

Like sands through the hourglass...

Benjamin Goodyear reports on *Mondelez Australia Pty Ltd v The Australian Manufacturing Workers Union* (2020) 381 ALR 601; [2020] HCA 29

Introduction

Israeli philosopher Joseph Raz, in his seminal essay titled *The Rule of Law and its Virtue* (1979), espoused eight principles, the first of which was that all laws 'should be prospective, open, and clear'. The question of whether a law is 'clear' might be interrogated by asking what the reasonable man on the Brixton to Clapham omnibus (or, in gender neutral and local terms, the reasonable person on the Bondi 333 articulated bus) would understand the law to mean. What has that to do with shift workers making Cadbury chocolate in Tasmania?

The nub of it

Subsection 96(1) of the *Fair Work Act 2009* (Cth) (Act) provides that '[f]or each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave'. This appeal before the High Court, from a decision of the Full Federal Court, was concerned with the interpretation of the term 'day'. Consider two employees each working 36 hours a week. Barbara works five 7.2-hour shifts each week, while Patty works three 12-hour shifts each week. Is it the case that Barbara's annual entitlement of '10 days of paid personal/carer's leave' amounts to 10 authorised absences from her typical 7.2 hour working day, giving rise to a total of 72 hours of leave per year? If so, then applying that construction of the section (the '**working day**' construction) to Patty presumably entitles her to 10 authorised absences from her 12 hour working days, yielding a total of 120 hours of leave per year. In the words of Gageler J (at [87]):

One employer. Two employees. Equal hours of work. Unequal hours of paid leave. What is fair about that?

The alternative construction was that a 'day' within the meaning of the section referred to one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period (the '**notional day**' construction).

The majority

The majority comprising Kiefel CJ, Nettle and Gordon JJ in a joint judgment (with Edelman J agreeing in the orders made) embraced in part that sense of inequity, finding that the notional day construction was the correct one and allowing the appeal. Their Honours, declared (at [45]):

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.

As to the working day construction, their Honours stated (at [3]):

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 dissent

The reasoning of the majority is persuasive. It construed the expression '10 days' in the context of the Act as a whole, in light of relevant extrinsic materials, and the legislative history of the provision: at [13]-[39]. Nevertheless, there is considerable force in the dissent of Gageler J. Immediately following his rhetorical question as to fairness quoted earlier in this article, Gageler J answered (at [88]):

The answer is that to focus on the relative number of hours of paid leave is to miss the point of the entitlement. So is to focus on the relative lengths of the potential authorised absences from work or on the relative dollar values of the potential payments. Each employee has the same entitlement to receive that employee's base rate of pay for all work

the employee is unfit to perform over the same number of days because of illness, injury or unexpected emergency. The income of each is equally protected.

Indeed, when Patty misses a day of work due to illness, she misses 12 hours of paid work – much more than Barbara. And while it might be thought that Patty, with her 'compressed hours of work and fewer days of work' will be 'less likely to fall ill' (at [94]) on a day she is due to work, one might also consider the extent to which longer hours and shift work take a toll on one's health and those around them.

Moreover, one may wonder whether the average worker seeking to gain an understanding of his or her statutorily protected entitlements would have the proclivity or fortitude to review the relevant explanatory memorandum and predecessor statutes. In commenting upon what his Honour described (at [73]) as an 'uncomplicated and grammatically meaningful text', Gageler J, with an unblinking glance at the reasoning of the majority, considered (at [49]) that:

Construing '10 days' as a shorthand reference to an unspecified number of ordinary hours of work calculated according to an unexpressed mathematical formula overstrains the minimalist statutory text. Conjuring a formula does not advance the purpose of the conferral of the entitlement.

Edelman J, who (at [110]) agreed with the orders proposed by the majority, stated (at [109]) that the conclusion he had reached:

'appears counterintuitive from the ordinary meaning and impression that a reasonable reader might reach from first reading the legislation, and [was] contrary to my initial view prior to examination of the full context of s 96(1)'.

Closing reflections

What, then, of Raz? Whether the construction ultimately preferred by the majority would have been 'open, and clear' to the shift workers at the manufacturing plants with which this case was concerned, is a matter that no doubt turns on one's perspective. Trawling through extrinsic materials and legislative ancestry is second nature to the diligent lawyer, but not so for all. Perhaps all we can do is ensure that the next time the boss tells us to 'take the day off', we first ask – is that a 'working day', or a 'notional day'? **BN**