



RTBU

FOOTPLATE

**NEW SOUTH WALES BRANCH / LOCOMOTIVE
DIVISION**

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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 footplate.**

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. Simply being rostered on for a public holiday is not a request.

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 (i.e. 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 a request from Sydney Trains and/or NSW Trains to its Drivers will be *capable* of being a reasonable request, due to the nature of rail operations and relevant conditions of employment. That does not mean that they have made, or will successfully make, a reasonable request.

If a request is made, 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 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](#)