

SHIFT WORK

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Authority and Application

Clause 43 of the *Victorian Public Service Enterprise Agreement 2024* (the Agreement) applies to Victorian Public Service (VPS) Departments and Agencies (Employers) and their Employees covered by the Agreement.

Overview

Clause 43 of the Agreement sets out the entitlements which apply to Employees performing Shift Work. Shift Work involves the performance of ordinary hours, which while not necessarily worked within a 24/7 operation, include as part of a regular roster pattern or regular roster cycle, a Saturday, Sunday, Public Holiday or an afternoon or night shift.

In addition to the entitlements outlined in clause 43 of the Agreement, an Employee who performs Shift Work may be entitled to other benefits as set out in other clauses of the Agreement (including in Agency Specific appendices) subject to meeting the requirements set out in the relevant provision.

Relevant provisions of the Agreement

Clause 43. Shift Work

Agency specific relevant provisions of the Agreement

Clause 4. – Appendix 1 – Applicable to Custodial Officers in the Custodial Officers Structure who are employed by the Department of Justice and Community Safety.

Clause 12. – Appendix 4 – Applicable to Employees in the Department of Families, Fairness and Housing and who are employed in the Child Protection Practitioner or Children, Youth and Families Stream.

Clause 3. – Appendix 13 – Applicable to Employees employed in the Victorian Gambling and Casino Control Commission.

Supplementary Guidance Information

1. What is Shift Work for full-time or part-time Employees?

- 1.1. Shift Work is defined in Clause 2 of the Agreement as ordinary hours of work rostered in accordance with clause 43.1(a) of the Agreement.
- 1.2. Clause 43.1(a) of the Agreement provides that an Employee (other than a Casual Employee) performs Shift Work when the Employee is required to perform rostered ordinary hours of work, which while not necessarily worked within a 24/7 operation, includes as part of a regular roster pattern or regular roster cycle, a Saturday, Sunday, Public Holiday or an afternoon or night shift.
- 1.3. Employees who are not engaged to perform Shift Work (as defined by clause 43.1(a) of the Agreement) and work their ordinary hours entirely within the span of hours, have their ordinary hours of work regulated by clause 42 of the Agreement and are not required to work ordinary hours outside the span of 7:00am to 7:00pm Monday to Friday.
- 1.4. In some cases, an Employee whose hours of work are ordinarily regulated by clause 42 of the Agreement, may be required to undertake Shift Work, for a limited period to meet peak or seasonal demands. This expectation is usually recorded in an Employee's contract of employment or position description. In such cases the Employee is entitled to any relevant entitlements under clause 43 of the Agreement, for the period they are performing Shift Work to meet the seasonal or peak work period.

2. What is Shift Work for a Casual Employee?

- 2.1. Clause 43.1(b) of the Agreement confirms that Casual Employees are entitled to the shift penalties outlined in clause 43 of the Agreement, where they are engaged to perform work in a role which, as part of its usual operations, would include rostered ordinary hours of work, which while not necessarily worked within a 24/7 operation, would include operating on a Saturday, a Sunday, a Public Holidays, or an afternoon/night shift.
- 2.2. Casual Employees are also entitled to shift penalties when performing Shift Work, in addition to the casual loading set out in clause 35 of the Agreement.

3. Who is a Shift-Worker?

- 3.1. An Employee who is engaged to perform Shift Work in accordance with clause 43 of the Agreement is a Shift Worker.
- 3.2. However, the Agreement includes a defined term (see clause 2 of the Agreement) for Shift Worker for the purposes of determining the application of some of the entitlements set out in the Agreement. The definition of Shift Worker in clause 2 of the Agreement defines a Shift Worker as an Employee who performs Shift Work in a workplace in which the Employee is employed in which shifts are continuously rostered 24 hours a day for 7 days a week.

3.3. This creates a distinction between the definitions of Shift Work, which is not limited to 24/7 operations and the definition of Shift Worker. This means an Employee may be performing Shift Work even though they do not meet the definition of a Shift Worker. As an example, an Employee may be engaged to perform Shift Work in part of the Employer's operation which provide a 7 day a week service between 0900am to 1700pm each day. In this example, the Employee is performing Shift Work, because they are engaged to perform Shift Work and, as part of a regular pattern or regular roster cycle, are required to work ordinary hours which include a Saturday and Sunday. However, the Employee does not meet the definitional test to be a Shift Worker because they are not performing work in a 24/7 operation as shifts are only required between 0900am and 1700pm.

3.4. This definitional difference has implications for how shift related entitlements outlined in the Agreement apply. This is explored in further detail in section 9 below.

4. Shift penalties

4.1. Clause 43.2 of the Agreement sets out two sets of shift penalties, one for rotating shifts and the other for continuous shifts.

4.2. Rotating shift penalties applies where the day and times of an Employee's shift rotate across the roster or roster cycle. For example, roster patterns which require the Employee to work a mixture of day, afternoon, night and weekend shifts. This encompasses the majority of shift arrangements in the VPS.

4.3. Continuous shift penalties apply where the Employee is required to perform the same shifts (for example, only working night shifts) continuously for a period exceeding four weeks. Continuous shift penalties do not apply where, but for mutual agreement, the Shift Worker would be required to work rotating shift duty.

5. Substitute Leave for Public Holidays

5.1. Clause 43.4 of the Agreement provides that where the nature of the employment of Shift Workers does not permit the observance of Public Holidays as they occur, substituted leave will be granted by the Employer.

5.2. For Part-time Shift Workers, payment for a Public Holiday granted as a day's leave will be made only in respect of those Public Holidays on which the part-time Shift Worker would have worked had there been no Public Holiday (Clause 43.4(a) of the Agreement). For example, if the part-time Employee works Monday to Wednesday and the Public Holiday is on a Friday, they are only entitled to substitute leave under this clause for Public Holidays which fall on Monday, Tuesday or Wednesday.

5.3. A Shift Worker who is rostered to perform ordinary duty on a Public Holiday but who is on paid leave on that day will be granted one day's leave in lieu of the Public Holiday (Clause 43.4(a) of the Agreement).

5.4. A Shift Worker whose rostered day off duty falls on a Public Holiday will be granted one day's leave in lieu of such holiday (Clause 43.4(c) of the Agreement).

5.5. With the agreement of the Employer, a Shift Worker may receive payment in lieu of any accrued substituted leave. The Employer can authorise this payment in lieu of additional substituted leave in extenuating circumstances or to reduce the outstanding balance of accruals of leave owing to Shift Workers.

6. Shift Allowances during a period of Primary Caregiver Parental Leave or Additional Paid Secondary Caregiver Parental Leave

- 6.1. Clause 43.5 of the Agreement provides that a Shift Worker will be paid an allowance equal to any additional shift allowances to which the Employee would have been entitled for the period of paid Primary Caregiver Parental Leave under clause 62.4(a)(i) of the Agreement or Additional Paid Secondary Caregiver Parental Leave under clause 62.6 of the Agreement, as if they were not proceeding on paid Primary Caregiver Parental Leave or Additional Paid Secondary Caregiver Parental Leave (as relevant).
- 6.2. The construction of this provision is similar to that of clause 50.4(a)(ii) of the Agreement which characterises the calculation of the annual leave allowance. As such, the same methodology should be applied to calculating relevant shift penalties as is currently applied for annual leave allowance for shift workers. This would generally involve the Employer assessing the relevant shift allowances that the Employee would've received had they remained on roster.
- 6.3. Where an Employee who is a Shift Worker takes half pay parental leave, the shift penalties payable under clause 43.5 of the Agreement during the period of parental leave will also be at half pay. That is, there is no financial benefit to the Employee in taking the leave at half pay as compared to full pay – only the duration of the leave is different.

7. Rosters Notification

- 7.1. Clause 12.8 of the Agreement requires the Employer to display a roster for Shift Workers, as defined in clause 2 of the Agreement, in a convenient area fourteen days prior to the effective date.
- 7.2. The Employer may change the Shift Work roster without written notice, if the Employer is of the reasonable opinion that an emergency exists.
- 7.3. A Shift Worker may request the Employer approve a change to rostered Shift Work times by giving to the Employer 48 hours' written notice of the proposed change.
- 7.4. While clause 12 of the Agreement, uses the defined term of Shift Worker, which is limited to 24/7 operations, it would be reasonable that similar arrangements would be put in place for Employees who are engaged to perform Shift Work but who do not meet the definition of a Shift Worker in clause 2 of the Agreement because they do not work in a 24/7 environment.

8. Rostering on Public Holidays

- 8.1. Section 114 of the *Fair Work Act 2009* (FW Act) provides the entitlement for an Employee to be absent from their employment on the day or part day that is a Public Holiday where the Employee is based for work purposes. Section 114 also allows for an Employer to request an Employee to work on a Public Holiday provided the request is reasonable. Employees may refuse their Employer's request where it is reasonable to do so or where the request was unreasonable.
- 8.2. The Full Court of the Federal Court clarified the application of this section in *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP PTY LTD* [2023] FCAFC 51. In its decision, it held that the Employer which required its Employees to perform work on the Christmas and Boxing Day Public Holidays in 2019, without first 'requesting' its employees to do so was in contravention of the National Employment Standards (NES) – specifically, section 114 of the FW Act.
- 8.3. The Federal Court reasoned that under the NES, Employees have a fundamental right to not be required to work on a Public Holiday, unless first requested by the Employer. The Federal Court held that a request must be a specific request which leaves the Employee with a choice as to agree or not agree to work on that Public Holiday. The Federal Court held that simply rostering an Employee on a Public Holiday prior to its occurrence would not constitute a request.

- 8.4.** In its decision the Federal Court also recognised the unique circumstances of organisations providing ‘critical services’ and ruled that Employers can ultimately require Employees who are involved in critical services or where it is desirable (although “not critical”) to remain open on Public Holidays, to work on Public Holidays where the Employer has satisfied that:

- 8.4.1.** It has made a request of its Employees to work on the Public Holiday and,
- 8.4.2.** That the request is reasonable (noting the criteria as to whether a request or refusal of a request is reasonable under section 114(4) of the FW Act).

8.5. Immediate Compliance Steps

To comply with the NES Employers must take the following steps:

- 8.5.1.** A template contract or letter of offer for the employment for Shift Workers should include additional wording stating that rosters containing a Public Holiday are to be treated as indicative at first and that refusal to work on those Public Holidays will be considered in accordance with the NES (with reference to section 14(4) of the FW Act). Where no refusal is received, Employees are deemed to have consented to work the Public Holiday rostered shift.
- 8.5.2.** Alternatively, Employers may develop a guidance note that can be provided to Employees upon commencement outlining these factors. Where the Employer develops guidance it will be in accordance with the NES (with reference to section 114(4) of the FW Act).
- 8.5.3.** Employers should consider setting out advice to Managers and Individuals required to consider refusal requests. Individuals who are responsible for making rostering decisions need to be made aware of the requirements in the NES regarding reasonable/unreasonable requests, including ensuring they understand the factors that will be considered in determining whether a request, or a refusal of a request, to work on a Public Holiday is reasonable (see section 114(4) of the FW Act).
- 8.5.4.** Employer must ensure that their Payroll instructions are aligned to the NES. Where an Employee does not work a Public Holiday that they were rostered on because the Employer accepted their request to refuse the shift, payment needs to be consistent with the pay owed to the Employee for the absence on the Public Holiday determined the Agreement. This does not include Public Holidays not worked due to a shift swap – a shift swap is where an Employee is no longer rostered on that Public Holiday as opposed to refusing to work.

9. Distinction between Shift Worker (as defined in clause 2 of the Agreement) and an Employee engaged to perform Shift Work

Application of entitlements

- 9.1.** As explained in section 3, the Agreement provides different definitions of Shift Work and Shift Worker, which means that entitlements in the Agreement apply differently to an Employee performing Shift Work in a 24/7 environment (i.e. a Shift Worker as defined in clause 2 of the Agreement) and an Employee engaged to perform Shift Work in a non-24/7 environment. The different treatment is explained in further detail below.

9.2. Shift penalties – Clause 43.2 of the Agreement

- 9.2.1.** Shift Workers, as defined in clause 2 of the Agreement, are entitled to the shift penalties outlined in clause 43.2 of the Agreement.

9.2.2. An Employee who is engaged to perform Shift Work but who does not meet the definition of a Shift Worker in clause 2 of the Agreement because they do not work in a 24/7 environment, on a strict legal reading is not entitled to shift penalties under clause 43.2 of the Agreement (as the clause uses the defined term).

9.2.3. However, clause 43.1(a) of the Agreement includes reference to the ordinary hours of work not necessarily being worked in a 24/7 operation. Given this it is recommended that where Employers engage an Employee to perform Shift Work in a part of their operation that is not a 24/7 operation, that shift penalties are paid in accordance with clause 43.2 of the Agreement.

9.3. Substitute Leave for Shift Workers – Work on Public Holidays – Clause 43.4 of the Agreement

9.3.1. Where the nature of the employment of Shift Workers (as defined in clause 2 of the Agreement) does not permit the observance of Public Holidays as they occur, substituted leave will be granted by the Employer, in accordance with clause 43.2 of the Agreement.

9.3.2. An Employee who is engaged to perform Shift Work but who does not meet the definition of a Shift Worker in clause 2 of the Agreement because they do not work in a 24/7 environment, is not entitled to Substitute Leave under clause 43.4 of the Agreement (as the clause uses the defined term). Employees who perform Shift Work on a Public Holiday will instead receive the appropriate Overtime Penalty for working on the Public Holiday.

9.3.3. Where an Employee who is engaged to perform Shift Work but who does not meet the definition of a Shift Worker in clause 2 of the Agreement because they do not work in a 24/7 environment is either on paid leave on the Public Holiday or a rostered day off which falls on the Public Holiday, the Employee should be granted another day in lieu of the Public Holiday to ensure the Employee has received their NES entitlement to be absent from their employment on the day or part day that is a Public Holiday where the Employee is based for work purposes (without having to use other entitlements).

9.4. Calculation of Pay for Shift Workers on Parental Leave – Clauses 43.5 and 62.25(f) of the Agreement

9.4.1. Shift Workers as defined in clause 2 of the Agreement, are entitled to be paid an allowance equal to any additional shift allowances to which the Employee would have been entitled for the period of paid Primary Caregiver Parental Leave or Additional Paid Secondary Caregiver Parental Leave, as if they were not proceeding on paid Primary Caregiver Parental Leave or Additional Paid Secondary Caregiver Parental Leave.

9.4.2. An Employee who is engaged to perform Shift Work but who does not meet the definition of a Shift Worker in clause 2 of the Agreement because they do not work in a 24/7 environment, is not entitled to continue to be paid shift penalties during a period of paid Primary Caregiver Parental Leave or Additional Paid Secondary Caregiver Leave under clause 43.5 of the Agreement (as the clause uses the defined term).

9.5. Overtime and the interaction with Shift Work provisions – Clause 46 of the Agreement

9.5.1. Shift Workers as defined in clause 2 of the Agreement, are, subject to the exceptions outlined in clause 46.6 of the Agreement, entitled to be paid overtime for hours worked which are:

- worked without the provision of a ten-hour rest break, or

- in addition to a Shift Worker's rostered ordinary hours of work, or
- for a Casual Employee working hours as part of a regular pattern of work, or a regular roster cycle where they work in excess of their rostered or agreed hours of work for that day.

9.5.2. An Employee who is engaged to perform Shift Work but who does not meet the definition of a Shift Worker in clause 2 of the Agreement because they do not work in a 24/7 environment, is not expressly excluded from the operation of clause 42 of the Agreement (because that clause uses the defined term) so overtime penalties apply for hours:

- worked without the provision of a 10-hour rest break; or
- in addition to an Employee's ordinary daily hours of work on any day; or
- for a Casual Employee working hours as part of a regular pattern of work, or a regular roster cycle where they work in excess of their rostered or agreed hours of work for that day.

9.5.3. For part-time Employees who are not Shift Workers as defined in clause 2 of the Agreement, the exceptions in clause 46.11 of the Agreement apply.

9.6. Additional week of Annual Leave for Shift Workers – Clause 50.2 of the Agreement

9.6.1. Shift Workers as defined in clause 2 of the Agreement, are, subject to the conditions outlined in clause 50.2 of the Agreement, entitled to an additional one week's annual leave (pro-rata when working less than 10 Sundays).

9.6.2. An Employee who is engaged to perform Shift Work but who does not meet the definition of a Shift Worker in clause 2 of the Agreement because they do not work in a 24/7 environment, is not entitled to additional leave under clause 50.2 of the Agreement.

9.7. Payment whilst on Annual Leave – Clause 50.4 of the Agreement

9.7.1. Shift Workers as defined in clause 2 of the Agreement, who take annual leave are entitled to be paid, in addition to their salary, the greater of the two amounts:

- the annual leave allowance rate of 17.5 per cent of the Shift Worker's salary; or
- the value of additional payments for shift, Saturday or Sunday duty which they are required to perform if they were not proceeding on annual leave.

9.7.2. An Employee who is engaged to perform Shift Work but who does not meet the definition of a Shift Worker in clause 2 of the Agreement because they do not work in a 24/7 environment, but who is paid shift penalties in accordance with paragraph 9.2.3 of this Policy, should also be paid in accordance with clause 50.4 of the Agreement when then take annual leave.

Making decisions under this policy

Under s.20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so. Each Department and Agency should give effect to this policy in accordance with its own delegations.

Dispute resolution

An Employee who is directly affected by a decision made or action taken pursuant to clause 43 of the Agreement may apply for a review of actions under the Employer's review of actions policy or seek to resolve a dispute through the Resolution of Disputes procedure at clause 13 of the Agreement.

Further Information

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

Related policies or documents

Common Policies

- Annual Leave
- Parental Leave
- Public Holidays

All policies can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.

Authorised by Industrial Relations Victoria:

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