

**MONDELEZ AUSTRALIA PTY LTD v AMWU & ORS (M160/2019);  
MINISTER FOR JOBS AND INDUSTRIAL RELATIONS v AMWU &  
ORS (M165/2019)**

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 21 August 2019

Special leave granted: 17 December 2019

The appellant (“Mondelez”) is a national system employer and operates food manufacturing plants in Australia, including a Cadbury plant in Tasmania. The Australian Manufacturing Workers Union (“AMWU”) is a trade union which represented Mondelez’ workers.

Under the relevant enterprise agreement, Mondelez employees who work 12-hour shifts were entitled to 96 hours of paid personal leave per annum. Consequently, when a 12-hour shift worker takes a day of personal/carer’s leave, 12 hours are deducted from their leave balance. On this approach, for one year of service, an employee who works three 12-hour shifts would have sufficient leave to cover eight days absent from work under the enterprise agreement.

A dispute arose between Mondelez and AMWU about whether the above method for calculating personal leave is consistent with s 96 of the *Fair Work Act 2009* (Cth) (“the Fair Work Act”). Relevantly, s 96 of the Fair Work Act states:

- For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer’s leave.
- An employee’s entitlement to paid personal/carer’s leave accrues progressively during a year of service according to the employee’s ordinary hours of work, and accumulates from year to year.

The Fair Work Act states that a term in an award, agreement or employment contract cannot provide for an entitlement that is less than an entitlement set out in the National Employment Standards.

Mondelez argued that their enterprise agreement was consistent with s 96 of the Fair Work Act, as under s 96 employees would only be entitled to 72 hours of leave per year whereas the enterprise agreement entitled employees to 96 hours of paid personal/carer’s leave. AMWU argued that, as the employees worked 12-hour shifts, they should be entitled to 10 days of 12 hours of paid leave, totalling 120 hours a year, and that anything less would be inconsistent with s 96 of the Fair Work Act.

Mondelez filed an application seeking declaratory relief in the original jurisdiction of the Federal Court of Australia. Pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) the Chief Justice directed that the jurisdiction of the

Court be exercised by a Full Court on the basis that the matter is of sufficient importance to justify that course.

The then Minister for Jobs and Industrial Relations intervened in the proceeding pursuant to s 569 of the Fair Work Act.

The majority of the Full Federal Court (Bromberg and Rangiah JJ; O'Callaghan J dissenting) determined that full-time and part-time employees are entitled to 10 working days of paid personal/carer's leave for each year of employment. The leave protects those employees' income when they are entitled to be absent from work due to illness or injury (or providing care or support to a family or household member who is ill, injured or suffering from an unexpected emergency).

The Court also determined that the leave must be calculated in working days, not hours. A working day is the portion of a 24 hour period that an employee would otherwise be working. An employee's entitlement is based upon time working for the employer and is expressly calculated in days. For every day of personal/carer's leave taken, an employer deducts a day from the employee's accrued leave balance. If an employee takes a part-day of leave, then an equivalent part-day is deducted from the employee's accrued leave balance.

The grounds of appeal are:

- The Full Court erred by holding that a "day" in s 96(1) of the Fair Work Act means "the portion of a 24 hour period that would otherwise be allotted to work", rather than an average working day calculated as the employee's average daily ordinary hours of work based on a standard five-day working week; and
- The Full Court erred in construing s 96(1) of the Fair Work Act as entitling national system employees (other than casuals) to paid personal/carer's leave equivalent to 10 'working' days (of whatever duration would have been worked on the day in question), per year of service.