



RTBU NSW LOCO DIVISION NEWSFLASH

April 4, 2023

IMPORTANT ANNOUNCEMENT REGARDING PUBLIC HOLIDAY WORK

On 28 March 2023 the Federal Court handed down an important decision for all employees that has profound impacts with respect to public holidays moving forward. All members should carefully read this newsflash.

In summary, the Federal Court found that employers that **require** their employees to work public holidays, without first formally making a genuine **request** have breached the minimum requirements of the *Fair Work Act 2009*. Such a requirement is therefore invalid and illegal.

As a result, and relevantly for this Easter holiday period, all employers are required to formally make a request of employees questioning whether they are available to work a public holiday.

A request will not be valid unless it genuinely *leaves the employee with a choice as to whether or not to work on a public holiday*. Relevantly, if an employer *indicates there is no choice for an employee but to work on a public holiday* (or unnecessarily curtails that choice), then they have not made a reasonable request. That you may have been rostered for a public holiday is not a request, please consider that component of the roster as *draft*.

It is also worth noting that a provision in an employment contract, enterprise agreement, policy, position description or any other document, requiring an employee to work a public holiday is not binding and an employer is still required to make a request of relevant employees.

Members should further note that the **employer's request must be reasonable**. Whether a request is reasonable will depend on a number of factors including the nature of the employers operation (ie a request of a hospital worker is more likely to be *reasonable* than a request of a rail worker), the amount of notice given, whether there are additional payments available for working a public holiday, personal circumstances of the employee, whether any particular employee might have expected to be asked to work a public holiday and more.

The Locomotive Division interprets this case as having the result that all requests from major employers of train drivers (except labour hire) will be *capable* of being a reasonable request, having regard to the nature of rail operations and the conditions of employment. That does not mean that all employers have made, or will successfully make, a reasonable request.

As the Court noted, *an employee must comply with the request if it is reasonable unless the refusal is also reasonable*. Whether an employee's refusal is reasonable will depend on largely the same factors

AUTHORISED: F Campbell Locomotive Divisional Secretary

Level 4, 321 Pitt St Sydney.NSW 2000



as the request, i.e. the amount of notice given by both parties, personal circumstances of the employee, working conditions/payments for public holidays, and the nature of the employers operations.

If an employee simply does not feel like working on a public holiday, a refusal on that basis is not likely to be reasonable.

However if an employee's personal circumstances, and in particular, family circumstances ground a refusal, then that refusal is more likely to be reasonable.

Taking this Easter for example, it would more likely be reasonable if an employee were to refuse the request to work the associated public holidays because:

1. They have an elderly or sick family member who they wish to spend time with, as this easter may be their last together;
2. They wish to observe the religious traditions of the holiday;
3. The joining of one or more public holidays with rostered days-off would present a unique opportunity to travel with a school aged child; or
4. It presents the only opportunity to spend some time with family members who may have travelled for the occasion.

If an employee's refusal is reasonable, they are entitled to be away from work on the public holiday, and to be paid for that public holiday, without accessing any form of leave.

If the employee's refusal is not reasonable, only then the employer may require the employee to work the public holiday.

Remember the Court has acknowledged the prompt of the request/refusal process should create a dialogue, which in turn has *capacity for discussion, negotiation and a refusal*. A request may be more reasonable, if an employer was to offer additional payment or an additional ADO for the public holiday shift in the negotiation process that alleviates a ground for refusal.

The Locomotive Division is ready and able to assist members who feel that their rights with respect to public holidays are not being respected by their employer, in particular where a reasonable refusal is not respected by an employer. Members should contact their organiser if they have any questions.

Read the decision here: [CFMMEU v OS MCAP Pty Ltd \[2023\] FCAFC 51](#)

Over the Page - Further information relating to recent specific requests from employers



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Aurizon NSW/SEQ

Aurizon in an 'Employee Update' dated 3 April 2023 has failed to properly make a request of employees, still describing the *request* as a 'requirement'. Further Aurizon has diminished the capacity of employees to refuse the request by describing it as the *ability to say they would prefer not to work on the public holiday*. For clarity, employees do not simply have the ability to say '*they prefer not to work*', they have the right to completely *refuse* if it is reasonable for them to do so in all the circumstances.

Describing the request/refusal process in this way is a direct violation of the Federal Court decision.

Given the incorrect information supplied by Aurizon in this update, curtailing the choice of employees, we do not believe this request is reasonable for the purposes of the *Fair Work Act 2009*.

Pacific National Coal/Bulk/Intermodal

Pacific National in an identical letter to employees sent in each Coal/Bulk/Intermodal has incorrectly identified grounds as to why the request of employees is apparently reasonable - it is not a relevant consideration that shift workers get five weeks annual leave neither is it relevant that it is their custom and practice to roster indiscriminately on public holidays. An employee's individual circumstances, in addition to any other relevant matter, will also be material to determining if a request is reasonable.

Further the letter mischaracterizes the grounds for a reasonable refusal of the request, an employee's 'circumstances' do not need to be 'unique' to be reasonable. Also an employee's 'circumstances' are only one ground of many that may form the basis for a reasonable refusal. Framing the right of employees to deny the request **only** on this basis is incorrect and not reflective of genuine choice.

Given the incorrect information supplied by Pacific National in this letter, curtailing the choice of employees, we do not believe this request is reasonable for the purposes of the *Fair Work Act 2009*.

One Rail

In an email sent to employees in NSW and QLD by Andrew Betts dated 3 April 2023, a request was made of employees to work the upcoming public holidays. As with Aurizon, One Rail has relied on irrelevant grounds for justifying the reasonableness of its request - specifically that shift workers get five weeks annual leave and it is custom and practice to roster without regard for public holidays.

However, One Rail has not curtailed the grounds on which the request can be refused. Therefore the request is likely reasonable and therefore valid. Employees should only refuse if they have reasonable grounds to do so.

Others

We are not aware of other employers having sent requests to employees to work the upcoming holidays. If such requests are not made formally, employees are not obliged to work their otherwise rostered public holiday shifts.

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like to join please Join Now!**

