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Laundy intervenes as employers take leave challenge to court

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Workplace Minister Craig Laundy has intervened in Federal Court proceedings as the Ai Group looks to overturn a significant FWC ruling on how personal/carers' leave is calculated.

The Ai Group's application for a judicial review by the full Federal Court comes after the Minister in April had his request for the case to be referred to a five-member full bench rejected by Vice President Adam Hatcher (see [Related Article](#)).

In the Commission proceedings, the Minister said there were "strong public interest considerations" for a full bench referral.

However, Vice President Hatcher rejected arguments that there was "divided authority" – particularly a divided full bench authority – on the interpretation of s96(1) of the Fair Work Act.

The Mondelez case relates to the quantum of personal/carer's leave an employer is obliged to provide to employees working 12-hour days, an issue which arose in an agreement awaiting approval for a chocolate factory in Tasmania.

Ai Group chief executive Innes Willox said the application related to the meaning of the phrase "10 days of paid personal/carer's leave" in s96.

"In payroll systems, personal/carer's leave entitlements are typically recorded in hours, not days, on the basis of the number of ordinary hours that an employee works," said Willox.

"For example, employees who work 38 hours per week are typically credited with 76 hours of paid personal/carer's leave per year, regardless of whether their ordinary hours are arranged on the basis of 7.6, 8, 10 or 12 hours per day."

Willox said the Mondelez case related to 12-hour shift workers, but had implications for most employers in Australia.

"The current enterprise agreement agreed to by Mondelez International applies to employees at the Claremont Plant and states that they are entitled to 96 hours of personal/carer's leave per year.

"This is a lot more generous than the 76 hours employees are entitled to under the Fair Work Act, if the Act is interpreted in the manner in which Ai Group and Mondelez contend."

The Ai Group filed an originating application on June 18 for the case to be heard by the Full Court of the Federal Court.

A hearing has been scheduled for September 6 in Melbourne, with Justice David O'Callaghan to hear arguments about a referral to the Full Court.

Shift workers awarded higher paid leave

Meanwhile, in an FWC decision handed down last week, Deputy President Lyndall Dean ruled on how personal/carers' leave is calculated for shift workers at the Sydney operations of a pharmaceutical company, AstraZeneca.

The [AstraZeneca Enterprise Agreement 2016](#) provides for personal/carer's leave to be accrued and taken in accordance with the National Employment Standards, which sets an entitlement of 10 days per annum.

The AWU and the AstraZeneca are in dispute over how the company is accruing and deducting personal/carer's leave for about 200 employees undertaking shift work.

The enterprise agreement has three rosters, which involve shifts of 12 hours, about 10.3 hours and eight hours.

The union argued that AstraZeneca took the approach of using an average hourly figure for the accrual of personal/carer's leave, but then used the actual hourly figure worked for the deduction.

This meant that workers on Rosters 1 and 2 accrued 72 hours of personal/carers' leave per year, while those on Roster 3 accrued 76 hours over a year.

The AWU argued this resulted in **an employee on Roster 1** having 12 hours deducted when absent for a full shift, meaning their annual entitlement would be exhausted after being absent for six shifts; **an employee on Roster 2** having 10.28 hours deducted from their leave balance each time when absent for an entire shift, meaning they would exhaust their entitlement after being absent for seven shifts; and **an employee working on Roster 3** having eight hours deducted when absent for an entire shift, meaning they would exhaust their annual entitlement after being absent for 9.5 shifts.

The AWU contended that these outcomes resulted in employees receiving an inferior entitlement to the minimum standard of 10 days' leave set by the NES.

AstraZeneca argued the amount to be deducted from an employee's accrued personal leave had to reflect the number of hours for which the employee is paid.

The case was argued before the Mondelez decision was handed down in April, with the parties able to make further submissions in May.

Deputy President Dean ruled that AstraZeneca employees are entitled to 10 days of personal/carer's leave per annum and that a day was deducted when it was taken from the leave balance when it was taken.

But she considered the dispute could not properly be determined without dealing with the issue of payment for personal/carer's leave.

She could not accept AstraZeneca's submission that the entitlement to 10 days of paid personal/carer's leave meant an entitlement to payment for 10 ordinary or standard days of averaged ordinary hours.

In terms of pay, this meant that an AstraZeneca employee on Roster 1 would be paid for 12 ordinary hours for each day for which personal/carers' leave was taken; an employee on Roster 2 would receive 10.28 hours' pay; and Roster 3 employees would get eight hours' pay.

Deputy President Dean said her ruling was consistent with the 2015 full bench decision in [RACV Road Service Pty Ltd v ASU](#).

[Australian Workers' Union, The v AstraZeneca Pty Ltd \[2018\] FWC 4660 \(8 August 2018\)](#)

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