



DECISION

Fair Work Act 2009
s.739—Dispute resolution

Australian Workers' Union, The

v

AstraZeneca Pty Ltd
(C2017/5066)

DEPUTY PRESIDENT DEAN

SYDNEY, 8 AUGUST 2018

Application to deal with a dispute – personal/carers leave – National Employment Standards.

[1] The Australia Workers' Union (AWU) filed an application pursuant to s.739 of the *Fair Work Act 2009* for the Fair Work Commission to deal with a dispute with AstraZeneca Pty Ltd (AstraZeneca).

[2] The application was made in accordance with clause 6 (Conflict Resolution & Avoidance of Industrial Disputes) of the *AstraZeneca Enterprise Agreement 2016* (the Agreement). The Agreement has a nominal expiry date of 22 June 2019.

[3] The AWU filed an amended application in response to an objection by AstraZeneca as to the jurisdiction of the Commission to deal with the dispute. The objection was subsequently withdrawn.

[4] The parties agree that this dispute is about how AstraZeneca is accruing and deducting personal/carer's leave for employees undertaking shiftwork.

[5] The AWU and AstraZeneca each provided a statement of facts, and relied on oral and written submissions. No evidence was called by either party.

[6] The AWU's application sought the determination of the following question:

“Is [AstraZeneca's] current approach to the accrual and deduction of personal/carer's leave for employees on Rosters 1, 2 and 3 consistent with the National Employment Standards?”

[7] The AWU contended that the answer to the question was no, while AstraZeneca contended that the answer was yes.

[8] At the hearing on 20 February 2018, Mr S Crawford appeared on behalf of the AWU, and Mr HJ Dixon SC appeared for AstraZeneca. Permission was granted for both parties to be legally represented.

[9] Subsequent to the hearing, a decision was made on 13 April 2018 by Vice President Hatcher in *Mondelez Australia Pty Ltd¹ (Mondelez)*. As it appeared that the *Mondelez* decision may be relevant to the matter for determination in this dispute, the parties were invited to make additional submissions as to its relevance. Both parties filed further submissions on 17 May 2018.

Factual background

[10] The Agreement provides that personal/carer's leave be accrued and taken in accordance with the National Employment Standards (NES). AstraZeneca does not dispute that the entitlement to personal/carer's leave is 10 days per annum.

[11] The matters which are not contested provide context for the issue in dispute:

1. AstraZeneca employs some 200 employees who perform shift work at its site in North Ryde, New South Wales.
2. Employees currently perform shift work under three rostering arrangements, which are permitted by clause 12 (Shift Patterns and Rosters) of the Agreement.

- Roster 1 – 24 hour, 6 day roster
- Roster 2 – 24 hour, 7 day roster
- Roster 3 – 8 hours, 5 day roster

3. The current approach by AstraZeneca to the accrual and deduction of personal/carers leave is summarised as follows:

Roster 1 - 24 hour, 6 day roster (Roster 1)

- i) Employees employed to work regularly on Roster 1 work an average of 36 ordinary hours per week on the basis of an average of 7.2 ordinary hours per day over a two week cycle.
- ii) Employees employed to work regularly on Roster 1 accrue a total of 72 ordinary hours of paid personal/carer's leave for each year of service.
- iii) Employees employed to work regularly on Roster 1 work an average of 36 ordinary hours per week, spread across 3 working days each week, and when they take paid personal/carer's leave, they are paid for 12 ordinary hours for each rostered day for which leave is taken, until their accrued paid personal/carer's leave balance has been exhausted.

Roster 2 - 24 hour, 7 day roster (Roster 2)

- i) Employees employed to work regularly on Roster 2 work an average of 36 ordinary hours per week, on the basis of an average of 7.2 ordinary hours per day over a two week cycle.

- ii) Employees employed to work regularly on Roster 2 accrue a total of 72 ordinary hours of paid personal/carer's leave for each year of service.
- iii) Employees employed to work regularly on Roster 2 work an average of 36 ordinary hours per week, working 7 days in any consecutive 2 week period, and when they take paid personal/carer's leave, they are paid for 10.28 ordinary hours for each rostered day for which leave is taken, until their accrued paid personal/carer's leave balance has been exhausted.

Roster 3 – 8 hours, 5 day roster (Roster 3)

- i) Employees employed to work regularly on Roster 3 work an average of 38 ordinary hours per week, on the basis of an average of 7.6 hours per day over a four week cycle.
- ii) Employees employed to work regularly on Roster 3 accrue a total of 76 ordinary hours of paid personal/carer's leave for each year of service.
- iii) Employees employed to work regularly on Roster 3 work an average of 38 ordinary hours per week, working 19 days in any four week cycle, and when they take paid personal/carer's leave, they are paid for 8 ordinary hours for each rostered day for which leave is taken, until their accrued paid personal/carer's leave balance has been exhausted.

[12] While agreeing that employees worked an average of 36 or 38 ordinary hours per week (as the case may be), under the three roster patterns, the AWU did not agree with AstraZeneca's contention that this was "on the basis of" a particular number of notional or averaged ordinary hours per day.

Relevant provisions of the Agreement

[13] Clause 11 of the Agreement provides:

"11. Ordinary Hours

The ordinary hours of work are listed in the various roster patterns described below.

The Company shall determine, in consultation with the team members involved, a roster appropriate to the needs of each team at the workplace. The roster detailing the shift commencement and completion times will be published and provided to each team member not less than 30 days prior to the commencement of work on such a roster.

In the case of individual team members who are needed to change shifts, the Company will provide a new roster not less than ten (10) working days prior to the commencement of work unless mutually agreed."

[14] Clause 12 of the Agreement sets out various shift patterns and rosters which are allowed. The shift rosters currently performed are characterised as follows:

“12 Hour Shift Roster

Crews will be rostered to work 12-hour shifts for an average of 36 hours per week over the roster cycle. These rosters will work an average of 3 days/week. The pay rate for this roster is set out in the attached Skills Based Pay Schedule. The roster will be set up to ensure that weekend work will be shared evenly between crews. Wages are annualised to enable team members to be paid the same amount each week or month.

The team may vary this with the agreement of all team members and support services, and the consent of management. The intent of this clause is to allow teams rostered on a Saturday night to change their roster to Sunday night and to incur no extra costs to the Company.

5 x 8 Hour Shift Roster

38 hours per week (averaged over 4 weeks) will be worked over 5 days, each day working no more than 8 hours. One ROO per four weeks will be arranged via agreement between team members and management. The pay rate for this roster is set out in the attached Skills-based Pay Schedule.

It is not the intention of the Company to move all team members to the 5x8hr roster. This roster will only be used to ensure that increases in volume requirements for particular products are met after having considered other alternatives eg, alternate ROO’s on the nine-day fortnight etc.”

[15] Clause 21 of the Agreement relevantly states:

“Sick leave accrues and may be taken in accordance with the Personal/Carer’s leave provisions of the NES. See section 22 below.

[16] Clause 22 of the Agreement relevantly provides:

“Personal/Carer’s leave accrues and maybe taken in accordance with the Personal/Carer’s leave provisions of the National Employment Standards (NES)”.

Personal/Carers leave will accumulate year to year, but will not be paid out to a team member upon termination of employment.

...”

[17] The NES provisions are not set out in the Agreement. The entitlement to personal/carer’s leave and the manner in which the leave should be paid are prescribed by sections 96 and 99 of the Act as follows:

“96 Entitlement to paid personal/carer’s leave

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

(2) 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."

99 Payment for paid personal/carer's leave

If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period."

[18] AstraZeneca also relied upon section 63(1) of the Act which provides:

"(1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:

- (a) for a full-time employee - 38 hours; or
- (b) for an employee who is not a full-time employee - the lesser of:
 - (i) 38 hours; and
 - (ii) the employee's ordinary hours of work in a week."

Submissions

The AWU

[19] The AWU submitted that the approach adopted by AstraZeneca to manage personal/carer's leave balances for employees performing work under the current shift arrangements results in the following outcomes:

- a. An employee working on Roster 1 who accrues 72 hours of personal/carer's leave each year of services and has 12 hours deducted from their leave balance on each occasion they are absent for an entire shift will exhaust his/her annual entitlement after being absent for six (6) full shifts.
- b. An employee working on Roster 2 who accrues 72 hours of personal/carer's leave each year of services and has 10.28 hours deducted from their leave balance on each occasion they are absent for an entire shift will exhaust his/her annual entitlement after being absent for seven (7) full shifts.
- c. An employee working on Roster 3 who accrues 76 hours of personal/carer's leave each year of services and has eight hours deducted from their leave balance on each occasion they are absent for an entire shift will exhaust his/her annual entitlement after being absent for 9.5 shifts. The entitlement will be exhausted during his/her absence on the 10th shift.

[20] The AWU contended that these outcomes result in employees receiving an inferior entitlement to the minimum standard established by the NES.

[21] It is clear that under section 96(1) and (2) of the Act, an employee must accrue 10 days of personal/carer's leave per year of service. As a result, it argued, the dispute between the AWU and AstraZeneca related to the amount of leave which is being deducted from an affected employee's leave balance when they access personal/carer's leave.

[22] The AWU contended that the insurmountable problem with the current approach taken by AstraZeneca is it uses an average hourly figure for the accrual of personal/carer's leave but then uses an actual hourly figure for the deduction.

[23] In other words, the daily accrual figure is different to the daily deduction figure. If the daily deduction figure exceeds the daily accrual figure, in normal circumstances the full NES entitlement can never mathematically be achieved, it argued.

[24] The AWU argued that accrual figure must equate to deduction figure and relied on the decision in *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union*² (*RACV*) as authority for this proposition.

[25] In its written submissions, the AWU argued that AstraZeneca's contentions suffered from 'two fatal legal problems'.

[26] First, AstraZeneca has attempted to rely on the terms of the Explanatory Memorandum to alter the effect of the words in the Act. In support, the AWU relied on a decision of the High Court³ in which it was said:

“The words of the statute, not non-statutory words seeking to explain them, have paramount significance.”

[27] The AWU asserted that the personal/carer's leave provisions of the NES were perfectly clear and accordingly reference to the Explanatory Memorandum was not required.

[28] Second, the AWU submitted that for AstraZeneca to succeed in its argument, the Commission must not follow the full Federal Court judgement in *CFMEU v Glendell Mining Pty Ltd & Anor*⁴ (*Glendell Mining*).

[29] The AWU contended that the full Federal Court in *Glendell Mining* specifically endorsed the *RACV* decision, thereby confirming that under the NES a “day” of leave is an authorised absence from the working time in a 24 hour period, and if a day of leave is taken, a day is deducted from the employee's accrued personal/carer's leave balance.

[30] The AWU contended that the Commission could not make a decision which was inconsistent with *Glendell Mining*.

AstraZeneca

[31] AstraZeneca argued that its approach to the amount of personal/carer's leave that accrues and is deducted and paid for employees who work the relevant rosters is consistent with the NES and the Agreement.

[32] In its oral submissions, AstraZeneca contended that despite what was put by the AWU, its case was not in conflict with the decision in *RACV*. In this regard, it said it adopted a different approach, which focused on the question of payment of personal/carer's leave as opposed to the entitlement to 10 days personal/carer's leave per annum.

[33] AstraZeneca also contended that the AWU's approach clearly ignored the system of averaging working hours which is permitted by section 63 of the Act, and in doing so paid no regard for the legislative structure and overall context in which section 96 of the Act appears.

[34] AstraZeneca made the following two propositions:

1. The amount to be deducted from an employee's accrued personal leave in respect of an absence on paid personal/carer's leave must reflect the number of hours for which the employee is paid.
2. The total entitlement to payment is limited to a number of hours accrued and that the total entitlement is 72 hours for Roster 1 and 2 employees, and 76 hours for Roster 3 employees.

[35] It argued that any approach to the accrual, deduction and payment of personal/carer's leave that does not include both concepts above is not workable and would result in unacceptably unfair outcomes in the context of a workforce where rosters are worked under an averaging arrangement. This unfair outcome arises because an employee who works Roster 1, who is rostered for shifts of 12 hours' duration, will receive significantly more pay than an employee who works Roster 2, who is rostered for shifts of 10.28 hours' duration. This would also provide unwarranted additional benefits not provided for in the NES.

[36] AstraZeneca said that under the averaging system, the employees are in effect entitled to be paid 7.2 ordinary hours per day (or 7.6 for Roster 3 employees) over a two week period for 10 'standard' work days, whether or not they are rostered on to be at work on each and every one of those days.

[37] AstraZeneca relied on the Explanatory Memorandum and a number of decisions including *RACV* and *The Australian Workers' Union v BP Refinery (Bulwer Island) Pty Ltd*⁵ (*Bulwer Island*) to support the proposition that the accrual of personal/carer's leave over a period is not affected by differences in the actual spread of an employee's ordinary hours of work in a week.

[38] Senior Counsel for AstraZeneca highlighted that the decision in *RACV* was not concerned with the actual rate of payment under the NES where ordinary hours are averaged over a work cycle. In *RACV*, the enterprise agreement in question provided for an annual salary, and payment was made on that basis. In other words payment for different daily hours in different rostered work cycles was not an issue in *RACV*.

[39] AstraZeneca contended that nothing in its submissions was inconsistent with the *RACV* decision. There was no dispute that the entitlement is to 10 days of personal/carer's leave, and that the entitlement of 10 days is not reduced by reference to accrued hours, but rather by reference to the number of days of leave taken. In terms of the question of payment,

the day or days of personal/carer's leave require payment by reference to an averaging system for the ordinary hours upon which the employee in question may work.

[40] AstraZeneca also relied on the Explanatory Memorandum which provides the following in relation to the accrual and payment of personal/carer's leave:

“The concept of an employee's ordinary hours of work is central to the paid personal/carer's leave entitlement as it determines the rate at which the entitlement accrues and also the entitlement to payment when leave is taken.

General principles

Leave accrues according to an employee's ordinary hours of work (which may be set out in a modern award or enterprise agreement, or are calculated in the manner set out in clause 20). Such hours are often expressed as a number of hours per week. In effect, therefore, the Bill ensures an employee will accrue the equivalent of two weeks' paid personal/carer's leave over the course of a year of service.

Although this is expressed as an entitlement to 10 days (reflecting a 'standard' 5 day work pattern), by relying on an employee's ordinary hours of work, the Bill ensures that the amount of leave accrued over a period is not affected by differences in the actual spread of an employee's ordinary hours of work in a week.

Therefore, a full-time employee who works 38 hours a week over five days (Monday to Friday) will accrue the same amount of leave as a full-time employee who works 38 ordinary hours over four days per week. Over a year of service both employees would accrue 76 hours of paid personal/carer's leave.

Similarly, the requirement to pay an employee for their absence on the basis of their ordinary hours of work for the period of the absence means that the employee is entitled to be paid for his or her ordinary hours of work on the days in the week they would have worked but for being absent from work on paid personal/carer's leave (i.e., excluding overtime).”

[41] AstraZeneca submitted that it is clear from the Explanatory Memorandum that the intention of section 96 of the Act is to provide for a quantum of paid personal/carer's leave expressed in days but requiring attention to the averaging of ordinary hours over a work cycle and payment corresponding to hours averaged over the work and roster cycle. The quantum of accruable leave, whether expressed in hours or days, is not affected by the number of days over which an employee works his or her ordinary weekly hours.

[42] AstraZeneca argued that contrary to the AWU's submissions, accrual of 10 days leave per year of service cannot be divorced from the average number of ordinary hours per rostered day and week cycle and cannot result in a greater or more favourable entitlement in hours accrued (or for payment when leave is taken) than the employee working a “standard” 38 ordinary hour week. It was contended that under an averaging system, the accrual, deduction of accrued leave, and payment, must take account of the days not rostered to work and must accommodate payment for each rostered hour but averaged over a work cycle up to the maximum accruable entitlement.

[43] In regard to the question of payment, AstraZeneca asserted that the amount to be deducted from an employee's accrued personal/carer's leave in respect of an absence on paid personal/carer's leave must reflect the number of hours for which the employee is paid. It argued that the total entitlement to payment is limited to a number of hours accrued, that being 72 hours for Roster 1 and 2 employees, and 76 hours for Roster 3 employees.

[44] The Explanatory Memorandum also sets out three examples illustrating the intended operation of the accrual and payment provisions. One of the examples provides:

“Sudhakar is a full time employee who has entered into a permissible averaging arrangement under the NES and works an average of 152 hours every four weeks (based on 38 ordinary hours per week). The number of ordinary hours that Sudhakar works on any given day may vary according to the averaging arrangement. However, over a year he accrues ten days (76 hours) of paid personal/carer's leave. If he is sick and takes leave for a day, he will be entitled to be paid for the number of ordinary hours he was rostered to work on that day (but not for any additional overtime hours that he was to work).”

[45] In the circumstance of averaged ordinary hours and work patterns, AstraZeneca argued the entitlement to 10 days paid leave meant an entitlement to payment equal to the time that would be worked on 10 ordinary (“standard”) days of averaged ordinary hours, namely 7.2 or 7.6 hours duration. Payment must be directed at the hours of leave accrued, and payment by reference to the hours rostered on a particular day, as opposed to average ordinary hours for the day for 10 rostered days (e.g. 12 hours versus 7.2 hours) results in an entitlement greater than the hours accruable in any year of service, namely 72 or 76 hours paid leave, and to payments beyond the entitlement required under the NES.

[46] AstraZeneca argued that the matter of the averaging of working hours was an essential consideration and it was not possible to interpret the Act without having regard to the fact that where employees work different shift patterns, it should not produce a different result for the entitlement as to payment.

[47] AstraZeneca disagreed with the AWU's submission that its position was contrary to the decision in *Glendell Mining* and said that that decision did not undermine in any way what it sought to put to the Commission in relation to the entitlement to payment.

Submissions regarding the *Mondelez* decision

[48] As indicated earlier, the parties were invited to make further submissions in relation to the decision of the Commission in *Mondelez*, as it appeared that it may be relevant to the determination of this dispute.

[49] *Mondelez* concerned a request for a referral to a Full Bench of the Commission of an application by Mondelez Australia Pty Ltd for the approval of its proposed enterprise agreement. Part of the basis for the request for referral to a Full Bench was in relation to personal/carer's leave entitlements under the NES.

AstraZeneca

[50] AstraZeneca noted that only two critical issues arose for consideration in *Mondelez*, one of those issues being whether there was divided Full Bench authority on the interpretation of section 96 (1) of the Act. The Commission rejected the submission that there was divided Full Bench authority and stated the position to be applied to the interpretation of section 96 (1) of the Act is as stated in *RACV*.

[51] In *Mondelez*, the Commission held that two Federal Court decisions, in *Glendell Mining* and *CFMEU v Anglo Coal (Drayton Management) Pty Ltd*⁶ (*Anglo Coal*), affirmed the approach taken in *RACV* to NES leave entitlements.

[52] In relation to *Glendell Mining*, AstraZeneca reiterated that the approach taken by the Federal Court there was consistent with *RACV* only insofar as it involved an acceptance that the entitlement to authorised absence from work was for “weeks” or “days”, and this was not in issue in these proceedings. AstraZeneca argued that the decision in *Glendell Mining* did not endorse an approach entitling employees who work an average number of hours to receive significantly greater payment because of the particular hours which they would have worked on the particular day. It argued that the reasoning found in paragraphs [131] to [132] was, by implication, to the opposite effect. Further, AstraZeneca argued that because *Glendell Mining* dealt with terms of a specific enterprise agreement, it was not authority for the proposition that in the present matter employees are to be paid for actual hours which would have been worked on particular days without reference to their ordinary average hours.

[53] In relation to *Anglo Coal*, AstraZeneca argued that the decision was concerned with the construction of a particular enterprise agreement, and the Court did not appear to have dealt with section 63 of the Act and its interaction with section 99 in a situation where, as in the present matter, there is an entitlement to payment (and paid leave) for averaged weekly hours.

[54] AstraZeneca reiterated that *RACV* dealt with payment for the accrued days or weeks of leave by reference to the interpretation of the agreement under consideration in that case, and specifically to a distinction between accrual and deduction of leave on the one hand, and the issue of payment on the other. It highlighted that although the contention in *RACV* that accrued entitlements was not to days, but hours, was rejected, it nevertheless held in respect of the 10 days that the entitlement was to 7.6 hours of pay for each day.

[55] AstraZeneca’s submissions concluded with the following:

“To the extent that *RACV v ASU* is interpreted as entitling employees of the Respondent, who are working the rosters the subject of these proceedings, to 10 days of paid entitlements by reference to the actual hours rostered on a particular day in the average system under the AstraZeneca agreement, and not by reference to the averaged hours over their roster cycles, the Respondent makes the formal submission that the decision is wrong. It is not necessary, however, for the Commission to adopt that interpretation of *RACV* in order to determine this matter in favour of the Respondent.”

The AWU

[56] The AWU stated that it considered *Mondelez* relevant to the resolution of this dispute, and *Mondelez* confirmed that the AWU's position throughout these proceedings had been correct.

[57] In relation to the issue of payment for personal/carer's leave, the AWU argued that *Mondelez* identified that AstraZeneca's argument with respect to payment of personal/carer's leave had already been rejected by the Federal Court.

[58] The AWU submitted that in *Anglo Coal*, Buchanan J was required to determine the approach to payment for personal/carer's leave under the NES for shift workers in circumstances that were similar to the facts in these proceedings. It contended that his judgement confirmed the following⁷:

- a. Paid personal/carer's leave under the NES is leave without loss of pay for ordinary hours;
- b. A shift worker is paid for the ordinary hours they would have worked on the relevant day – for an employee who works 12 hour shifts – the entitlement is to be paid for 12 ordinary hours; and
- c. The practical result of the statutory scheme is that an employee who works 12 hour shifts is entitled to access and be paid for more hours of personal care is leave per year than an employee who works 8 hour shifts.

[59] The AWU concluded by submitting that *Mondelez* supported the view that AstraZeneca's current approach to personal/carer's leave entitlements for affected employees was inconsistent with the NES.

Consideration

[60] I am satisfied as to the Commission's jurisdiction to determine the dispute, and in this regard I also note that the initial objection by AstraZeneca as to jurisdiction was withdrawn prior to the hearing.

[61] The question posed by the AWU for determination is whether AstraZeneca's current approach to the accrual and deduction of personal/carer's leave for employees on Rosters 1, 2 and 3 is consistent with the NES. This question, however, cannot be decided simply with a yes or no answer.

[62] It is clear that the provisions in the Agreement establish that the accrual, payment and deduction of personal/carer's leave for employees are determined by reference to the terms of the NES. In this sense, there is nothing ambiguous about the terms of the Agreement.

[63] While the question for determination did not specifically refer to 'payment' (i.e. as opposed to *accrual* or *deduction*), it is evident from the submissions made by the parties that this is probably the key aspect of the current dispute. I do not consider that the dispute can properly be determined without dealing with the issue of payment for personal/carer's leave.

Accrual

[64] As to the accrual of personal/carer's leave, the entitlement is to 10 days of personal/carer's leave per annum. I do not need to deal further with the issue of accrual as there is no dispute in relation to it.

Deduction and Payment

[65] As to the deduction and payment of personal/carer's leave, I consider that these matters have been addressed by *RACV* and *Anglo Coal*.

[66] The Full Bench in *RACV* dealt comprehensively with the entitlement to personal/carer's leave (and annual leave) under the NES. Of particular relevance to this case are the following paragraphs of the decision:

“[32] Having regard to the immediate context in which the words are used - namely in relation to leave from work - we consider that a “week” of leave is to be understood as meaning an authorised absence from the working days falling in a seven day period, and a “day” of leave is an authorised absence from the working time in a 24 hour period. The immediate context does not suggest that “week” and “day” are used as special constructs to refer to a given number of paid ordinary working hours, as suggested by RACV.”

[37] As earlier stated, the Commissioner concluded in the Decision that the NES annual leave and personal/carer's leave provisions did not deal with the rate at which annual leave and personal/carer's leave is deducted when taken, and also that the NES did not require that the rate at which the leave is accumulated and the rate at which it is deducted when used must be the same. While these propositions are, strictly speaking, correct in that the FW Act does not contain express provisions of the nature described, it does not follow that there is any lack of clarity in the statutory scheme. No such provisions are necessary because, when “week” and “day” are assigned their ordinary meanings, the position is entirely clear. The accrued entitlement is simply reduced by the amount of leave taken, so that if a week of leave is taken, the accrual of leave is reduced by a week, and if a day is taken, the accrual is reduced by a day. If, as RACV contends, the reduction in an employee's accrued NES entitlement to annual leave or personal/carer's leave when the employee takes a day off work will vary depending upon the number of ordinary hours that would have been worked that day, then one would expect the FW Act to contain provisions specifying this. The absence of any such provision tells against the construction of the NES provision propounded by RACV.

[82] Accordingly we conclude that in the NES provisions of the FW Act, a “week” of annual leave is an authorised absence from work during the working days falling in a seven day period, and a “day” of leave (whether of annual or personal/carer's leave) is an authorised absence from the working time in a 24 hour period. We reject RACV's submission that “week” and “day” are to be read as terms of art referring to a specific number of working hours that may not constitute an actual week or day in a given case. We further conclude that the amount of leave deducted from an employee's leave balance necessarily correlates with the amount of leave taken, so that if a week's annual leave is taken, a week is deducted from the employee's accrued annual leave balance, and if a day of annual leave or personal/carer's leave is taken, a day is

deducted from the employee's accrued annual leave or personal/carer's leave balance." (my emphasis)

[67] The Full Bench in *RACV* also noted that the expression of the personal/carer's leave entitlements in the Act is distinctly different to that in the preceding *Workplace Relations Act 1996* as it was immediately before the enactment of the Act. In essence, the entitlement was previously expressed in hours rather than days. It said that: "the position is thus distinctly different to that in the FW Act, and suggests a deliberate policy decision to abandon this mode of expressing the entitlements."⁸

[68] In *Anglo Coal*, the Court observed:

"[10] The period of 'paid personal/carer's leave' referred to in s 99, for which an employee must be paid at the base rate of pay for ordinary hours, must necessarily be one or more of the "days" (or part of a day) of leave referred to in s 96. The number of hours normally worked by, for example, an 8-hour day worker and a 12-hour shift worker on a normal or rostered day of work are self-evidently different, by a margin of 50%. Nevertheless, the entitlement to paid leave is not referable to an hourly equivalent; it is expressed in days, and it necessarily follows, I think, that the possibility exists that the statutory entitlement to 10 days leave (and pay) may result in a greater hourly entitlement (and overall pay) in some cases than in others. it appears to me, is the effect of the statutory arrangements, whatever position might arise under the specific provisions of particular enterprise agreements." (my emphasis)

[69] In *Mondelez*, the decisions in *Glendell Mining* and *Anglo Coal* were described as affirming the approach taken in *RACV* to NES leave entitlements.

[70] *Mondelez* also gave consideration to *Bulwer Island* and said that the decision pre-dated *RACV* and 'may be regarded as having been overtaken ...'.⁹ Accordingly, I do not consider *Bulwer Island* is relevant to my determination in this matter.

[71] It is a well-established legal principle that Commission members should follow a Full Bench decision as it relates to matters to be determined, unless the decision is inconsistent or wrong in law. In other words, a Full Bench decision should be followed unless there are sound reasons for not doing so. In *Nguyen v Nguyen*¹⁰ the High Court held:

"When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law."

[72] In essence, the decisions referred to above confirm that where an employee takes a day of personal/carer's leave, then a day is deducted from his/her leave balance. In terms of payment for the day, the employee is paid for the ordinary hours that they would have worked on that day. The entitlement to payment for the day, as stated in *Anglo Coal*, may result in a greater entitlement and overall pay in some cases. There is no support for the proposition that payment is based on an average number of hours worked rather than the actual hours that would have been worked on the day that is taken as personal/carer's leave.

[73] I accept AstraZeneca's submission that the decisions referred to above do not appear to have dealt with section 63 of the Act and its interaction with section 99. However, I do not consider that section 63, or any other sections of the Act, varies the accrual, deduction or payment of personal/carer's leave under the NES. Had it been intention that section 63 should have the impact contended by AstraZeneca, then I consider that the Act would have specifically dealt with this.

[74] In terms of AstraZeneca's reliance on the Explanatory Memorandum, I agree with the AWU's submissions that in circumstances where the relevant provisions of the Act are clear, reference should not be made to the Explanatory Memorandum. I note, however, that there does seem to be an inconsistency between the words of the Act with regard to personal/carer's leave (i.e. 'days') and the Explanatory Memorandum, which is suggestive of a conversion from days to hours. While this inconsistency is unfortunate (and no doubt confusing), it cannot impact the interpretation of the Act in circumstances where the provisions of the Act are clear.

[75] In light of *RACV* and other relevant decisions earlier discussed, I cannot accept AstraZeneca's submission that the entitlement to 10 days of paid personal/carer's leave means an entitlement to payment equal to the time that would have been worked on 10 ordinary or standard days of averaged ordinary hours, i.e. of 7.2 or 7.6 hours duration.

[76] Accordingly, I determine the dispute as follows:

- a. Employees are entitled to 10 days of personal/carer's leave per annum.
- b. When a day of personal/carer's leave is taken, then a day is deducted from the employee's personal/carer's leave balance.
- c. In respect of payment, for an employee on Roster 1, this means the employee is paid for 12 ordinary hours for each day for which the leave is taken. Similarly, an employee on Roster 2 will receive 10.28 hours pay, and for Roster 3 employees, 8 hours pay, for each rostered day for which leave is taken.

[77] This is consistent with *RACV*.

[78] The dispute is determined accordingly.




DEPUTY PRESIDENT

Appearances:

S Crawford for the Australian Workers' Union.

HJ Dixon SC for AstraZeneca Pty Ltd.

Hearing details:

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Sydney:
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¹ [2018] FWC 2140.

² [2015] FWCFB 2881.

³ *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11.

⁴ [2015] FCCA 3152.

⁵ [2012] FWA 1197 at [75].

⁶ [2016] FCA 689.

⁷ *Ibid* at paragraphs 10, 22 and 36.

⁸ [2015] FWCFB 2881 at [40].

⁹ [2018] FWC 2140 at [15].

¹⁰ 169 CLR 245 at 269.