

Case Note

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

Challenge to routine requirements for shiftworkers to work on public holidays upheld

**Sladen
Legal**



The Full Court has clarified that s 114(2) will be contravened if there is no opportunity afforded to refuse an unreasonable request

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

1 Background facts

- The Respondent (**OS**)¹ — BHP’s in-house labour hire provider — operates the Daunia Mine near Moranbah in central Queensland. OS employs shiftworkers on a 24/7 basis to work in the Daunia Mine.
- OS rostered shiftworkers on Christmas and Boxing Day 2019 as part of standard operations at the Daunia Mine
- An application was brought by the CFMMEU contending that a routine requirement for employees to work during public holidays (as rostered) contravened ss 44 and 114 of the Fair Work Act 2009 (FW Act). The CFMMEU argued that a requirement for workers to perform work during public holidays by way of routine rostering enlivened section 114 of the FW Act such that employers would need to first reasonably request employees to work on public holidays. At first instance the Federal Court held that a routine requirement to work on public holidays was not in contravention of section 114 of the FW Act. The CFMMEU subsequently appealed to the Full Court.
- OS’s standard form contracts said that the expectation to work on public holidays was incorporated into existing remuneration. Relevant contractual provisions stipulated that employees “may be required to work on public holidays”.

2 Key issue to be decided

- The Full Court considered whether OS’s engagement of shiftworkers on 24/7, 365-day rosters enlivened section 114 of the FW Act in circumstances where employees were routinely required to work on public holidays (and specifically on Christmas Day and Boxing Day in 2019).
- The CFMMEU argued that a contravention of s 114(2) would occur where an employer imposes a requirement for employees to work on public holidays without making any request at all. OS argued that its requirement for shiftworkers to work on Christmas and Boxing day 2019 was a reasonable request within the meaning of section 114(2) of the FW Act.

Notes: 1. OS is also known as ‘Operations Services’.

The Full Court has clarified that s 114(2) will be contravened if there is no opportunity afforded to refuse an unreasonable request

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

3 Determination

- The Full Court held that OS had contravened section 114(2) because it required the employees to work on Christmas Day and Boxing Day in 2019 **without affording an opportunity to reasonably challenge** or refuse the requirement. The evidence showed that OS **required (and did not request) shiftworkers to work on the relevant public holidays**. There was an assumption that employees rostered to work on public holidays would work unless they applied for leave and it was granted. OS did not communicate to employees that they had any right under s 114 or otherwise to refuse to work on public holidays.
- The Full Court cited the previous decision of *Shop, Distributive & Allied Employees Association v Woolworths Ltd* [2012] FCA 540 in which Barker J suggested that a request in the context of section 114(1) included “leaving room for negotiation and discussion.” The Full Court further considered that section 114(2) required employers to provide employees with an opportunity to refuse the request on reasonable grounds.
- The Full Court said:

[38] 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. The requirement that there be a “request” rather than a unilateral command, prompts the capacity for discussion, negotiation and a refusal.

4 Implications for employers

- **Ask employees:** Employees cannot unreasonably refuse a request to work on a public holiday. Employers can robustly respond to refusal communications in accordance with business / operational requirements. However, it is important to set expectations upfront.
- **Provide an opportunity to challenge:** Employers must at least provide employees who are rostered to work on a public holiday with an opportunity to challenge the applicable roster if it would be unreasonable to work on a particular public holiday. This requires making employees aware that they can reasonably refuse a request to work on a public holiday.
- **Take action:** Employers who employ shiftworkers on 24/7 rostering arrangements should take action as follows:
 - implement policies, procedures and processes to assess and respond to employee refusals to work on public holidays; and
 - ensure that employees who are rostered to work on public holidays confirm that they have agreed to work (ideally in writing) on the relevant public holiday.

**Sladen Legal is
ready to assist
you with
employment
and workplace
matters**

Our team



Jasmine O'Brien

Principal

jobrien@sladen.com.au

03 9611 0149

0401 926 108

sladen.com.au

<https://www.linkedin.com/in/jasmine-obrien-sladen/>



Stephan Hill

Lawyer

shill@sladen.com.au

03 9611 0165

sladen.com.au

<https://www.linkedin.com/in/stephan-hill-27476a159/>