From: Judy Hawkins
To: Andrew Molnar
Cc: Cheryl-Anne Laird
Subject: Dispute C2025/2979
Date: Tuesday, 3 June 2025 9:44:46 AM
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Dear Andrew

RE: Update on the position of RFDS on dispute C2025/2979

We refer to the dispute conference held on 22 May 2025 with the Fair Work Commission.

In that conference we agreed to consider our position and engage with you to see if we could reach agreement to avoid the need to take the matter to arbitration.

We have given the issues further consideration. In summary, our preferred position is:

- We will accrue 84 hours of personal/carer's leave per year for a Pilot. This is in excess of 76 hours of personal/carer's leave per year (based on an average of 38 ordinary hours of work per week).
- We will deduct the number of hours of personal/carer's leave based on the hours of the shift unable to be worked.

We are not prepared to return to the practices which applied prior to the changes made in November 2024. Pilots can take as many instances of paid personal/carers leave as required in any given year, provided they have sufficient personal/carers leave accrued.

RFDS employees, other than the pilots accrue personal/carers leave at 76 hours per annum and it is acquitted based on the actual hours taken. We currently provide additional paid personal/carers leave to the Pilots as we accrue 84 hours for this group. This is not something that is required under the Enterprise Agreement, it was offered as a gesture of good will as part of the process to correct how personal/carers leave is managed for the Pilots.

We have sought clarity on the amount of personal/carer's leave accrual per year you are seeking. We have not received a clear response.

If, AFAP are seeking that the accrual rate be 120 hours per annum to facilitate 10 instances of personal/carers leave for 12-hour shifts, this is unreasonable and would create significant inequity with other employees at the RFDS who as noted above accrue 76 hours per annum of personal/carers leave.

As per our response to the Dispute notice, it is our position that the accrual and acquittal of personal/carers leave in hours is supported by the section 96 of the Fair Work Act, 2009, which also makes reference to 10 days, particularly in conjunction with the High Court decision in *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries [2020] HCA 29 (Mondelez)*.

The High Court in determining Mondelez, reversed the earlier decision of the Full Court of the Federal Court, which had determined that an employee's entitlement to 10 days of personal leave in the FW Act is an entitlement to be paid for 10 separate 24 hour periods, where the employee is not able to attend for scheduled work because they are ill, injured or accessing the leave for carer purposes. As we understand the position of the AFAP, you are seeking to apply these principles which have since been overturned by the High Court

The High Court held that 'one day' refers to a notional day consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two week period. An employee's entitlement to '10 days of paid personal leave', regardless of their roster arrangement, is therefore to be calculated and paid at the rate of 1/26th of the employee's ordinary hours of work.

Section 96(2) of the Fair Work Act, 2009, refers to personal/carers leave being accrued according to an employee's "ordinary hours of work". Section 14.1 of the current Agreement states:

"Ordinary hours of work will be an average of 38 per week over 3 roster cycles"

Therefore, the ordinary hours of work on which personal/carers leave accrues is that set out in clause 14.1 of the Agreement, which means that the actual entitlement is to 76 hours of personal/carers leave per annum. "*Ordinary hours*" of work are not the same as the hours ordinarily worked. As you are aware the Pilots work an average of 38 ordinary hours and 4 over time hours per week, which is calculated based on the maximum availability of 168 hours per roster cycle.

Clause 23 of the current agreement provides:

23.1 Personal/carers leave is provided for in the NES and detailed in policy.

There is nothing in our policy which, in our view alters the entitlement provided for in the NES.

Clause 96 of the Fair Work Act, 2009 (NES) provides:

Amount of leave

1. *For each year of service with an employer (other than periods of employment as a causal employee of the employer), an employee is entitled to 10 days of paid personal/carers leave.*

Accrual of leave

2. *An employee's entitlement to paid personal/carers leave accrues progressively during a year of service (Other than period of employment as a casual employee of the employer) according to the employee's ordinary hours of work and accumulates for year to year.*

Given the similarities in the clauses in the NES and in our Agreement, we believe that the only valid interpretation is one consistent with the High Court decision in Mondelez.

A consequence of the decision in Mondelez is that some employees who work their ordinary hours on a compressed roster (as is the case for our Pilots), may exhaust their entitlement to '10 days' of personal leave in a year before they can take ten separate calendar days of leave. However, it must also be remembered that although there is a cap on accrual of leave each year, there is no such cap on the taking of paid leave other than the complete exhaustion of all accrued paid personal/carers leave. As you are aware, untaken personal/carers leave from previous years remains available to all employees to take in subsequent years.

We refer to the comments made in the dispute conference about the use of custom and practice to interpret the Agreement.

It is our view that the seminal case for the interpretation of Enterprise Agreements remains *AMWU v Berri Pty Ltd [2017] FWCFB 3005. In that case, the Full Bench stated:*

15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding.

During the dispute conference you referred to two Federal Court cases, being *Sheehan v Thiess Pty Ltd [2019] FCA 1762* and *Target Australia Pty Ltd v Shop Distributive and Allied Employees' Association [2023] FCAFC 66*. With particular reference to the latter case, which sites the first case, you indicated that it has a similar fact situation to our current dispute. We agree that there is some similarity in the fact situation, however in that case, it was made clear that past practices on how leave was paid to employees, did not mean that there was a common understanding on the interpretation of the Agreement and was not to be used to interpret the industrial instrument.

In relation to the above, we have made clear, that it was only after the negotiations had concluded on the current Agreement that the anomalies in how personal/carers leave were being managed were identified. It became evident during the implementation phase of the current agreement and given the wording of this clause did not change in this Agreement, it is our view, and we have expressed this often, that the previous agreement was also not applied correctly. There was no common understanding as to the correct interpretation of the relevant clause of the Agreement. Therefore, consistent with the decision in the Target case, past practices are not relevant to the interpretation of the Agreement.

We do not believe that the timing of identifying this issue has any bearing on the correct interpretation of the Agreement. Similarly, there is no prohibition on applying the law as articulated in Mondelez merely because we did not do so at the time the decision was released. We have moved to correct an anomaly in past practices once we became aware and in doing so have applied the law as it currently stands.

In the context of the above we welcome further discussion on any of the below options:

Option 1 – continue the existing process of accruing 84 hours per annum, and acquitting based on the rostered hours on the shift when leave is taken. The number of actual instances of paid leave is restricted only by the accrued personal/carers leave balance and the number of hours taken as leave (subject to rostered hours).

Option 2 – apply the accrual of 84 hours personal leave per annum and deduct 8.4 hours for each shift of leave taken and pay the Pilot for 8.4 hours for such shift. Of course, if the Pilot was rostered to work less than 8.4 hours on a shift and they take personal/carers leave, the deduction and payment would be for actual hours. To remove any doubt, this is not our preferred option.

Option 3 – apply the correct number of hours to the accrual of personal leave, being 76 per annum and deduct 7.6 hours for each shift of leave taken and pay the Pilot for 7.6 hours for such shift. Of course, if the Pilot was rostered to work less than 7.6 hours on a shift and they take personal/carers leave, the deduction and payment would be for hours. To remove any doubt, this is not our preferred option

Option 4– apply the previous accrual of 80 hours per annum and implement the same terms as those set out in Options 2 and 3. This is also not our preferred option.

In seeking to rectify the past anomaly we offered to accrue leave at 84 hours per annum (being fully aware that the entitlement is actually 76 hours per annum) and in seeking to resolve this matter by agreement, we will continue to offer that option to the Pilots. This is set out in Option 1. This remains available to the Pilots despite it effectively meaning that the Pilots receive a higher accrual rate than their colleagues (although their ordinary hours are the same).

If AFAP requires this matter to be arbitrated, we will however argue for the correct interpretation to be applied in the future, which as set out above is 76 hours per annum. This is the only fair position to take given that this is the basis for the accrual and acquittal of leave for all our other employees. This will further reduce the number of instances a Pilot can take as paid personal/carers leave in a year (if they wish to be paid for rostered hours which are most often 12 hours), based on that years' accrual only. Pilots will of course continue to have access to the paid personal/carers leave previously accrued but not taken and subject to leave balances[1] there is no actual limit to the number of instances of personal/carers leave which can be taken.

We look forward to the opportunity to discuss the above options with you and it is our hope that his matter can be resolved on the basis of one of the above options, which would negate the need for arbitration.

Kind Regards

Judy

[1] The taking of personal/carers leave is also subject to the provision of evidence and any other requirement in the Enterprise Agreement or policy.

Judy Hawkins
RFDS Queensland Section
Level 4, 5-7 Lobelia Circle
Brisbane Airport QLD 4008

T 07 3852 7528
M 0428 978 007
E Jhawkins@rfdsqld.com.au
> www.flyingdoctor.org.au

Royal Flying Doctor Service
QUEENSLAND SECTION

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