

High Court leave victory for employers voids \$2bn in extra costs

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The High Court has upheld an appeal by the Morrison government and confectionary giant Mondelez International of a Federal Court ruling that business warned would have imposed more than \$2bn a year in extra leave costs on employers.

The Coalition and industry groups welcomed the High Court decision on Thursday that clarified the quantum of personal/carers leave entitlements for millions of workers. But unions said the decision meant shift workers were entitled to less than 10 days personal leave each year.

A full Federal Court majority ruling last August rejected a bid by Mondelez to cut the personal and carers' leave entitlements of shift workers at its Cadbury plant in Tasmania. It found the National Employment Standards required all employees to be able to take 10 days of personal/carer's leave a year, irrespective of how many hours they worked each day.

The Fair Work Act says for "each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave".

The High Court said the issue was whether "day" in "10 days" referred to a "notional" or a "working" day, finding the answer was notional day.

"The alternative construction is that the reference to "10 days" entitles every employee, regardless of their pattern of work or distribution of hours, to be absent without loss of pay on ten working days per year ("the 'working day' construction")," it said.

"That construction is rejected. It would give rise to absurd results and inequitable outcomes, and would be contrary to the legislative purposes of fairness and flexibility in the Fair Work Act, the extrinsic materials and the legislative history. The appeals should be allowed."

Acting Minister for Industrial Relations Mathias Cormann welcomed the decision, which he said restored clarity and certainty in relation to how paid personal/carers leave entitlements are calculated.

“If the Federal Court’s decision had been allowed to stand, it would have created inequities between employees and exposed employers to significantly increased costs, estimated to have been as much as \$2bn per year,” Mr Cormann said.

He said the Federal Court found workers doing the same number of hours each week but on different shift patterns should be entitled to different amounts of personal/carer’s leave.

“Under that ruling, a worker doing 36 hours across five shifts (7.2 hours per day) was entitled to 10x7.2 hours leave, or 72 hours per annum,” he said. “But a worker who did their 36 hours across three 12-hour shifts was entitled to 10x12 hours leave, or 120 hours per year.

“The High Court’s decision avoids these inequities and ensures employees who work the same number of hours per week accrue the same number of hours of leave each year, regardless of how their shifts are rostered.

Australian Industry Group chief executive Innes Willox said the High Court judgment preserved widespread industry practice.

“The interpretation adopted by the High Court ensures that all employees are entitled to take up to two weeks off work each year for personal/carer’s leave regardless of how many ordinary hours an employee works in that two-week period,” he said.

The Australian Manufacturing Workers Union said the decision has implications for workers working ordinary days of more than the standard 7.6 hours.

“Cadbury workers do 12-hour days making the chocolate that we know and love. This decision means that they will get fewer days of personal leave per year than someone doing an office job working 9 to 5,” the union’s Tasmanian secretary, John Short, said.