DECISION

Fair Work Act 2009
s.604—Appeal of decision

Peter Ridings
v
Fedex Express Australia Pty Ltd T/A Fedex
(C2024/5176)

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT ANDERSON
DEPUTY PRESIDENT MASSON

MELBOURNE, 24 DECEMBER 2024

Appeal against decision [2024] FWC 1845 of Deputy President Lake at Brisbane on 12 July 2024 in matter number C2024/1129.

[1] Mr Peter Ridings (**the Appellant**) has lodged an appeal under s 604 of the *Fair Work Act 2009* (Cth) (**FW Act**) for which permission to appeal is required against a decision[1] of Deputy President Lake issued on 12 July 2024 in matter number C2024/1129 (**the Decision**). The Decision dealt with an application made by Mr Ridings on 29 March 2024 under s 65B to resolve a dispute with his employer Fedex Express Australia Pty Ltd T/A Fedex (**the Respondent**) regarding a flexible working arrangement.

[2] The matter was listed for permission to appeal and merits of the appeal. Directions were issued on 6 August 2024 for the filing of submissions and material with the matter listed for hearing on 17 September 2024. Both parties filed material in advance of the hearing pursuant to the Directions. At the hearing, the Appellant appeared on his own behalf while the Respondent was represented by Ms Tirado.

[3] The background to this appeal may be shortly stated. The Applicant who has been employed since April 2013 has a wife and two children who each have disabilities that require him to provide care for them. Since 2019 the Appellant has worked on a part-time basis for four days per week and has largely worked from home due to a range of circumstances including two previously approved flexible working arrangements, workplace attendance restrictions arising from the COVID-19 pandemic and through the use of personal and annual leave. Confronted with the Respondent's requirement that he return to the office for at least two days a week in late 2022, the Appellant made a third and then fourth flexible working arrangement request, firstly in July 2023 through which he sought to only work in the office one day per week and then again in January 2024, through which he sought to work from home on a full-time basis. Both of these requests were rejected by the Respondent. It was the rejection of the latter request which prompted the Appellant's s 65B application to the Commission.

The Decision

[4] The Deputy President set out the factual background to the dispute before him including as follows.

[5] The Appellant commenced employment with the Respondent on 13 April 2015 as a Clearance Classifier working in the Respondent's Brisbane office on a full-time basis, his working hours being 6am to 2pm five days per week. A flexible working arrangement request (**the First Request**) made by the Appellant on 1 July 2019 to reduce his working hours to that of part-time, working four days per week, was agreed to by the Respondent. The revised working hours were that of 9.45am to 6pm in the office four days per week. When COVID-19 restrictions and lockdowns were introduced in 2020, the Respondent required its employees to work from home if they could, with which direction the Appellant complied, working remotely from home four days per week from April 2020 to September 2022.[2]

[6] While the First Request expired on 1 December 2019, it continued in place through an informal agreement until the Appellant made a further request (**the Second Request**) in October 2021 to work 30.4 hours over four days per week. The Second Request was approved following which the Appellant worked all his hours from home during the COVID-19 period of restrictions. The following documents were provided by the Appellant in support of the Second Request regarding the medical condition of his wife and two daughters:

- Medical Certificates confirming that his children have autism dated 20 June 2014 and 10 November 2015.
- A Guidance Report regarding one of his children's conditions dated 13 December 2018 identifying that the child had extremely low intellectual and adaptive functions, and their support needs were extremely high.
- A Psychologist Report dated 14 August 2020 identifying that Mrs Selina Ridings requires substantial support because of her autism spectrum disorder.[3]

[7] With the waning of the COVID-19 pandemic and restrictions, the Respondent moved to require employees to return to the office around August/September 2022. This was supported by the introduction of a hybrid work model which required employees to return to the office for a minimum of two days per week. At that stage, the Appellant was working from home four days per week and was advised that he would be expected to return to the office a minimum of two days per week. Between September 2022 and July 2023, when the Appellant was required to work two days per week in the office, he used various annual and personal leave entitlements on days when he was required to work in the office.[4]

[8] The Respondent's hybrid model was revised in June 2023 when the Respondent's Operations Manager advised Clearance Managers that employees would be required to work in the office a minimum of three days per week. When it was clarified with the Appellant on 10 July 2023 that this requirement would also apply to part-time employees, the Appellant made a further flexible working arrangement request (**the Third Request**) on 12 July 2023 in which he sought to work from home three days a week and one day in the office. The following medical information regarding the Appellant's wife and children was furnished in support of the Third Request:

- a Developmental Assessment Report dated 20 February 2013 for his youngest child.

- a Guidance Report regarding one of his children's conditions dated 13 December 2018.
- a Report from a Rheumatologist dated 19 August 2022 which contained information on Mrs Ridings' condition (Mrs Ridings is noted to have symptoms which are associated with Ehlers Danlos Syndrome).
- a letter from a Clinical Psychologist dated 3 January 2023 to the NDIS seeking a change in Mrs Ridings' NDIS funding because of a change in circumstances.[5]

[9] The Third Request was declined by the Respondent on 1 August 2023 due to business and operational requirements. In declining the Third Request, the Respondent offered the Appellant the alternative of working two days per week from home and two days per week in the office. The Appellant rejected that there were any productivity issues arising from him working from home, sought further information from the Respondent on the claimed loss of efficiency and productivity and stated that he would continue to use his personal and annual leave entitlements to remain at home. Between 2 August and 18 September 2023, the Appellant took annual leave on each Wednesday that he was required to attend the office. From 18 September to 23 December 2023 the Appellant was unable to attend the office following his sustaining an injury to his ankle[6].

[10] On 10 January 2024, the Appellant lodged a further flexible working arrangement request (**the Fourth Request**) seeking to work from home on a full-time basis. Medical information on the Appellant's wife and children was again provided. It was similar to that which was provided in support of the Third Request. The Respondent then unsuccessfully sought additional information from the Appellant regarding the Fourth Request through further correspondence. This culminated in a meeting on 9 February 2024 at which the Respondent canvassed various alternative working hours arrangement options with the Appellant, each of which were rejected by the Appellant. The Fourth Request was formally declined by the Respondent on 23 February 2024 and the Appellant lodged his s 65B application with the Commission that same day.[7]

[11] After setting out the background to the application, the Deputy President turned to consider whether the Appellant was entitled to make a flexible working arrangement request to the Respondent. In determining whether the Fourth Request was validly made, the Deputy President considered the Full Bench authority of *Jordan Quirke v BSR Australia Pty Ltd,*[8] in which the Full Bench stated that five *'discernible requirements in s 65 must be satisfied in order for a request under s 65(1) to have been validly made*'. The Deputy President summarised those five requirements as follows:

1. Any circumstance under s.65 must apply to the Applicant. It must be a present circumstance rather than an anticipated circumstance.

2. The employee's desire for changed working must be because of the relevant circumstances under s.65(1A) and the request for a change in working arrangements must relate to it.

3. The employee has a minimum period of service of 12 months.

4. The request must be in writing.

5. The request must set out the details of the change sought and the reasons for the change.[9]

[12] The Deputy President concluded that the Appellant had a made a valid request to the Respondent, stating:

> "**[37]** The Applicant has a present circumstance where he is currently caring for his wife with signs of Ehlers Danlos Syndrome and is diagnosed with Level 2 autism, he also has two children who have an intellectual disability and Level 3 autism. There is sufficient evidence to establish that his family are dealing with these conditions. I am also satisfied that the Applicant is a carer under s 65(1A)(b) of the FW Act. Mr Ridings had been working with FedEx for longer than 12 months and there is a reasonable expectation that his employment will continue as a permanent part-time employee.
>
> **[38]** The Applicant made a request in writing on 10 January 2024 and provided reasons why he was seeking the arrangement. He received a final response from the Respondent on 23 February 2024. FedEx have refused the request in writing. Given that the employer has refused the request under s65B(1)(b)(i) of the FW Act, the Applicant has made a valid application to the Commission."[10]

[13] Having found that the Fourth Request was validly made, the Deputy President noted the request was rejected by the Respondent and went on to consider whether the Respondent's refusal of the Fourth Request complied with the requirements of s 65A(3). After setting out that provision, the Deputy President summarised the following requirements that must be met in order for an employer to refuse a flexible working arrangement request:

> "**[45]** A request means that an employer has the discretion to either approve or reject the request. There are particular parameters which the employer can refuse a request. The employers can refuse a request 'only if':
>
> 1. The employer discusses the request with the employee.
> 2. The employer genuinely tries and reach an agreement with the employee about making changes to the employee's working arrangements to accommodate their circumstances.
> 3. Where the employer and employee have still not reached an agreement, the employer may only refuse the request on reasonable business grounds."[11]

[14] In considering whether the requirements of s 65A(3) had been met, the Deputy President firstly found that there was no dispute that the Respondent had discussed the Fourth Request with the Appellant.[12] He then moved on to consider whether the Respondent had refused the Fourth Request only after it had 'genuinely tried to reach an agreement' with the Appellant, as required by s 65A(3)(a)(ii). In doing so, the Deputy President observed that an employer can only take into account the relevant information before it, and that while the Appellant referred to his increased carer demands during the proceedings, he had not provided

the Respondent with any new documents when he made the Fourth Request, apart from a GP certificate on 6 February 2024.[13]

[15] The Deputy President then set out the steps taken by the Respondent to try and understand the Appellant's specific carer demands before concluding that it had genuinely attempted to reach agreement with the Appellant over his Fourth Request. The Deputy President relevantly stated as follows:

> "**[59]** The Respondent sought to understand the specific time constraints upon the Applicant in his role as a carer. However, the Applicant was not forthcoming during this process, wanting to record the meetings and was not available to meet in person. In the end, the information provided by the Applicant lacked sufficient detail for the Respondent to accept the request from the Applicant to work exclusively from home. The medical certificate does not particularise in enough detail how his carer demands have changed from his third request (1 day in the office and 3 days at home) to his fourth request (4 days at home). The employer cannot consider what it does not know.
>
> **[60]** The Applicant was not required to provide extensive evidence regarding his carer's duties but had to demonstrate what his carer responsibilities entailed and how it impacted his ability to attend work in the office.
>
> **[61]** The Respondent provided the Applicant opportunities to further explain his circumstances when Mr Bilic followed up on 31 January 2024. Mr Bilic and Mr Michael followed up the request again on 9 February 2024 through a meeting to better understand his circumstances given that there was no update in his supporting documents or a change in circumstances that were known to them. If Mr Ridings had provided this information, the employer could have further considered different working arrangements which were more suitable to Mr Ridings.
>
> **[62]** I am satisfied that FedEx did try to genuinely attempt to reach agreement in understanding the Applicant's circumstances with the information before them."

[16] The Deputy President then considered whether the Respondent's refusal of the Fourth Request was based on reasonable business grounds as defined in s 65A(5) of the FW Act, set out those provisions and identified that the Respondent refused the request on the basis that approving the request would result in a significant loss in efficiency or productivity (s 65A(5)(d)).[14] The Deputy President accepted that the benefits of working in the office were made out, but found the Respondent had failed in its 21 February 2024 response to account for any detriment that would arise from granting the Fourth Request. The Deputy President relevantly said as follows:

> **"[68]** Although the benefits of working in the office are made out, it does not account for any detriment. As part of the National Employment Standards, the purpose of flexible working arrangements is to accommodate circumstances of individual employees if the employer is in a position to do so. FedEx states that nil attendance in the office would likely decrease efficiency and productivity. However, this was not flagged with Mr Ridings on 21 February 2024 noting the following reasons:

> *The Company is committed to in-person collaboration and interaction, knowledge sharing, training, support and culture-building. In your role as a Classifier, you benefit from having in person discussions with colleagues on matters such as regulatory changes and problem shipments, engagement and interaction that does not occur over Microsoft Teams. You also have the ability to approach Brokers for advice regarding clearing a problem shipment. These in person interactions relation to your role and responsibilities support more productive and efficient working.*
>
> *The Company's Fit for Purpose hybrid working policy expected employees work at least 3-days in office. Permanently working from home full time does not support the Company's hybrid working expectations for all employees.*
>
> *Face-to-face presence allows teams to have an appropriate balance of digital and physical interaction in the workplace.*
>
> *Travelling to and from work is a requirement to fulfil your employment obligations, and your travel time to the workplace is not unreasonable.*

[69] If the argument was that the lack of interaction and collaboration would cause a likely detriment to productivity and efficiency, it would need to be substantiated. For instance, if the employee was not meeting targets, difficult to contact, and tasks were not being performed to a specific standard while he or she was working remotely, it would be a reasonable business ground to refuse the request. Another example could have been the lost opportunity to assist an employee to improve performance through collaboration and guidance if working from home 100% of the time. The evidence of Mr Bilic and Mr Michael suggested that this was a potential issue. However, this was never raised by FedEx refusing the Applicant's request."[15]

[17] The Deputy President also went on to conclude that the Respondent in refusing the Fourth Request also failed to consider the Appellant's personal circumstances in its reasoning, stating that he was "*not satisfied that the Respondent provided a sufficient explanation for why the request was refused on reasonable business grounds on 21 February 2024."*[16]

[18] Having found that the Respondent's refusal of the Fourth Request was not based on reasonable business grounds, the Deputy President then identified that the Commission had power to arbitrate the dispute pursuant to s 65C of the FW Act <u>only</u> if it was satisfied there was no reasonable prospect of the dispute being resolved without the Commission making an order. Having been so satisfied after unsuccessful conciliation of the matter, the Deputy President proceeded to arbitrate the dispute pursuant to s 65C of the FW Act.[17] In doing so he firstly identified that in arbitrating a flexible working arrangement dispute, the Commission must take into account *'fairness between the parties'* as required under s 65C(2) of the FW Act and observed that this requires a balancing of the needs of employers with that of the right of employees to access flexible working arrangements under the National Employment Standards (NES).[18]

[19] The Deputy President then identified the factors he considered in achieving the objects of the FW Act including; the processes undertaken by the Respondent in reviewing the Fourth

Request, the operational needs of the Respondent, the circumstances of the employee and the gravity of those circumstances, any other factors that may be relevant to the practicality of any order and finally, that any order should not be indefinite and should be subject to review. Alternate flexible working arrangement options proposed by the Respondent were then set out as follows:

> "**[76]** The options that were presented by the Respondent are as follows:
>
> 1. The Applicant is to work 3 days at home and 1 day in the office in a week which was proposed by the Respondent during conciliation. This was not accepted by the Applicant.
>
> 2. The Applicant is to work his 4 days over a 5-day period, thus reducing the hours worked per day, and thus work 3 days working from home, and 2 days a week in the office with reduced hours (28.4 hours per week). This was rejected by the Applicant.
>
> 3. The Applicant is to work 2 days at home and 2 days in the office in a week. This was rejected by the Applicant."[19]

[20] The Deputy President noted that the Applicant had not proposed a compromise in relation to the above options and that the only option he (the Appellant) was prepared to consider was that of working from home all four days per week.[20] The operational circumstances of the Respondent were then set out, relevantly including that its concerns regarding the need for efficient informal discussions and increased collaboration and teamwork would be met by adoption of its final proposed position of the Appellant working one day per week in the office and three days from home. In then summarising the Appellant's circumstances, the Deputy President referred to the challenging and difficult circumstances the Appellant faced in caring for his family, that he did not live far from the office and that the Appellant's change in circumstances which he sought to rely on for his Fourth Request were not elaborated upon beyond the matters raised in the Third Request when the Appellant sought to work from home three days per week with one day in the office.[21]

[21] The Deputy President then considered the practicality of implementing a trial of the Appellant working on the basis of three days from home and one day in the office, as proposed by the Respondent. He observed that the Appellant had not attended the office since 18 September 2023, had *'avoided attending the office at all costs'* and been absent either without reason or had used statutory entitlements in that period. The Deputy President also raised concerns that the Appellant may not follow any order issued and thereby render the flexible working arrangement ineffective. To address that concern the Deputy President decided to place caveats in his order (**the Order**) to ensure the effectiveness of the flexible working arrangement. The particular caveat was that while the Appellant was entitled to take statutory leave on a day that he was due to attend the office, if the Appellant failed to attend the office after two consecutive weeks, the Respondent would be able to lawfully direct the Appellant to attend the office on a different day. The Deputy President then concluded by determining that it would be appropriate to trial the arrangement over a three-month period as follows:

> **"[92]** I Order the following:

A. The flexible working arrangement lodged by the Applicant on 10 January 2024 is not granted.

B. FedEx are ordered to make the specified changes in the employee's working arrangements.

- Mr Ridings may work from home for 3 days a week.
- Mr Ridings is required to work at the office for 1 day a week.

C. If:

- Mr Ridings does not attend the office for 2 consecutive weeks;
- there are performance concerns or
- there are genuine operational requirements which require Mr Ridings' attendance.

FedEx may lawfully and reasonably request Mr Ridings to work at the office on the days that he is permitted to work from home.

D. This Order will be valid for 3 months from the date of making this Order and will expire on 12 October 2024 to allow the parties to review Mr Ridings' circumstances and provides FedEx the opportunity to assess its operational requirements.

E. If Mr Ridings wishes to extend or vary the flexible working arrangement of this Order once it expires, he will need to lodge a new request in accordance with s.65 of the Act.

F. The Order is effective from 12 July 2024."[22]

Grounds of appeal

[22] The Appellant's *Form F7 – Notice of Appeal* includes an 'Outline' which is said to disclose his grounds of appeal. From these, we discern the Appellant asserts:

(1) The Deputy President made errors of law by;

a. ordering the Appellant to return to the office despite finding that, in rejecting his flexible working arrangement request, the Respondent failed to do so on reasonable business grounds;

b. failing to allow the Appellant to work from home four days per week in recognition of his full-time career responsibilities, contrary to the approach adopted by Commissioner Platt in *Gregory v Maxxia Pty Ltd*[23] (*Maxxia*); and

c. ordering the Appellant to return to the office one day per week, the Deputy President failed to uphold the rights of a full-time carer under both the *Fair Work Act 2009* and *Anti-Discrimination Act 1992*.

(2) The Deputy President made errors of fact by;

a. wrongly finding at [10] of the Decision that the Appellant took days off on leave between September 2022 and July 2023 on days when he was required to attend the office;

b. wrongly finding at [81] of the Decision that the Appellant had the assistance of support workers through NDIS funding in respect of his wife Selina Ridings in circumstances where her NDIS plan contains no funds for support workers;

c. wrongly finding at [84] of the Decision that the Appellant did not agree and had not attended the office since 18 September 2023 when he had attempted to attend the office between 24 April 2024 and 11 July 2024;

d. wrongly assuming that the WH&S issue that existed between 22 December 2023 and 24 April 2024 was that of a disputed Workcover (Comcare) accident claim when in it was in fact an outstanding WH&S issue;

e. in finding that the Appellant was not interested in trying to return to the office at [86] of the Decision, then imposing condition (C) in the Order;

f. in finding at [86] of the Decision that the Appellant had failed to demonstrate that the arrangement of working one day per week in the office could work and ignored the Appellants full-time carer responsibilities and that he was struggling to attend the office;

g. by finding at [87] that the Appellant had expressed on 9 February 2024 that he did not wish to 'befriend his work colleagues' which ignored the Appellant's evidence that he maintains regular contact with his work colleagues by email and MS Teams;

h. by then contradicting himself at [88] of the Decision by stating that the Appellant is not expected to befriend his work colleagues;

i. by taking into account at [88] of the Decision evidence that the Appellant was less efficient and productive than his colleagues in circumstances where the Appellant was not aware of any outstanding productivity or performance issues;

j. by finding at [39] of the Decision that there was no substantive change in the circumstances of the Appellant in terms of his carer responsibilities between the third and fourth flexible working arrangement requests; and

k. wrongly finding at [41] that the Appellant assumed he was entitled to a flexible working arrangement request.

Principles governing an appeal under s.604 of the Act

[23] An appeal under s 604 of the FW Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[24] There is no right to appeal, and an appeal may only be made with the permission of the Commission. Subsection 604(2) *requires* the Commission to grant permission to appeal if satisfied that it is *in the public interest to do so*. Permission to appeal may otherwise be granted on discretionary grounds.

[24] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[25] The public interest is not satisfied simply by the identification of error, or a preference for a different result.[26] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> "... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters..."[27]

[25] Other than the special case in s 604(2), the grounds for granting permission to appeal are not specified. Considerations which have traditionally been treated as justifying the grant of permission to appeal include that the decision is attended with sufficient doubt to warrant its reconsideration, and that substantial injustice may result if leave is refused.[28]

[26] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[29] However, as earlier stated, the fact that the Member at first instance made an error is not necessarily a sufficient basis for granting permission to appeal.

Consideration

Errors of law

Ground 1a.

[27] By this first ground of appeal, we understand the Appellant contends that the Deputy President erred at law by issuing the Order that he work in the office one day per week on a three-month trial basis. The essence of this ground of appeal appears to be a contention that the Deputy President erred by ordering the Appellant to attend the office one day a week because this was inconsistent with the Deputy President's finding that the Respondent's rejection of the Fourth Request was not supported by reasonable business grounds.

[28] The Appellant's argument proceeds on a misunderstanding of the statutory requirements and relationship between ss 65A, 65B and 65C.

[29] Section 65A of the FW Act is concerned with the response of an employer to a flexible working arrangement request and having found the Appellant's Fourth Request was validly made, the Deputy President was required to consider the Respondent's response. Section 65(A)(1) requires that a written response must be provided by an employer within 21 days. Section 65A(2)(a)-(c) then state that the written response must state either that the request is agreed, or an agreement has been reached for an alternate flexible working arrangement or that the request is refused.

[30] An employer may only refuse a request if it has complied with the requirements of s 65A(3) and s 65A(5). These requirements are:

- The employer has discussed the request with the employee (s 65A(3)(a)(i));
- The employer genuinely tried to reach agreement with the employee (s 65A(3)((a)(ii));
- No agreement has been reached between them (s 65A(3)(b));
- The employer has had regard to the consequences of the refusal on the employee (s 65A(3)(c)); and
- The refusal was based on reasonable business grounds (s 65A(3)(d)), as defined in a non-exhaustive list set out at s 65A(5).

[31] The Deputy President considered each of these elements and concluded that the refusal of the Fourth Request was not based on reasonable business grounds and that the Respondent had not had regard to the consequences of the refusal on the Appellant.

[32] The dispute before the Deputy President was about a request validly made under s 65(1) that had been refused. Consequently, s 65B applied to the dispute and the Deputy President initially dealt with by means other than arbitration (s 65B(4)(a)) and when this was unsuccessful, the Deputy President proceeded to arbitrate (s 65B(4)(b)).

[33] Section 65C of the FW Act sets out the requirements in respect of the Commission dealing with a dispute by arbitration. In arbitrating a dispute of this kind the Commission is permitted to make various orders, including that if the employer has refused the request, it may make an order that the grounds of the refusal are taken to be reasonable business grounds (s 65C(1)(b)(i)) or an order that the grounds for refusal of the request are taken not to be reasonable business grounds (s 65C(1)(b)(ii)). If the Commission is satisfied that the employer has not responded or has not responded adequately, it may make an order that the employer takes further steps as the Commission considers appropriate having regard to matters in s 65A (s 65C(1)(e)). Significantly, for present purposes, the Commission may also make orders that the employer grant the request (s 65C(1)(f)(i)), or that the employer makes other specified changes to the employee's working arrangements (s 65C(1)(f)(ii)). The Commission may only exercise these discretionary powers if it is satisfied that there is no reasonable prospect of the dispute being resolved without making such an order (s 65C(3)). In the present case, the Deputy President was so satisfied.

[34] What is readily apparent from a plain reading of the statutory provisions is that in arbitrating a dispute under s 65C, the Commission is not compelled to make an order consistent with a finding that it has made in respect of an employer's refusal of a flexible working arrangement request. The range of orders available to the Commission along with the

requirement *'to take into account fairness between the employer and the employee'* (s 65C(2)) indicates that there is a broader discretion conferred to the Commission including the weighing of the interests of the employer and employee when arbitrating a dispute. In the present case, the fact that the Deputy President found the Respondent's refusal of the Fourth Request was not supported by reasonable business grounds did not compel an order to be made that was consistent with that finding. This is because the Deputy President was arbitrating the dispute and not simply reviewing whether the Respondent had refused the request on reasonable business grounds.

[35] We are not persuaded the Deputy President erred by making the Order in the form that he did. The Deputy President was permitted to make an order under s 65C(1)(f)(ii) that made specified changes, *'in the employee's working arrangements to accommodate, to any extent, the circumstances mentioned in paragraph 65B(1)(a)'*. The Order made by the Deputy President specified changes to the Appellant's working arrangements (other than the requested changes). Those changes, which were to be implemented on a three-month trial basis, were that the Appellant was required to attend and work in the office one day per week, thus permitting him to continue working from home three days per week. It is noted that at the time of the Fourth Request, the Appellant did not have an approved flexible working arrangement that permitted him to work from home at all.[30]

[36] The Deputy President's decision to make specified changes to the Appellant's working arrangements (other than the requested changes) involved the exercise of a discretion and was for the reasons stated. In making that decision it is apparent that the Deputy President considered a broad range of matters including the *'challenging'* caring responsibilities of the Appellant and the legitimate desire of the Respondent to maintain a level of face-to-face professional contact with the Appellant. The Deputy President also considered there was a lack of any flexibility on the part of the Appellant and that the best means of testing the workability of the arrangement was to implement it for a limited trial period. This was a pragmatic and sensible approach that balanced the interests of both parties, as was required of the Deputy President. We are not persuaded that the Deputy President erred in his construction and application of the relevant provisions of the FW Act or that his exercise of the available discretion in arbitrating the dispute under s 65(C) miscarried.

Ground 1b.

[37] By this ground of appeal, the Appellant appears to contend that the Deputy President's decision to require him to attend the office one day per week despite his full-time caring responsibilities was at odds with a finding of Commissioner Platt in *Maxxia.* Contrary to the suggestion of the Applicant, *Maxxia* does not stand for the proposition that caring responsibilities are a prima facie justification for working from home on a full-time basis. Further, the factual background in *Maxxia* differed and the result turned on its own particular circumstances. *Maxxia* was not binding on the Deputy President and no appealable error is disclosed in relation to this ground of appeal.

Ground 1c.

[38] By this ground of appeal, we discern from the Appellant's submissions that he contends the effect of the Deputy President's Order was either directly or indirectly discriminatory (or

both) by reference to the objects of the FW Act, s 351 of the FW Act, the *Disability Discrimination Act 1992* (Cth) and equivalent state legislation. The discrimination is said by the Appellant to arise from the contended failure of the Deputy President to 'uphold the rights of a full-time carer'. Putting to one side the clear tension that arises between the Appellant's contractual obligations to his employer and his claimed full-time caring responsibilities, we do not accept that the Deputy President has fallen into legal error as claimed by the Appellant for the reasons that follow.

[39] In arguing that the Deputy President's Order is inconsistent with the objects of the FW Act, the Appellant appears to rely on s 3(e) of the FW Act which states that the object of the FW Act is to be achieved in part by:

> "enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms"
>
> (emphasis added)

[40] The Appellant's reliance on s 3(d) of the FW Act appears however to ignore the introductory paragraph of s 3 as well as ss 3(a) and (d) which state as follows;

> "The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> …
>
> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
>
> …"
>
> (emphasis added)

[41] As will be obvious, the FW Act has as its primary object that of providing a '*balanced framework for cooperative and productive workplace relations'*. Implicit in that language of achieving a balanced framework is the need to reconcile the at times competing interests of employers and employees. Whilst observing that the FW Act is, in many respects, remedial legislation, the objects of the FW Act do not in our view establish a framework that prioritises the interests of employees over those of employers. The promotion of productivity and flexibility for businesses and the balancing of the interests of employers and employees is reinforced through the language in ss 3(a) & (d) of the FW Act. Relevantly, s 3(d) does not mandate that an employee's caring responsibilities entirely displace the needs of his or her

employer. Rather it states that an object of the FW Act includes assisting employees to balance their work and family responsibilities by providing for flexible working arrangements.

[42] As to the term *'discrimination'* where it appears in s 3(d) of the objects of the FW Act, it may be accepted for the purpose of this ground of appeal that the Commission is required to have regard to the object of preventing discrimination along with a range of other objects when discharging its functions. The term *'discrimination'* is not defined within the FW Act but guidance on the meaning to be given to the term may be found in the *Disability Discrimination Act 1992* (Cth) where both direct and indirect discrimination are defined in ss 5 & 6 of that act. Relevantly, the *Disability Discrimination Act 1992* (Cth) extends the protections against discrimination afforded to persons with a disability (as defined in s 4 of that Act) to *'associates'*, which is defined to include spouses and carers. It is clear enough that the Appellant's status as a spouse/carer for his wife and children affords the Appellant protections against direct and indirect discrimination under the *Disability Discrimination Act 1992.*

[43] Direct disability discrimination is defined in s 5 of the *Disability Discrimination Act 1992* as follows;

> (1) For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
>
> (2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
>
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
>
> …

[44] For the Deputy President's Order to be directly discriminatory within the meaning of s 5(1) of the *Disability Discrimination Act 1992*, the Appellant would need to show that being required to attend and work in the office one day per week had the effect of treating the Appellant (in his capacity as a carer) less favourably than other persons without a disability would be treated in circumstances that are not materially different. There was no evidence before the Deputy President that the Appellant would be treated less favourably than a person without a disability because of the requirement that he attend the office one day per week. In fact, the evidence is to the contrary. In our view the effect of the Deputy President's Order is that the Appellant was treated more favourably than persons without a disability in the Respondent's workforce by being allowed to work from home three days per week. That

flexibility is to be contrasted with the Respondent's normal requirement that its employees attend the office a minimum of three days per week.

[45] Under the second limb of s 5, the Appellant would need to show in the alternative that there was a failure to make reasonable adjustments to the requirement to attend the office one day per week and that failure had the effect of treating the Appellant less favourably than a person without a disability in similar circumstances. We were not taken to any evidence that was before the Deputy President that would support a finding that a failure to make or propose reasonable adjustments to the requirement to attend the office one day per week had the effect of treating the Appellant less favourably than other person without a disability (as defined) in similar circumstances. As stated, we are satisfied that the effect of the Deputy President's Order was to treat the Appellant more, not less, favourably than other persons in the Respondent's workforce without a disability who were required to attend the office a minimum of three days per week. It follows from the foregoing that the contention that the effect of the Order was directly discriminatory must be rejected.

[46] Turning to whether the Order requiring the Appellant to attend the office one day per week was indirectly discriminatory, it is useful to set out the definition of *'indirect disability discrimination'* which is found at s 6 of the *Disability Discrimination Act 1992* (Cth) and states as follows:

> "(1) For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
>
> (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
>
> (2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition."

[47] Dealing with what we understand to be the Appellant's contention that the Order was indirectly discriminatory, we accept that the requirement to attend the office one day per week required the Appellant to comply with a condition or requirement (s 6(1)(a)). We are not however persuaded that the evidence before the Deputy President rose to the level of establishing that the Appellant in his capacity as a carer would not or could not comply with the condition or requirement (s 6(1)(b)). The purpose of the three-month trial of the one day per week arrangement was in fact to allow an assessment of the practicality of that working arrangement. Absent the assessment enabled by the three-month trial period required by the Deputy President's Order and having regard to the Appellant's long period of absence from the workplace, we do not accept that the requirements of s 6(1)(b)), a necessary element of establishing indirect discrimination under the first limb of the definition, are met.

[48] Turning to the second limb of the definition of indirect disability discrimination, we again accept that the Order would impose a condition on the Appellant in his capacity of a carer (s 6(2)(a)). As to whether the Appellant could comply with the requirement subject to a reasonable adjustment being made, we are unable to identify any reasonable adjustment that could have been made to the requirement to attend the office short of the Appellant being relieved of the requirement entirely. Removal of the requirement does not in our view constitute a reasonable adjustment, rather it constitutes the complete withdrawal of the requirement. In these circumstances we do not regard the second limb of the definition of indirect discrimination as having been met.

[49] Even if we were to accept that the Appellant had, as a consequence of the Deputy President's Order, been subject to indirect discrimination within the meaning of either the first or second limb of s 6 of the *Disability Discrimination Act 1992* (Cth), such discriminatory conduct found under either ss 6(1) or (2) would not apply if the requirement or condition was reasonable (s 6(3)) and which had been proven having regard to the circumstances of the case. It is clear that the Deputy President found based on the material before him that the requirement to attend the workplace one day per week for the three-month period of the trial was reasonable in the circumstances. We agree. As such, the requirement imposed on the Appellant by the Deputy President's Order to attend the workplace one day per week was not indirectly discriminatory.

[50] Turning briefly to the Appellant's submission that the Deputy President's Order offends s 351 of the FW Act. The submission is misconceived. Section 351 is directed to prohibiting unlawful conduct of an employer. It proscribes adverse action being taken by an employer against an employee or prospective employee because of a particular attribute including *'family*

or carer's responsibilities.' Section 351 has nothing to say about the contended effects of an order of the Commission and is only relevant to Part 3-1 general protections applications, which was not the application dealt with by the Deputy President.

[51] It follows from the foregoing that we are not persuaded that the Deputy President has fallen into error.

Factual Errors

[52] The Appellant appears to contend that various factual errors made by the Deputy President led him into error in determining that the Appellant should attend the office one day per week on a trial basis, despite finding that the Respondent's rejection of his Fourth Request was not supported by reasonable business grounds. Much of the Appellant's submission appears to be an attempt to reargue his case on appeal because of dissatisfaction with the Decision. Such an approach is not permissible.

Ground 2a.

[53] The Appellant contends that the Deputy President erred in finding at [10] of the Decision that the Appellant took days off on leave between September 2022 and July 2023 "during the days when he was required to attend the office". The Appellant argues that the days taken off on leave in that period were not taken off because he was required to attend the office, disclosing that the days were taken off because they happened to be adjacent to either the weekend or his RDO on Tuesday, in which circumstances it made sense for him to take leave to create a 'long weekend'. The reason advanced by the Appellant for taking particular days off and where those days fell relative to weekends or RDOs is irrelevant to the unchallenged factual finding made by the Deputy President. No error in the Deputy President's finding is disclosed.

Ground 2b.

[54] The Appellant also contends that the Deputy President was in error when he found at [81] of the Decision that the Appellant had the assistance of support workers through the NDIS in circumstances where the NDIS plan for his wife contains no funding for support workers. The Deputy President did not particularise the various funding arrangements provided for in the NDIS plans of either the Appellant's wife or his children. In particular, the Deputy President made no finding that the plan of the Appellant's wife provided for support workers. The Deputy President simply noted that Mr Ridings had assistance of support workers through NDIS funding, an observation that is not challenged by the Appellant in respect of his children. No error is disclosed.

Ground 2c.

[55] Further error on the part of the Deputy President is contended in that he erred in finding at [84] of the Decision that the Appellant did not agree to and had not attended the office since 18 September 2023. No error is disclosed in respect of that finding. It simply recorded that the Appellant had not attended the office since 18 September 2023 and had not agreed to the Respondent's proposal that he work in the office one day per week.

Ground 2d.

[56] The Appellant also contends that the Deputy President erred at [85] of the Decision by wrongly assuming that the WH&S issue that existed between 22 December 2023 and 24 April 2024 was that of a disputed Workcover (Comcare) accident claim when it was in fact an outstanding WH&S issue. We are unable to identify in that paragraph or elsewhere in the decision where such an assumption was made by the Deputy President. No error is disclosed.

Ground 2e.

[57] The Appellant also contends that the Deputy President erred by finding at [86] of the Decision that the Appellant was not interested in trying to return to the office and then imposing condition (C) in the Order. That condition means that if the Appellant was absent from the workplace for two consecutive weeks or if there were performance concerns or there were genuine operational requirements requiring his attendance, the Respondent could lawfully request the Appellant to work in the office on days that he was otherwise permitted to work from home. While not entirely clear, we understand the complaint of the Appellant to be about the adverse impact that compliance with that condition of the Order would have. That is in circumstances where he argued before the Deputy President and again before us that compliance with such an attendance requirement was not possible in light of his caring responsibilities. That the Appellant is aggrieved at this element of the Order does not disclose error on the part of the Deputy President.

Ground 2f.

[58] The Appellant further contends that the Deputy President erred in finding at [86] of the Decision that the Appellant had failed to demonstrate that the arrangement of working one day per week in the office could work and in doing so, ignored the Appellant's full-time carer responsibilities and the Appellant's struggles to attend the office. Contrary to the Appellant's assertion, the Deputy President did not ignore the Appellant's caring responsibilities. He referred to the Appellants circumstances as "*challenging and difficult",*[31] identified the need to account for the "*gravity"* of the Appellant's circumstances[32] and found that the Appellant did not live far from the office, such that it "*would not be unfair for him to travel to and from work one day per week."*[33] It is clear the Deputy President had regard to the Appellant's caring responsibilities when according fairness to both the Appellant and Respondent in his determination, as he was required to do. We discern no error.

Grounds 2g. & h.

[59] The Appellant also argues that the Deputy President erred by finding at [87] that the Appellant had expressed on 9 February 2024 that he did not wish to "*befriend his work colleagues"* which is said to have ignored the Appellant's evidence that he maintains regular contact with his work colleagues by email and MS Teams. He further contends that the Deputy President's finding was then contradicted at [88] of the Decision where the Deputy President stated that the Appellant was not expected to befriend his work colleagues. We see no contradiction in these two statements of the Deputy President. The fact that the Appellant may not have wished to *'befriend'* his colleagues was a sentiment the Deputy President readily

accepted. In any case, it is unclear to us how the contended error is said by the Appellant to have infected the Deputy President's reasoning, conclusions and Order. No error is disclosed.

Ground 2i.

[60] Further error is pointed to by the Appellant in that the Deputy President took into account at [88] of the Decision evidence that the Appellant was less efficient and productive than his colleagues in circumstances where the Appellant was not aware of any outstanding productivity or performance issues. This was a matter raised in the evidence of Jovan Bilac in the first instance proceedings. During cross-examination before the Deputy President, Mr Bilac confirmed that the Applicant was one of the least productive members of the team although his productivity had not varied much between office and home-based work.[34] Apparently accepting Mr Bilac's evidence, the Deputy President noted that the Appellant was one of the less efficient and productive classifiers. The Deputy President's noting of the productivity issue in [88] was clearly not determinative of the outcome but rather one factor that supported a conclusion that requiring the Appellant to attend the office one day per week would allow for coaching and support. No error is disclosed in the Deputy President's observation.

Ground 2j.

[61] The Appellant also submits that the Deputy President erred by finding at [39] of the Decision that there was no substantive change in the circumstances of the Appellant in terms of his carer responsibilities between the Third Request and Fourth Request. We discern the apparent significance of this finding to be that there were no significant changes in the Appellant's circumstances from the Third Request that would justify the Appellant working from home on a full-time basis as sought by him in the Fourth Request when considered in the context of his Third Request which, had it been agreed to by the Respondent, would have required the Appellant to work in the office one day per week.

[62] The Appellant contends that the above-referred finding fails to take into account the degenerative condition of his wife which he says was the subject of discussion with Mr Bilac on 31 January 2024. The Deputy President relevantly records in the Decision at [24]-[26] the medical evidence relied on by the Appellant in making the Fourth Request, the efforts of the Respondent to obtain further information from the Appellant and the Appellant's response to those requests for additional information. Significantly, the Appellant did not provide any additional medical information in support of the Fourth Request when requested by the Respondent. That left the supporting medical information before the Respondent as essentially the same as that provided by the Appellant in support of the Third Request. In these circumstances, the Deputy President's finding at [39] of the Decision was open to him and no error is disclosed.

Ground 2k.

[63] Finally, the Appellant argues that the Deputy President erred at [41] of the Decision by finding that the Appellant had assumed he was entitled to a flexible working arrangement without an approved request. The Appellant submits that no such assumption was made by him

and that the barrier to his return to work in 2024 was the outstanding WH&S issue. The Appellants' reliance in these proceedings on the outstanding WH&S as having prevented him from returning to the workplace may be contrasted with the position he communicated to Mr Bilac. In an email exchange that took place between 27 March and 29 April 2024,[35] following a direction from Mr Bilac that the Appellant attend the office one day per week, the Appellant relied on his belief that the direction was neither reasonable nor lawful in circumstances where he had provided a medical certificate to the Respondent dealing with his caring responsibilities. Relevantly, he stated to Mr Bilac that he would not be returning to the office until *'Fair Work has made their decision'*.

[64] It appears to us that the Appellant is now arguing that he was prevented from returning to the office in early 2024 because of the outstanding WH&S issue when the reason he advanced at the time of his absence was his belief that the direction to attend the office was not lawful and reasonable. We hold some doubts about the submission when the reason now advanced for the prolonged absence in early 2024 differs from the reasons put to the Respondent at the time of the absence from the workplace in March and April 2024. In any case, the finding made by the Deputy President was reasonably open to him in our view based on the Appellant's conduct of refusing to return to the office pending a decision of the Commission despite a direction from Mr Bilac to attend the office. No error is disclosed.

Conclusion

[65] An appeal exists for the correction of error. While the Appellant is aggrieved by the Decision, he seeks to re-argue, through this appeal, matters which the Deputy President appropriately considered and weighed, in search of a different result. The Appellant has failed to advance any matter disclosing appealable error in the Decision. Absent any identified appealable error, the Appellant's public interest arguments do not persuade us that it is in the public interest for permission to appeal to be granted. The Decision is one confined to its particular facts and we do not consider that the appeal raises any issue of potentially wider application.

[66] One final point to be made is that there would be no useful purpose to granting permission to appeal in this matter because the appeal, even if successful, would have no practical consequences for the parties. The flexible working arrangement that was the subject of the Order of the Deputy President expired on 12 October 2024. Regardless, for the reasons set out above, the Full Bench is not satisfied that the Appellant has demonstrated an arguable case of appealable error or that it would be in the public interest to grant permission to appeal pursuant to s.604(2) of the FW Act.

[67] Permission to appeal is refused.

DEPUTY PRESIDENT

Appearances:
P Ridings on his own behalf
C Tirado for the Respondent

Hearing details:
Melbourne via Microsoft Teams.
2024.
17 September.

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[1] [2024] FWC 1845.

[2] Ibid at [4]–[6].

[3] Ibid at [7].

[4] Ibid at [8]–[10].

[5] Ibid at [14].

[6] Ibid at [16]–[21].

[7] Ibid at [24]–[31].

[8] 2023 FWCFB 6191.

[9] [2024] FWC 1845 at [36]

[10] Ibid at [37]-[38]

[11] Ibid at [45].

[12] Ibid at [53].

[13] Ibid at [54]–[57].

[14] Ibid at [66]–[67].

[15] Ibid at [68]–[69].

[16] Ibid at [71].

[17] Ibid at [73].

[18] Ibid at [72]–[74].

[19] Ibid at [76].

[20] Ibid at [77].

[21] Ibid at [78]–[83].

[22] Ibid at [92].

[23] [2023] FWC 2768.

[24] *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[25] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398, [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]–[46].

[26] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 [28], 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, [28].

[27] [2010] FWAFB 5343, 197 IR 266, [24]–[27].

[28] See also *CFMEU v AIRC* (1998) 89 FCR 200; *Wan v AIRC* (2001) 116 FCR 481.

[29] *Wan v AIRC* (2001) 116 FCR 481, [30].

[30] The most recent approved flexible working arrangement was in respect of the Second Request, which allowed the Appellant to work his 30.4 hours per week over four days.

[31] [2024] FWC 1845 at [81].

[32] Ibid at [75].

[33] Ibid at [83].

[34] Transcript of hearing on 19 June 2024 at PN577–PN583.

[35] Statement of Peter Ridings, Annexure PR-22 in proceedings before DP Lake