SQUIRE PATTON BOGGS

Flexible Working Arrangement Disputes – What Does the Fair Work Commission Say?

July 2024

Effective from 6 June 2023, as part of the changes made through the federal government's "Secure Jobs, Better Pay" legislation, the *Fair Work Act's* flexible working arrangement (FWA) provisions were amended to:

- Expand the circumstances in which an employee may request an FWA
- Increase an employer's obligations when considering an employee's request
- Introduce dispute resolution provisions that empower the Fair Work Commission (FWC) to make orders where an employer refuses an employee's request

Of all the changes, the introduction of a dispute resolution process is a particularly significant (and controversial) development, as an employee's ability to request an FWA was specifically excluded from the *Fair Work Act's* dispute resolution processes when the act was first introduced.

Many employers and business groups expressed concern at the time these changes were announced, fearing that they may be flooded with applications from employees hoping to have decisions refusing requests for FWAs overturned, including requests involving working from home. So, what is the state of play a year later? Has the FWC been inundated with applications? Is there a trend of employees successfully challenging employers' decisions, or is the FWC supporting employers' right to refuse an FWA request on reasonable business grounds? A review of some of the FWC's decisions over the last 12 months paints an interesting picture.

Charles Gregory v Maxxia Pty Ltd (2023) FWC 2768

In this case, the employee raised a dispute after his request to work 100% of his full-time hours from home was refused. (Under the employer's policy, employees were required to work at least 40% of their hours at the office.) Mr. Gregory argued his request should have been granted because he was in the process of seeking a custody arrangement where he could care for his school-age child every second week, and because he suffered from inflammatory bowel disease. Maxxia countered that the nature of Mr. Gregory's role (as a support coach) meant that it was desirable for there to be face-to-face contact within the team, that being in the office would allow for observation, interaction and coaching to improve Mr. Gregory's productivity (which was below the required level) and offer him support, and that arrangements to work from home during the weeks that he would potentially have custody of his child would be sufficient to satisfy his caring responsibilities.

Maxxia also submitted that it had genuinely tried to reach agreement about making changes to accommodate Mr. Gregory's medical condition and parental responsibilities, and had regard to the consequences of refusal for him.

The FWC agreed, finding that Mr. Gregory's medical condition did not constitute a disability and that Maxxia had reasonable business grounds for refusing the request.

Shane Gration v Bendigo and Adelaide Bank Limited (2024) FWC 717

Mr. Gration applied to the FWC after his request to work solely from home was refused. Mr. Gration argued that he needed to work from home because he was the carer for his wife who had sustained a serious foot injury, and because he was responsible for the care of his school-aged daughter.

Bendigo Bank had adopted a hybrid working model, but encouraged the importance of working in the office to meet the needs of the business and provide opportunity for meaningful team connection. The bank had also offered to allow Mr. Gration to work from home or have access to carer's leave if he needed to provide care for his daughter.

The FWC again found in the employer's favour, finding that it could not conclude on the evidence that Mr. Gration was a carer within the meaning of the *Carer Recognition Act 2010* due to the lack of evidence surrounding his wife's condition. It also found that the bank's offer for Gration to take carer's leave or work from home on days where he would need to provide care to his daughter was an appropriate response and there was no need for him to work permanently from home to deal with his caring responsibilities. As the commissioner stated, "The employment relationship is a two-way street."

The Police Federation of Australia v Victoria Police/Chief Commissioner of Police (2024) FWC 1631

The Police Association lodged an application on behalf of Senior Constable Beaumont alleging a failure on part of Victoria Police to correctly apply the flexible work arrangement provisions of the relevant enterprise agreement. Beaumont had requested to perform eight 10-hour shifts per fortnight on the basis that he was over 55 years of age and needed to care for his elderly parents. Beaumont had previously trialled the arrangement with Victoria Police following an earlier FWC application, but it was cancelled after four months, during a dispute with Victoria Police over his duties.

Beaumont's request for an FWA was refused, and the alternative offered by Victoria Police (a blended roster of four 10-hour shifts and five 8-hour shifts per fortnight) was rejected.

The FWC ultimately held that Victoria Police had reasonable business grounds for refusing Beaumont's FWA request because:

- As police officers worked in pairs and since other officers operated on 8 hour-shifts, it was reasonable for Victoria Police to reject Beaumont's proposal to work 10-hour shifts on fewer days in order to maintain productivity in accordance with the enterprise agreement
- As the proposal resulted in the loss of up to two operational shifts per fortnight, this had the potential to create a service delivery problem

Notably, the FWC also encouraged Beaumont to reconsider the alternative offer of a blended roster, with the commissioner stating, "a part-way compromise is still better than nothing at all."

Ambulance Victoria v Natasha Fyfe (2023) FWCFB 104

Although this involved an appeal from a decision that predated the changes to the FWA provisions, the same principles were applied. In the original decision, Ms. Fyfe, a paramedic, requested to amend her night shift hours pursuant to her right to seek an FWA under her enterprise agreement, asking to change her start and finish times so she could care for her three young children.

Ambulance Victoria refused Fyfe's request on the grounds that a shortened night shift did not exist, they were unable to accommodate shift start/finish times outside of the team roster configuration, and there was insufficient resourcing in Ms. Fyfe's area to accommodate the request.

The FWC disagreed (which was confirmed on appeal), finding that Ambulance Victoria lacked reasonable grounds for refusing the FWA request, noting that it did not attempt to meet or hold discussions with Ms. Fyfe before confirming its decision. The FWC also observed that the reasons provided for refusing the request were relatively trivial, with the explanation that the service area could not provide start and finish times outside the roster configuration being the equivalent of the Little Britain catchphrase, "Computer says No."

So, what are the lessons from the FWC's initial approach to FWA requests? As the first three cases show, the FWC is prepared to uphold an employer's right to refuse a request on reasonable business grounds, particularly if the request involves a significant change in working arrangements (such as solely working from home). However, these grounds must be valid, explained in detail, and conveyed clearly to the employee.

It is also worth noting that in each case where the FWC found for the employer, the employer had engaged with the employee and tried to accommodate their needs by offering alternative arrangements in an attempt to reach a compromise. In contrast, the employee in each case resisted any position that was less than a full acceptance of their request.

In the one case where the FWC found for the employee, the FWC focused on the fact that the employer had not attempted to engage with the employee or consider any form of compromise position. So, if anything can be taken from these cases, it is that it is risky to take a blanket "say no" approach to requests for FWAs, particularly now the FWC can potentially overrule an employer's decision if there are not reasonable business grounds for the refusal.

For that reason, it is important that each FWA request is assessed on a case-by-case basis, and if a request cannot be fully accommodated, consideration should be given to whether an alternative arrangement can be made that takes into account an employee's individual needs and responsibilities.

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