



PUBLIC HOLIDAYS - ROSTERING OBLIGATIONS CLARIFIED

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The Full Bench of the Federal Court ('the Court') has handed down a Decision which is likely to create significant operational and administrative challenges for businesses that open on public holidays. The Decision has provided guidance on how staff must be rostered to work on public holidays, and it is safe to say that the way the Court has determined it should be done is not the same as what happens in practice on a daily basis in thousands of businesses across the country.

The Legislation

Section 114 of the *Fair Work Act 2009* ('the Act) states;

114 Entitlement to be absent from employment on public holiday

Employee entitled to be absent 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.

In short;

Section 114(1) of the Act entitles employees to be absent from work on a public holiday; and then

Section 114(2) of the Act provides that an employer may request an employee to work a public holiday if the request is reasonable; and then

Section 114(3) of the Act provides that an employee may refuse the employer's request if the request was not reasonable or if the refusal is reasonable;

Section 114(4) of the Act provides a number of scenarios/circumstances that should be considered when determining whether a request/refusal is reasonable.

Each step of the offer and either acceptance or refusal process outlined above must be taken in order.

The Decision

The Court held that in accordance with the relevant legislation, each time a public holiday falls the employer must make a request to each employee that they want to work on the public holiday for them to work on that day. The issue that is most contentious is what does the word "request" actually mean. In most businesses historically, employers have just rostered the staff that they want to work on that day, and only dealt with objections if they arose. This Decision makes it clear that the definition of the word "request" is more specific and requires an overt act by the employer towards each employee they want to roster on that day.

The Court suggested that this could occur in a couple of different ways. A draft roster could be published and then each employee would confirm by some overt act to the employer whether they could or couldn't work that shift. A final roster would then be produced. Alternatively, each employee must be asked whether they wanted to work before a roster is produced.

What was not deemed acceptable, was undertaking this task on a one-off basis to cover a whole period such as a year. It has to be undertaken as each public holiday occurs. This would create in effect a negotiation about the reasonableness of the request to work, and this was the intention of the provision.

In summary, to comply with the Act, the employer must first make a request to employees to work on the public holiday and the employee/s must have the capacity to refuse the request.

If the employee refuses to work then an issue arises as to whether the employer can then direct them to work. If the employee's refusal is reasonable in the circumstances, or the original request is unreasonable, then they should not be rostered. If the refusal is not reasonable and the employers initial request was reasonable, then the employee can be rostered to work and if they don't work they may be sanctioned for failing to follow a lawful instruction.

The issue that arises though, is that all these decisions require judgements to be made by the employer and if they get it wrong, the employer is exposed to potential prosecution for breaching the Act. There are severe monetary penalties that can be imposed for breaches. Rostering an employee for work if they have refused the request should occur only after taking considered advice on the issue and with an understanding that there is only limited guidance from the Courts in this area. So it is risky.

What Does Reasonably Mean

In determining whether a request, or a refusal of a request, is reasonable, the following issues must be considered as provided in section 114(4) of the Act.

- (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.

As might be apparent, the indicia are not entirely clear as to what they mean and will be considered by the Court having regard to the circumstances in each case.

A Possible Methodology

Below is only one way that you may address the issue of rostering on public holidays. There are others, and until more guidance is available from the Courts and the Fair Work Ombudsman, caution is required.

1. The dates of public holidays are known well in advance. You need to decide how many staff will be required to work.
2. Once you have your numbers prepare a document, e-mail or some other method to give to each staff member before each public holiday roster is completed asking them if they want to work. Keep all the responses on file. Given that employees that work on public holidays are usually paid quite well, many employees may well want to work. If this is the case, then there may not be an issue. However, key public holidays such as Christmas and New Years Day may still give rise to problems. Remember it is not just a matter of making the request, you have to ensure that each employee responds prior to finalising any roster.
3. If you do get refusals, then you can just not roster those staff. If that can't be avoided and you need to need to have discussions with those staff to determine if their refusal is reasonable. If it is, then you should not roster them. If it is not reasonable then you need to decide if you are prepared to take the inherent risk in directing them to work. If you are then you should ensure that the employee knows that they have been rostered and the reasons why. If you are in doubt, then don't roster that employee.
4. Publish the final roster and hope you are right. The position as to what is reasonable will become clearer over time as the Courts provide guidance on this issue, but at the moment everyone is flying a bit blind on this matter.

When do These Laws Commence

These laws are already in effect and have been for a number of years. What has happened is the Courts have now clarified what is the expectation under the legislation. Unfortunately, this is different from what has operationally become the norm over time. Employers must adapt their procedures to the new norm immediately to minimise risk to their business.

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