

You want me to work on a public holiday! That's unreasonable – or is it?

By Stewart Rickevich of Gadens Lawyers, Brisbane and Meryl Remedios of Gadens Lawyers, Sydney

In the first decision of its kind, Fair Work Australia has considered whether an employee's refusal to work on a public holiday was reasonable in an application for an unfair dismissal remedy. The case arose when an employee was summarily dismissed after failing to attend work on Christmas Day and Boxing Day as his employer had requested.

What does the Fair Work Act say?

Under the *Fair Work Act 2009* (Cth), an employer can only request that an employee work on a public holiday if that request is reasonable. However, if an employer has made a reasonable request for an employee to work on a public holiday, the employee can only refuse the request if their refusal is also reasonable.

What happened?

The employer provides recycling and waste collection services for small and large business and local government authorities. The employer's business operates 365 days of the year, necessitating some work on weekends and public holidays.

In late November 2010, the employee informed his employer that he was not available to work on the 2010 Christmas and Boxing Day public holidays. The employee had made plans to spend these days with his wife away from the city approximately six months prior to the public holidays occurring. The employee had made these plans based on his belief that following an internal transfer 12 months prior, the area in which he was working was one where he was not required to work public holidays.

On 10 December 2010, the employee was informed of the requirement to work on the Christmas and Boxing Day public holidays. One week later, the employee stated that he would not work on those public holidays. The employee consistently stated that he was not obliged to provide a reason for his refusal to work on the public holidays and refused to provide a substantive reason, other than that his employer could not require him to work on public holidays.

Unsurprisingly, the employee failed to attend for work on the 2010 Christmas and Boxing Day public holidays. The employer followed an appropriate disciplinary policy, and ultimately dismissed the employee for failing to follow a lawful and reasonable direction to work on a public holiday.

What did Fair Work Australia find?

During the hearing of the employee's application for an unfair dismissal remedy, the employee's reasons for refusing to work on the public holidays became apparent. The employee had refused to work on the public holidays due to:

- his family responsibilities, including his wife's ill health and her lack of a driver's licence necessitating him being available on the public holidays

- his mistaken belief that his transfer meant that he no longer had to work on public holidays.

Fair Work Australia found that the employer's requests for the employee to work on the Christmas and Boxing Day public holidays were reasonable. However, Fair Work Australia also found that the employee's refusal to work on the public holidays was reasonable too. It came to this view based on the reasons the employee provided during the hearing for his refusal to work on the public holidays. Despite the finding of Fair Work Australia in this case however, it found that ordinarily, where an employee has good reason for refusing their employer's request to work on a public holiday but does not explain those reasons to the employer, then the refusal by the employee is likely to not be considered reasonable.

In assessing whether the employee had been unfairly dismissed, Fair Work Australia also had regard to the fact that whilst it was made plain to the employee that if he did not work the public holidays as requested there would be disciplinary action taken against him, there was no evidence presented by the employer that the employee was specifically informed that his refusal could lead to the termination of his employment.

Given that Fair Work Australia found that the employee's refusal to work on the public holidays was reasonable, it followed that the employee had not failed to follow a lawful and reasonable direction. Accordingly, Fair Work Australia ultimately determined that the dismissal of the employee was unfair, and he was awarded over \$12,500 in compensation.

Key lessons for employers

Employers should ensure that they are aware of the right of an employee to be absent from work on a public holiday, and that a request for an employee to work on a public holiday, or an employee's refusal to work on a public holiday, must be reasonable.

This case demonstrates that in ascertaining whether a request or a refusal is reasonable, no single factor will be determinative. However, where an employee has good reason for refusing their employer's request to work on a public holiday but does not explain those reasons to the employer, then the refusal by the employee is likely to not be considered reasonable.