Bosses must ask staff before rostering to work public holidays: court

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Updated Mar 29, 2023 – 5.43pm,
first published at 12.32pm

Employers must ask workers if they want to work public holidays and cannot just automatically roster them on, according to a landmark court ruling that will apply to all workplaces regardless of what is in contracts or agreements.

In a judgment delivered just days before the Easter holidays, a full bench of the Federal Court held that BHP's internal labour hire outfit, Operations Services, breached the Fair Work Act by requiring miners to work on Christmas Day and Boxing Day.

BHP argued the union's interpretation on what counted as a request, adopted by the court, was "inherently unworkable".

The ruling is a big win for unions and could expose other employers to civil penalties, including in resources, logistics, retail, hospitality, health and emergency services, if they automatically roster their employees on public holidays [https://www.afr.com/politics/federal/federal-public-servants-allowed-to-work-on-australia-day-20230118-p5cdct].

Justices Berna Collier, David Thomas and Elizabeth Raper affirmed the national employment standards (NES), which override contracts, awards or enterprise agreements, mandate that employers make reasonable requests to work public holidays. A roster or contractual requirement did not count as a request.

The judges said, "the intended mischief the provision confronts is the inherent power imbalance that exists between employers and employees".
"By virtue of this imbalance, employees will often feel compelled, and not understand, that they have the capacity to refuse a request that is unreasonable or where their own refusal is reasonable," they said.

"The requirement that there be a 'request' rather than a unilateral command prompts the capacity for discussion, negotiation and a refusal."

An employer could still require the employee to work on a public holiday if the employee's refusal was unreasonable given the nature of the work, reasonable employer expectations, the type of employment and the level of pay.

Mining and Energy Union president Tony Maher said the implications of the decision extended far beyond BHP to the broader coal mining industry and other workplaces, and would have consequences for Easter and Anzac Day.

"The right for workers to spend time with friends and family at important times of the year was traditionally respected by mining companies. However, this has been eroded under pressure for non-stop production," he said.

"It is common practice for employers in the mining industry to require employees to work on public holidays when they fall during their roster hours.

"This practice has been found to contravene the NES and employers will need to adapt and provide workers with a genuine choice that allows them the right to refuse."

Lawyers said the ruling came as a shock to many operations that work 24/7, from mining to aged care, as the assumption had been that employees accept working

public holidays when they take the job.

Baker & McKenzie partner Michael Michalandos said the decision reinforces that employers cannot simply impose holiday rosters on employees.

“Unfortunately, I suspect that many employers with large workforces would not have taken such a consultative approach to locking in rosters, relying instead on attractive penalty rates,” he said.

“The impact of this decision is likely to leave many employers who have not catered for this process on the back foot.”

Seyfarth Shaw partner Chris Gardner said the prospect of civil penalties against employers who have not undertaken this approach “gives the union enormous leverage”.

‘Inherently unworkable’

The court case involved 85 OS employees who worked 12½-hour shifts on Christmas Day and Boxing Day in 2019 at BHP-Mitsubishi Alliance’s Daunia Mine in central Queensland.

The workers did not receive any extra pay for working those days. However, the alliance’s production targets required OS to provide its services 24 hours a day, 365 days a year.

Workers’ contracts said they “may be required to work on public holidays” and only six were randomly chosen to take time off that Christmas.

BHP had argued the union’s interpretation of what a request was, which clashed with a primary court ruling in the company’s favour, was “inherently unworkable”.

“Such an interpretation would mean that an employer could not ever have a roster which included working hours on Christmas holidays or ever contain a contractual requirement,” the company told the court.

However, the court said employers could include public holidays in rosters as long as the employer “ensures that employees understand either that the roster is in draft ... 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 the refusal unreasonable,” it said.

It considered it may be “administratively burdensome” on BHP to request staff to work but “an employer never has complete certainty of operation regarding what it would like in the future to demand of its employees and whether it can do so lawfully”.

The potential for there to be a lack of employees who volunteer to work public holidays “is an ordinary predicament for any employer asking employees to work non-standard hours”.

The judgment is a second win for the Mining and Energy Union after it defeated BHP’s proposed OS agreement last week [https://www.afr.com/work-and-careers/workplace/union-stops-bhp-labour-hire-deal-ahead-of-same-job-same-pay-20230324-p5cv20] through a narrow majority of workers voting against the deal because it had inferior conditions to BHP’s direct workforce.

The union said it expected mining companies to change their practices regarding public holiday rostering over time as a result of the decision and would work with members on reasonable grounds to refuse to work public holidays.

Australian Industry Group chief executive Innes Willox said it was “very common” in many industries for employees to routinely have to work on public holidays as a part of their role.

He said many such employers will now need to issue separate ‘requests’ for employees to work on these days.

“The case demonstrates the unworkable complexity of our workplace relations system,” he said.

“It provides an example of our workplace relations laws leading to mistakes being made by even Australia’s largest employers, and indeed courts, when determining precisely what is required by our workplace laws.”

The court is still to determine penalties to impose against BHP for the breaches.

A BHP spokesman said that “we are reviewing the decision and considering appeal options”.

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