

High Court overturns contentious Federal Court decision on personal/carer's leave accrual

In an important decision for employers whose full-time or part-time employee/s do not work the same number of ordinary hours each day (e.g. part-time admin employee working 3 days per week), the High Court has today [confirmed](#) that for the purposes of paid personal/carer's leave accrual under the National Employment Standards (NES) – an employee accrues their entitlement based on an average, 'notional day':

*"The expression '10 days' in s 96(1) of the Fair Work Act 2009 (Cth) means an amount of paid personal/carer's leave accruing for every year of service equivalent to an employee's ordinary hours of work in a week over a two-week (fortnightly) period, or **1/26 of the employee's ordinary hours of work in a year**. A 'day' for the purposes of s 96(1) refers to a 'notional day', consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly) period."* [emphasis added]

This means that for the purposes of the NES – and by extension, modern Awards including the *Vehicle Repair, Services and Retail Award 2020* and the *Clerks Private Sector Award 2020* – the personal/carer's leave entitlement is based on the average ordinary hours worked by the employee. For example, if an employee works an average of 20 ordinary hours per week, they will accrue 40 hours each year of service.

Today's High Court decision overturns the earlier Full Bench of the Federal Court decision on this matter (known as [Mondelez](#)), where employees were found to be entitled to be absent without loss of pay for ten 'working days' per year. This reasoning meant that a part-time employee who worked one 8-hour day per week would be entitled to 80 hours of paid personal/carer's leave per year (or the equivalent of 10 weeks) – rather than 16 hours.

The Federal Court Mondelez decision was therefore significant, particularly as its approach to accrual was subsequently adopted by the Fair Work Ombudsman (FWO) in its advice to employers and employees. As a result of today's High Court Decision, the FWO is now in the process of updating this advice.

Today's High Court decision therefore re-establishes the longstanding, commonsense understanding of how paid personal/carer's leave accrues. Employees accrue progressively based upon their average ('notional') ordinary hours - and are entitled to be paid at their base rate of pay for the ordinary hours of work in the period of absence. Once an employee has exhausted their paid personal/carer's leave entitlement, subsequent leave is unpaid (unless otherwise agreed to be paid by the employer).

Members seeking further information are encouraged to contact the VACC Workplace Relations team on 03 9829 1123.

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