



Federal Court decision – Requirement to request that employees work on public holidays.

[Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd \[2023\] FCAFC 51](#)

A recent judgment of the Full Bench of the Federal Court has dealt with the provisions of the National Employment Standards (**NES**) affording employees a right to be absent on public holidays and the capacity of employers to seek that they undertake work on such days. The decision highlights the need for employers to request, rather than simply require, that employees work on a public holiday.

The decision, issued only shortly before the Easter public holidays, will likely raise the need for many employers to review their approach to scheduling work on public holidays.

Importantly, the decision indicates, in effect, that an employee who is requested to work on a public holiday may refuse the request if the request is not reasonable, or the employee has a reasonable basis for refusing to work. If the employee does not have a proper basis for refusing the request, the employee may ultimately be required to work on the public holiday.

What was the background to the decision?

The decision arose from an appeal by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) against a decision at first instance by a single judge of the Federal Court.

The proceedings concerned a requirement by the labour hire arm of BHP that approximately 85 employees work a standard 12.5-hour shift on Christmas Day and Boxing Day in 2019.

The CFMMEU contended that by imposing a requirement that the relevant employees work on a public holiday in accordance with a roster that it had issued, the employer had contravened section 114 of the National Employment Standards (NES).

Section 114 of the *Fair Work Act 2009* (Cth) (**FW Act**) provides:

Entitlement to be absent from employment on public holiday.

(1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.

Reasonable requests to work on public holidays

(2) However, an employer may request an employee to work on a public holiday if the request is reasonable.

- (3) *If an employer requests an employee to work on a public holiday, the employee may refuse the request if:*
- (a) *The request is not reasonable; or*
 - (b) *The refusal is reasonable.*
- (4) *In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:*
- (a) *The nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;*
 - (b) *The employee's personal circumstances, including family responsibilities;*
 - (c) *Whether the employee could reasonably expect that the employer might request work on the public holiday;*
 - (d) *Whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;*
 - (e) *The type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);*
 - (f) *The amount of notice in advance of the public holiday given by the employer when making the request;*
 - (g) *In relation to the refusal of a request – the amount of notice in advance of the public holiday given by the employee when refusing the request;*
 - (h) *Any other relevant matter.*

The relevant employees were employed under a standard form contract, which foreshadowed that employees may be required to work on public holidays and receive no additional remuneration.

Crucially, the employer did not make a request to any of its employees asking whether they would be willing to work on Christmas Day or Boxing Day in 2019. Rather, it issued a roster simply scheduling employees to work on those days. The employer effectively assumed that employees would work on those days unless they applied for leave and it was granted.

At first instance, a single judge of the Federal Court found that the employer's approach had not breached the Fair Work Act 2009 (Act). This decision was appealed by CFMMEU.

What did the Full Court decide and why?

The Full Federal Court upheld the appeal, finding that the judge at first instance had erred in his consideration of the matter.

In so doing, the Full Court found that the employer had required the employees concerned to work on the relevant public holidays and it had not engaged in discussion or negotiation around such a direction such that it could be said that the employees had been requested to work on the public holidays as contemplated by section 114(2). This meant that the employer had breached the Act.

The judgment provides significant consideration of the relevant provision of the Act.

Importantly, the Full Court found that section 114 of the NES affords an employee a right to be absent on a public holiday, but that that section 114(2) permits an employer to request that an employee work on a public holiday and section 114(3) only permits such a request to be refused if either the request is not reasonable or if the refusal itself is reasonable. In deciding whether a request or a refusal is reasonable or unreasonable, the various factors in section 114(4) must be considered.

The significance of the decision is the emphasis placed by the Full Court on the need for an employer to request rather simply require that an employee work on a public holiday.

The Full Bench stated:

“It is clear from s114(1) that the prima facie position is that an employee is entitled to be absent from his or her employment for a day or part day that is a public holiday. Not only is the employee entitled to be absent but also is entitled to be paid for that absence...The NES comprise standards which apply to the employment of employees, which cannot be displaced...”

The Full Bench went on to say the following about the need under section 114 for an employer to request that an employee work on public holidays:

“It is clear from one’s consideration of the words contained within the entirety of the section, that the word ‘request’ connotes the ordinary meaning of the word and envisages a circumstances where there is not a unilateral condition of employment requiring an employee to work on a public holiday, but rather the purpose is to allow an employer in circumstances where the request is reasonable, to ask an employee to work on a public holiday, so as to precipitate a discussion or negotiation...and most particularly the opportunity for an employee to refuse such a request in reasonable circumstances. The section demands that there be a request in order for subsection (3) to apply at all. The structure of the provision encourages a conversation, and the textual indicator that exists in s 114(3) requires, first, that there be a request, and secondly, that there is capacity to refuse. Therefore, the express words and structure of the provision prevent any implication that ‘request’ is synonymous with requirement. If there were only a requirement, there would be nothing to precipitate a refusal.”

Can an employer ever require that an employee work on a public holiday?

Yes.

The decision does however highlight that an employer’s capacity to require an employee to work on a public holiday will depend upon both the specific circumstances and the employer first following a process that involves them requesting or asking the employee to work.

In effect, section 114(1) affords employees a right to not work on a public holiday, but section 114(2) nonetheless permits an employer to request an employee to work on a public holiday, “if the request is reasonable” and section 114(3) provides that a request can be refused if the request is not reasonable, or the refusal is reasonable.

The Full Court held that an employer can ultimately require an employee to work on a public holiday:

“...where the employer has satisfied the obligations imposed upon it under ss 114(2) and (3), namely, that it has made a request, that request is reasonable, and in

circumstances where an employee's refusal is not reasonable (taking into account the factors in s 114(4))."

What potential practical options are available to Growers?

The Court's decision indicates that Growers must not simply roster employees to work on public holidays. Instead, they should ensure that it is clear that any such roster constitutes, or is accompanied by, a request that employees work on a public holiday.

The Court did give some guidance as to how the issue might be managed. One of the submissions made by the employer was that needing to request employees to work on a public holiday is unworkable at a 24/7 operation or where shiftwork is the norm. The Full Court commented as follows (emphasis added):

"The Court does not accept the submission of OS that the Union's interpretation would be inherently unworkable because such an interpretation would mean that an employer could never have a roster which included working hours on Christmas holidays or ever contain a contractual requirement. An employer is able to have a roster which includes public holidays. All that is required is that an employer ensures that employees understand either that the roster is in draft requesting those employees who have been allocated to the holiday work that they indicate whether they accept or refuse that allocation, or where a request is made before the roster is finalised. Similarly, a contract may contain a provision foreshadowing that the employees may be asked to work on public holidays and may be required where the request is reasonable and a refusal unreasonable".

Accordingly:

1. Where a Grower intends to operate on public holidays and it wants employees available to work on those public holidays, a provision can be included in their contracts which specifies that they may be requested to work on public holidays, and they may in some circumstances be required to work on those public holidays, where the request is reasonable and their refusal to work is unreasonable. This does not however negate the need to actually request that they work on public holidays.
2. Where a Grower is preparing a roster for a period that includes a public holiday, it could specify that the draft roster provided constitutes a request to work on a public holiday and that employees should advise if they cannot work on the relevant day in question.
3. Alternatively, a Grower could issue a request to employees to work on a public holiday, separate to any roster.