provisions

24. *Workplace Relations Act 1996*:

    a. Compilation dated 6 January 2009.

    b. Section 249.