

## Article Information

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## Reminder for Employers - Failure to request employees to work on public holidays leads to penalty and compensation

***The Federal Court (Court) has issued a penalty to an employer for failing to 'request' its employees to work on Christmas Day and Boxing Day. The recent decision of Mining and Energy Union v OS MCAP Pty Ltd (No 3) [2025] FCA 1372 (the Decision) highlights the importance of compliance during the holiday period and warns employers not to rely on contract provisions and fixed roster arrangements which assume public holiday work. The employees were awarded compensation for the loss of opportunity to refuse work.***

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### Background

The matter involves proceedings brought by the *Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)* against BHP's in-house labour hire company OS MCAP Pty Ltd (**OS**) for rostering its workers at the Daunia mine in central Queensland to work on Christmas Day and Boxing Day.

At first instance, the primary judge sided with OS that there was no contravention of section 114 of the Fair Work Act 2009 (**FW Act**) and dismissed the claim. Finding among other things, that rostering employees to work on a public holiday could constitute a 'request' to work on those days and that this was 'reasonable' in OS's operations given the need for the 24-hour mine site to operate on Christmas Day and Boxing Day.[1]

On appeal, the Full Court rejected the primary judge's decision and agreed with the CFMEU,[2] instead finding that OS was in breach of section 114 of the FW Act as its employees were:

1. required to (and did) work on the public holidays; and
2. not given a valid request to work on those public holidays.

The Full Court handed back the proceedings to the primary judge to determine the remedy and penalty. The OS's application for special leave to appeal the Full Court's decision was rejected by the High Court of Australia on the basis that there was 'insufficient reason' to doubt the Full Court's decision. On 11 November 2025, OS was ordered to pay compensation to 85 employees totalling \$83,700 and a penalty of \$15,000 for its contravention of sections 44 and 114 of the FW Act.

### Understanding the employer's obligations around the holiday period

#### Loss of opportunity to refuse to work

The 85 OS employees had agreed in their employment contract that they may be required to work on public holidays and payment for this expectation had been incorporated into their salary. While the Court found that each of the employees' salaries compensated them for working on public holidays, compensation for non-economic loss could be awarded for OS's contravention. Not on the basis of a loss of an entitlement to not work, but the loss of opportunity to refuse to work.

This finding, based on deprivation of opportunity to refuse, may have broader implications on how the Court decides to remedy other employment related cases. For example, in cases of unreasonable overtime where an employee has been paid overtime rates and has suffered no economic loss, but has been deprived of an opportunity to refuse to work.

### When employees are required to work on public holidays

Employees have an entitlement to be absent from work on a public holiday, unless a statutory exception applies. An employer can require employees to work on public holidays where they are involved in critical services or where it is desirable (although not critical) to remain open on public holidays in the following circumstances. The employer must have satisfied its obligations under sections 114(2) and (3) of the FW Act. Namely, that the employer has:

1. made a request to the employee to work on the public holiday;
2. this request is reasonable; and
3. in circumstances where the request is reasonable, that the employee's refusal is not reasonable.

Ultimately, this comes down to a test of 'reasonableness' which includes considering the employee's personal circumstances, the type of employment and the amount of notice given in advance of the public holiday (FW Act, s 114(4)).

### Administrative burden

While it is accepted by the Court that this may be "*administratively burdensome*" for employers to make a request rather than require employees to work on public holidays, the FW Act is meant to "*confront this very mischief*" to ensure that employees are able to refuse to work public holidays in reasonable circumstances.

### **Key take-aways**

This Determination is a reminder of the Full Court's 2023 decision that an employer unilaterally rostering employees to work on public holidays can be a contravention of the FW Act. The Decision reignites the importance of employers making reasonable requests to employees to work around the holiday period.

The key takeaways for employers are as follows:

1. Fixed rosters are not adequate 'requests': Where projected rosters are used throughout the year and include public holidays, ensure that employees understand that this arrangement is in draft and that a separate request will be made to employees that are 'projected' to work on public holidays.
2. Good practices: Implement internal practices that ensure requests are made throughout the year in relation to each public holiday with sufficient time to deal with refusals. Consider the reasonableness of requests in relation to your unique businesses operations.
3. Record keeping: Keep up to date records of requests made to employees and responses given in relation to working on public holidays. Where an employee refuses to work a public holiday, provide the employee with an opportunity for them to explain why this refusal is reasonable.

[1] *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd (No 2)* [2022] FCA 132.

[2] *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51.