



Personal Leave – Have You Calculated It Correctly?

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Two recent rulings have thrown the workplace arrangements of two large-scale employers of shift workers into chaos as they potentially may result in mass underpayment claims being made against hundreds of businesses around the country.

The Issue

Under the National Employment Standards (**NES**) full-time employees receive 10 days paid personal/carer's leave per year of service and each work-day day is calculated as being comprised of 7.6 hours.

The Mondelez Decision

In the *Mondelez* decision a dispute arose in respect of their enterprise agreement:

- it provided “80 hours per annum” for paid personal/carer's leave rather than 10 days per annum under the NES
- the FWC was concerned the provision would deprive Mondelez's 10 and 12 hour shiftworkers from receiving the full NES entitlement of 10 days per annum
- the FWC had to decide whether the NES entitlement meant 10 days x 7.6 hours or 10 days x actual hours worked being either 10 or 12 hours for its shift workers
- the FWC held that ‘days’ for the purposes of the NES is calculated by reference to the actual hours the employee would have normally worked that day, in this case being either 10 or 12 hours

The AstraZeneca Decision

In the *AstraZeneca* decision a dispute arose in respect of their enterprise agreement:

- 3 different rosters with different hours and days of service existed
- the arrangements resulted in the value of each ‘day’ of paid personal leave being different amongst different shift workers
- AstraZeneca used an averaged hourly figure to calculate how much a shift worker was paid for taking personal leave but used an actual hourly figure to calculate the deduction from their paid personal leave entitlements for such absence
- thus where a shift worker missed a 12-hour shift, they would only be paid for 7.2 hours, however, 12 hours would be deducted from their leave accrual
- this meant the number of paid personal leave days per year differed between



shiftworkers working different rosters and that none, being full-time employees, received the minimum NES entitlement of 10 days per annum

- the FWC held the averaging process contravened the NES and that all full-time employees were entitled to accrue and be paid for 10 days per annum calculated by reference to the actual number of hours in the relevant rostered shift
- interestingly AstraZeneca's approach was based on advice received from the Fair Work Ombudsman and following the decision the Ombudsman has announced a review of its advice on leave accruals and have posted disclaimers

Lessons

For employers:

- the interpretation of NES entitlements are not settled despite the fact they have been in force for almost 10 years
- each decision is in the process of being appealed
- if the decisions stand they will likely have a substantial financial impact on businesses that employ large numbers of shift workers
- they must check their shift workers are accruing and receiving leave entitlements based upon their actual hours of work and, if not, brace for potential underpayment claims
- they must urgently review their contracts, enterprise agreements and business practices in order to ensure compliance with the NES

More Information

Please call the leading employment lawyers in Parramatta, the **Matthews Folbigg Workplace Solutions** employment law team on **9635 7966** to speak with one of our employment lawyers if you require any assistance or advice.