

[2024] FWC 1845 [Note: An appeal pursuant to s.604 (C2024/5176) was lodged against this decision.]



# DECISION

*Fair Work Act 2009*

s.65B - Application for a dispute about requests for flexible work arrangements

**Peter Ridings**

v

**Fedex Express Australia Pty Ltd T/A Fedex**

(C2024/1129)

DEPUTY PRESIDENT LAKE

BRISBANE, 12 JULY 2024

*Application to deal with a dispute about the right to request for flexible working arrangements—meaning of request—definition of reasonable business grounds – reasonable business grounds not established – order issued – dispute determined.*

## Introduction

[1] On 23 February 2024, Mr Peter Ridings (the **Applicant**) made an application to the Fair Work Commission (the **Commission**) under s.65B of the *Fair Work Act 2009* (Cth) (the **Act**) seeking to resolve a dispute regarding flexible working arrangements with FedEx Express Australia Pty Ltd (the **Respondent or FedEx**).

[2] The Commission attempted to resolve the dispute on 26 March 2024 through conciliation. After conciliation, the Respondent temporarily allowed the Applicant the ability to work three days from home and one day in the office until the matter was determined. The Applicant has not complied with this arrangement and has been working remotely without attending the office. FedEx and Mr Ridings have been given sufficient time to resolve the matter without the intervention of the Commission. I determined that it was appropriate that the matter be listed for arbitration to resolve this dispute in accordance with s.65B(4)(b) of the Act.

[3] Directions were issued and the matter was listed for Hearing on 19 June 2024 and 11 July 2024. The Applicant was self-represented and appeared with his wife, Ms Selina Ridings. Ms Catherine Tirado appeared for the Respondent.

## Background

[4] The Applicant commenced his employment with the Respondent on 13 April 2015 as a Clearance Classifier. He was working in the Brisbane office full-time, and his working hours were from 6.00am to 2.00pm 5 days per week (38 hours).<sup>1</sup>

[5] On 1 July 2019, the Applicant made a request to reduce his working hours and work 4 days a week (part-time). The Respondent agreed to the request by his manager, James Manley.

The new hours were 9.54am to 6pm in person at the Brisbane office 4 days a week. (**First Request**).<sup>2</sup>

[6] During the COVID-19 lockdown, FedEx required their employees to work from home full-time if possible. The Applicant was working from home remotely for 4 days a week which commenced in April 2020 and lasted until September 2022. He did not work in the office during this period. The flexible working arrangement on 1 July 2019 expired on 1 December 2019, and the Applicant did not lodge a new flexible working arrangement as there was an informal agreement with his manager to continue the terms of the prior flexible work agreement.<sup>3</sup>

[7] In October 2021, the Applicant lodged a new flexibility arrangement request to work 4 days per week (30.4 hours) (**Second Request**). This was approved by FedEx and this became his permanent arrangement from March 2022. The Applicant worked all his hours from home. Mr Ridings provided the following documents in support of his request:

- a Medical Certificate 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. It identified that one of his children had extremely low intellectual and adaptive functions, and their support needs were extremely high.
- A Psychologist Report dated 14 August 2020. The Report indicated that Mrs Selina Ridings requires substantial support because of her autism spectrum disorder.<sup>4</sup>

[8] On 25 August 2022, an email was sent from his manager advising that the Applicant was required to work in the office for 2 days a week from 5 September 2022 as COVID-19 restrictions eased.

[9] On 7 September 2022, FedEx's Vice President of Operations issued a memo stating that FedEx would be adopting a hybrid model of working and office employees would be expected to return to the physical office for a minimum of two days per week starting from 27 September 2022. The managers would specify which days of the week were the days that their team would be attending the office. It was done to enable 'valuable in person dialogues, collaboration meetings, and team engagement activities to resume'.<sup>5</sup>

[10] The Applicant was working from home 2 days a week and 2 days in the office between September 2022 and July 2023.<sup>6</sup> The Applicant took 9 days of annual leave, and 5.5 days of carers leave during this period. The Applicant would take leave during the days he was required to work in the office.<sup>7</sup>

[11] On 28 June 2023, Mr Jovan Bilic who was the Operations Manager of FedEx, sent an email to all Clearance Managers regarding an update on the hybrid working model. Mr Bilic foreshadowed that employees would now be required to work in the office 3 days a week and this would come into effect from 17 July 2023. The Applicant enquired how this would affect part-time employees. Mr Bilic stated he would seek confirmation from FedEx.<sup>8</sup>

[12] On 10 July 2023, the Applicant received a response from FedEx stating that employees on a part-time arrangement would still be expected to work in the office three days a week.<sup>9</sup>

The Applicant stated he would seek an exception to the hybrid working model through applying for a flexible working arrangement.

[13] The Applicant made a request for a flexible working arrangement in writing on 12 July 2023. The Applicant was seeking to work from home 3 days a week and 1 day a week in the office (**Third Request**). The Applicant provided the following reasons:

*“Both my teenage children are intellectually disabled and autistic. My wife is also diagnosed with autism. During 2021, after the stress of COVID and with me working from home; we made the decision to withdraw both the kids from special school and for my wife to homeschool them. In 2022 my wife was also diagnosed with Ehlers Danlos Syndrome; this is a physical condition including osteoarthritis, scoliosis and multiple joint dislocations.*

*While I am working from home I am able to cook breakfast as coming into the office add an extra ½ hours travel time to my day. I am able to support her wellbeing, just by being in the home as her General Anxiety Disorder and Depression also increased during this period, this mitigates risk as I am able to help my wife (if required) with small tasks like opening jars etc. I am also able to support my wife as we cannot leave our 13-year-old unattended, not even for 10 minutes to run up to the shops and my daughter often struggles to leave the house with us, let alone the multiple stops and even them some days it’s impossible to leave the house.*

*My wife has various therapy sessions, and we often have support workers phone in sick and we are able to organise around this while I WFH, I cannot do this when I am in the office. This means there is also a greater possibility of having to use carer’s leave.*

*We are already struggling with the 2 days a week, but 3 days puts even more pressure on me. I hate asking for any type of exemption, but this would really help us. I understand that Fedex only wants us in the office to ensure our mental wellbeing so I am happy to continue to coming in 1 day a week and meet the company part way.”*

[14] Mr Ridings provided the following documents in support of his request:

- a Developmental Assessment Report dated 20 February 2013 of 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. It was a letter to the NDIS seeking a change in Mrs Ridings’ NDIS funding because of a change in circumstances.<sup>10</sup>

[15] On 21 July 2023, the Vice President of Operations at FedEx issued a memo to all office-based employees requiring them to work in the office for 3 days per week from 1 August 2023.

[16] On 1 August 2023, the Applicant received a letter from the Respondent rejecting the Third Request. The Respondent had refused the request on business and operational requirements, asserting the following:

- The new working arrangements requested by the employee would be likely to have loss of efficiency or productivity.
- Company encourages intentional and effective collaboration among team members and more in person interactions in office so expected employees to work at least 3-days a week.<sup>11</sup>

[17] FedEx provided the Applicant with an alternative stating that the Applicant would not be required to work 3 days in the office, and that he could continue working in the office for 2 days a week and work from home for 2 days a week. This would be a continuation of his current working arrangement.

[18] On 7 August 2023, the Applicant agreed with 2 days in the office and 2 days at home but sought the reasons of what his 'loss of efficiency and productivity [were]'. The Applicant flagged that there was no issue regarding productivity raised by the Respondent apart from one incident. The Applicant stated that the requirement to work in the office was affecting his personal leave, and annual leave balance as he would use these entitlements to remain at home.<sup>12</sup>

[19] On 18 August 2023, the Applicant sent an email following up with FedEx. He noted that he would be making a submission to the Australian Government regarding unpaid carers leave and how it causes stress on his family. The Applicant followed up with the Respondent again on 4 September 2023 seeking a response about loss of efficiency and productivity. The Applicant was seeking to lodge an application with the Fair Work Ombudsman (assuming Mr Ridings was meaning the Fair Work Commission).<sup>13</sup>

[20] Between 2 August 2023 to 18 September 2023, the Applicant took annual leave every Wednesday which was an office day. The Applicant was only working in the office 1 day a week, took annual leave 1 day a week, and was working 2 days at home.<sup>14</sup>

[21] On 18 September 2023, the Applicant stated he sprained his ankle and was unable to drive. The Applicant did not work between September to December 2023 and took unpaid leave.<sup>15</sup> On 1 December 2023, the Applicant lodged a medical certificate from 1 December 2023 to 31 December 2023. The Applicant has not worked in the office since 18 September 2023 to the date of this decision.

[22] On 4 December 2023, the Applicant mentioned to FedEx that he was able to work 4 days a week, but he was unable to drive to the office. The Applicant asked if he could work from home during this period.<sup>16</sup> The Applicant returned to work on 22 December 2023.

[23] On 10 January 2024, the Applicant lodged another Flexible Working Arrangement upon the expiry of his flexible work arrangement made on 1 August 2023. The Applicant sought to work from home 4 days a week indefinitely (**Fourth Request**). The reason for the request is nearly identical to the request on 13 July 2023. The only substantial difference was the last paragraph where the Applicant notes the following:

*"We are struggling and am requesting an exemption under the Carers Recognition Act. I understand in part that FedEx only wants us in the office to ensure our mental*

*wellbeing, so I am happy to continue logging into our teams meeting every day and participating to fulfil my obligations for team collaboration. As for productivity I am requesting that any reports run to ascertain eligibility on that basis are forward with FedEx's decision".<sup>17</sup>*

[24] Mr Ridings provided the following documents in support of his request:

- a doctor's letter dated 21 January 2020 which notes that one of Mr Ridings' children has autism spectrum disorder, intellectual impairment and ADHD.
- a report from a Rheumatologist dated 19 August 2022 which contains information about Mrs Ridings' condition. Mrs Ridings is noted to have symptoms associated with Ehlers Danlos Syndrome.
- a Guidance Report explaining one of his children's conditions dated 13 December 2018.
- a letter from a Clinical Psychologist dated 3 January 2023 which sought a change in Mrs Ridings' NDIS funding because of a change in circumstances.<sup>18</sup>

[25] On 31 January 2024, Mr Bilic attempted to contact the Applicant on multiple occasions regarding his flexible working arrangement request. The Applicant did not pick up his phone. Mr Bilic wrote an email seeking the following information:

- any changes regarding his circumstances from his last flexible working arrangement made in August 2023,
- if there were any updated documents to better understand his situation given that one of Mr Ridings' documents was dated from 2018.
- Methods or plans by the Applicant to ensure personal concerns were not affecting work.
- the Applicant's long-term plan to return to mandated office days in line with his colleagues.
- if the 2 days in the office and 2 days at home would assist with his circumstances.<sup>19</sup>

[26] Mr Ridings provided a response to the questions stating:

- Mrs Ridings has signs of Ehlers Danlos Syndrome, which is a degenerative condition, and that she was having other conditions diagnosed. There was no medical treatment that would improve or alleviate her condition.
- Assessments of his circumstances would cost anywhere from \$800 to \$2000 to be done privately and the assessments were only done when required by NDIS. He wrote that there was no obligation to provide personal medical reports.
- He has support workers who take care of duties such as preparing food, and that he would perform simple tasks to improve morale.
- He would refuse to return to the office.<sup>20</sup>

[27] Mr Bilic replied to Mr Ridings that it was company policy to seek further information in order to give consideration to a flexible working arrangement. Mr Bilic required further information about Mr Ridings' request to work permanently from home, and to consider the ability to fulfil the inherent requirements of the role. Mr Ridings sought to record calls with FedEx. FedEx responded to this stating that permission would not be given to record calls, and

that Mr Ridings' current flexible work arrangement would stay in place until additional information was provided and then considered.<sup>21</sup>

[28] On 5 February 2024, Mr Bilic sought to understand the Applicant's request to work from home on a full-time basis as it was different to his previous applications and requested Mr Ridings to attend a meeting. Until his request was decided, the Applicant was to work 2 days in the office and 2 days at home. The Applicant insisted to record phone calls and meetings and asked for proof regarding company policy against recording phone calls. Otherwise, the Applicant sought to have his correspondence with FedEx in writing.<sup>22</sup>

[29] There is multiple back and forth correspondence between the Applicant and Mr Bilic regarding an informal meeting to discuss the arrangement, and the Applicant's insistence of recording the meeting should it take place. Given this back and forth, a Microsoft Teams meeting was arranged.<sup>23</sup>

[30] A Microsoft Teams meeting occurred between Mr Bilic, Mr Billy Michael (Senior People Operations Specialist at FedEx), Mr Ridings and Mrs Ridings on 9 February 2024. The following options were provided by the Respondent:

1. The Applicant could work 30.4 hours over 5 days. The Applicant refused this suggestion as he attends therapy for his wife and children 6 days a week and church 3 times a week for social interaction. There was no space in his life for his work colleagues.
2. The Applicant could work 28.4 hours a week instead of 30.4 hours a week. The Applicant refused this suggestion as he would be paid less, which would place him in financial hardship.<sup>24</sup>

[31] On 21 February 2024, Mr Bilic wrote that there was a further delay in providing a response to the Applicant's flexible working arrangement request.<sup>25</sup>

[32] On 23 February 2024, FedEx rejected the Applicant's request to work from home 100% of the time. FedEx provided 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.*<sup>26</sup>

[33] The Applicant contested this letter as there were no reasonable business grounds that were put forward to him. He stated that there were no issues of productivity when he was working 4 days a week from home during COVID-19 and he did not receive a productivity report demonstrating a significant drop in productivity or efficiency. He also communicated that his wife's and children's condition were not taken into account when assessing his productivity in the office given that he takes leave during his working from office days.<sup>27</sup>

[34] The Respondent confirmed that they were prepared to continue with the Applicant's previous flexible work arrangement which is working 2 days in the office and 2 days working at home. The Applicant lodged his application with the Commission on 23 February 2023.

[35] The Respondent offered the Applicant to work 1 day a week in the office, and 3 days a week at home during these proceedings. The Applicant has not attended work for the 1 day per week at the office as directed by the Respondent. I provided sufficient time to allow the parties to resolve the matter on their own accord, however this has been unsuccessful. As a result, I have determined that arbitration would be required to resolve this dispute.

#### **Is the Applicant's flexible work arrangement validly made?**

[36] In determining whether the Applicant has jurisdiction, the Full Bench of the Commission summarises the five requirements for a flexible working arrangement application to be validly made in accordance with s.65(1), s65B and s65C of the Act. The requirements per are as follows:

1. Any circumstance under s.65 must apply to the Applicant. It must be a present circumstance rather than an anticipated circumstance.<sup>28</sup>
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.<sup>29</sup>
3. The employee has a minimum period of service of 12 months.<sup>30</sup>
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.<sup>31</sup>

[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 s65(1A)(b) of the 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 Act, the Applicant has made a valid application to the Commission.

[39] There are some issues as to the contents of the flexible working arrangement. Although the Applicant sets out the details of the change sought, there is no substantive change from the Third Request approved by FedEx on 12 July 2023 and the Fourth Request on 10 January 2024. This will be explored further in the decision.

### **The meaning of ‘request’ in flexible working arrangements**

[40] Mr Ridings has not attended the office since 18 September 2023. On 12 April 2024, the Applicant raised issues of discrimination by FedEx stating that the direction to work in the office one day of the week was not lawful and reasonable, and that he would not comply with the return to office mandate until the Commission has made a decision.<sup>32</sup>

[41] There is assumption by the Applicant that he is entitled to be working a flexible working arrangement without an approved request. This assumption is incorrect. Employees are to follow a lawful and reasonable direction until the request for a flexible working arrangement is granted.

[42] Section 65 of the Act prescribes when an employee may make a request to the employer for a change in working arrangements.

### **65 Requests for flexible working arrangements**

#### *Employee may request change in working arrangements*

(1) If:

- (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
- (b) the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work

[43] The employer can only refuse request if the following criteria are met under s.65A of the Act.

### **65A Responding to requests for flexible working arrangements**

(3) The employer may refuse the request only if:

- (a) the employer has:
  - (i) discussed the request with the employee; and
  - (ii) genuinely tried to reach an agreement with the employee about making changes to the employee’s working arrangements to accommodate the circumstances mentioned in subsection (1); and
- (b) the employer and the employee have not reached such an agreement; and
- (c) the employer has had regard to the consequences of the refusal for the employee; and
- (d) the refusal is on reasonable business grounds.

Note: An employer’s grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances: see subsection 65C(5).



[44] In *Construction, Forestry Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51 at [36]- [37], the Full Court explained the ordinary meaning of ‘request’ in the context of the National Employment Standards (the NES). The Full Court expanded on how a ‘request’ works in flexible working arrangements:

*“These factors assume that there will first be a request, in the ordinary sense such that it is known to the employee that he or she can refuse the request. If the term was read, as OS urges, as a requirement, there would be nothing to precipitate the capacity to refuse. The use of the word “request” indicates that there is a choice and it validates it. This interpretation is consistent with the nature of other protections under the NES. Such protections only achieve their effect if they are known to exist by employees. A request impliedly signals to an employee that he or she has a right to take a paid public holiday and to refuse a request. As mandated under ss 124 and 125 of the FW Act, employers are required to provide employees with an explanatory statement as to the nature of employees’ protections under the NES. Making a “request” in the ordinary sense provides an opportunity for refusal.”*

*A wider reading of the legislative scheme affirms the same conclusion: There are a number of provisions in which the legislature intentionally chose to describe, in the context of other NES, whether a request or a requirement was required. In particular, s 62(1) prohibits an employer from either requesting or requiring an employee to work more than the maximum hours of work and states that “[a]n employer must not request or require an employee to work more than ... [the prescribed number of hours per week] unless the additional hours are reasonable”. This distinction undermines an argument that the legislature intended, in a later section of the same part of the Act, that “request” become synonymous with “require”. It is presumed that a word or phrase has the same meaning throughout a piece of legislation, though it is accepted the presumption yields to the context. The context fortifies this conclusion when one also notes that s 73(2) permits an employer to require an employee to take a period of unpaid parental leave. Again, as with s 65, the legislature has specifically, and in contrast to s 114(2), conferred the employer with a right to direct that the employee do something. In addition, ss 62 (regarding requests for flexible working arrangements), 66F (regarding requests for conversion of employment from casual to part-time or full-time) and 76 (requests to extend unpaid parental leave) are all framed in a manner consistent with s 114(2). They contemplate a request (albeit by the employee) and then allow the employer to consider the request and accept or decline it (within particular parameters). We accept the submission of the Union that these provisions reinforce the Union’s position as to why the ordinary literal meaning of “request” should be accepted in s 114.*

[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.<sup>33</sup>

[46] There is some mischief in the wording of s.65A of the Act with the phrase ‘only if.’ However, section s.65C(1)(f) provides that the Commission may ‘make an order that the employer grant the request’. It indicates that a request is not approved until the employer, or the Commission grants the flexible working arrangement request.

[47] This interpretation is consistent with the Explanatory Memorandum provided with the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*. The amendments under these provisions do not take away any discretion of employer to refuse a request. Instead, the new provisions of the Act, primarily s.65A, s.65B and s.65C, are intended to strengthen the employer's obligation to approve a flexible working arrangement request.

The Bill would amend Division 4 of the NES, which enables employees to request flexible working arrangements where they fall within certain circumstances set out in the FW Act, including where they are a carer or have a disability (existing paragraphs 65(1A)(b) and (c)). The Bill would support employees in these circumstances to access flexible working arrangements, by strengthening employer obligations when considering an employee's request. By improving the processes for how employers deal with requests for flexible work, the Bill would reduce the risk of discrimination against employees and support employees to engage in work on just and favourable conditions.

[48] The Revised Explanatory Memorandum provides the following:

“618. This Division would insert new section 65A to provide a more detailed procedure for how employers must respond to requests for flexible working arrangements. The new section 65A is based on the model award term developed by the FWC, which is already available to many national system employees. New section 65A would formalise a substantively similar process in the FW Act. The new section 65A would strengthen existing procedures in the FW Act by requiring employers to discuss requests with the employee and genuinely try and reach agreement prior to refusing an employee's request. The employer would also be required to provide detailed reasons for any refusal and inform the employee of any alternative working arrangements the employer would be willing to make instead to accommodate the employee's circumstances.”

[49] The new provisions surrounding flexible working arrangements have provided employees an additional avenue to challenge the reasonings of the employer when a flexible working arrangement is not granted. However, this can only occur if an employer exercises their discretion to refuse the request. If an employee is not satisfied with the outcome and believes that the employer has not refused the request within its parameters, they are given the jurisdiction to lodge an application with the Commission under s.65C.

[50] Therefore, until such an order is granted, the flexible working arrangement cannot be worked by the employee until the request is approved. The Commission cannot arbitrate a dispute until it attempts to resolve the dispute through other means such as conciliation under s.65B(4) of the Act unless there are exceptional circumstances. It is understood that the employer may reconsider the request upon a third-party view on the matter. The decision still lies on the employer unless the employer is firm on refusing the request. When taking into account the wording and purpose of the legislation, there is no inherent requirement to a flexible working arrangement.

[51] Until a request is granted, employees are expected to follow the lawful and reasonable direction of the employer.<sup>34</sup> An employee would not be complicit if they work on an arrangement that has not been approved. Therefore, it was inappropriate for Mr Ridings to refuse a lawful and reasonable direction to work from the office 1 day per week and work according to his own preference as there was no authority to do so.

[52] Future employees seeking this process should ensure that they are following lawful and reasonable direction from the employer. It is a factor I will consider when determining the practicality of the Order.

**Did the Respondent genuinely attempt to reach agreement to accommodate the Applicant's circumstances?**

[53] There is no contention between the parties that FedEx had discussed the request with Mr Ridings, and an agreement had not been reached. However, there is contention by Mr Ridings that the employer has not genuinely tried to reach an agreement.

[54] The employer may only refuse the request if it has genuinely attempted to reach agreement with the employee under s.65(3)(a)(ii) of the Act. The meaning of 'genuinely attempt to reach agreement' appears to be a discretionary factor by the decision maker in considering the circumstances of each case and I take this to be interpreted in its plain and ordinary meaning given that s. 65A(7) of the Act notes:

*Genuinely trying to reach an agreement*

(7) This section does not affect, and is not affected by, the meaning of the expression 'genuinely trying to reach an agreement', or any variant of the expression, as used elsewhere in this Act.

[55] It is important to emphasise that an employer can only refuse a request with the information that has been presented to them, and that the employer takes reasonable steps to enquire about the employee's circumstances.<sup>35</sup> This is because the employer cannot genuinely consider a request when all the relevant information has not been provided to them. I am conscious of the fact that there may be instances where all the relevant information may not be available such as employees facing domestic violence, and the employer will need to exercise proper discretion in dealing with these matters.

[56] At hearing, the Applicant raised that his carer demands have increased as Mrs Ridings' condition has slowly worsened where she was having difficulties swallowing food. I am very sympathetic to Mr Ridings' situation, and I found Mrs Ridings to be genuine when explaining her circumstances. However, this was not clearly put to the Respondent during the period where his request was being considered. Therefore, the employer could have not been properly informed of these circumstances.

[57] The Applicant did not provide any new documents regarding the reasons for seeking a flexible working arrangement besides a certificate from a GP on 6 February 2024 simply stating:

“[REDACTED] has a medical condition and her father (Mr Peter Ridings) is her primary carer and He needs to work from home to support his daughter who is permanently disable”

[58] In the Respondent's view, there was no substantive change from the third request approved by FedEx on 12 July 2023 and the fourth request on 10 January 2024. Therefore, it may have been the reason that FedEx were not moving from their position of offering the Applicant a working arrangement of 2 days at home and 2 days in the office.

[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.

### **Did the Respondent have reasonable business grounds to refuse the request?**

[63] The Applicant also raised that the Respondent did not have reasonable business grounds to refuse the request given that he was working remotely during COVID-19, and that FedEx did not identify that the arrangement would likely decrease efficiency and productivity.

[64] 'Reasonable business grounds' for refusing a request are provided under s65A(5) of the Act:

#### **65A Responding to requests for flexible working arrangements**

##### *Reasonable business grounds for refusing requests*

(5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:

- (a) that the new working arrangements requested would be too costly for the employer;
- (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
- (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;

- (d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
- (e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

Note: The specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

**[65]** Although the legislation does not limit what reasonable business grounds mean, the interpretation and wording of this provision seems to require the employer to demonstrate a likely detriment to the business if they wish to refuse a flexible working arrangement. If there is no detriment to the Respondent in accommodating the request, it is in the employer's interest to accommodate the employee in encouraging employee retention and provide job security.

**[66]** Section 65A(6) requires that an employer must explain how the grounds apply to the Applicant's flexible working arrangement request:

*Employer must explain grounds for refusal*

- (6) If the employer refuses the request, the written response under subsection (1) must:
  - (a) include details of the reasons for the refusal; and
  - (b) without limiting paragraph (a) of this subsection:
    - (i) set out the employer's particular business grounds for refusing the request; and
    - (ii) explain how those grounds apply to the request; and
  - (c) either:
    - (i) set out the changes (other than the requested change) in the employee's working arrangements that would accommodate, to any extent, the circumstances mentioned in subsection (1) and that the employer would be willing to make; or
    - (ii) state that there are no such changes; and
  - (d) set out the effect of sections 65B and 65C.

**[67]** The Respondent relies on s.65A(5)(c) of the Act for refusing the Applicant's request as approving the request would likely result in a significant loss in efficiency or productivity.

**[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.

[70] Another reason which FedEx could have considered was concerns on the Applicant's wellbeing. Given that the Applicant had not been in the office since 18 September 2023, there would be sufficient reason to ensure that Mr Ridings caretaker duties of his wife and children's conditions were accounted for and the Employer could check from time to time. Work from home arrangements on a full-time basis can be isolating, particularly in a potentially stressful home environment. Ensuring that the Applicant would work in the office on in some kind of regular pattern would allow the Respondent to ensure there are adequate support processes at work for him.

[71] Although it is beneficial for the Applicant to have further collaboration with his fellow workers, FedEx fail to consider the Applicant's personal circumstances in their reasoning for refusing their request or how approving the request would be detrimental to the business. Generic and blanket HR answers are not sufficient alone to establish a reasonable business ground for refusing a request. Therefore, I am not satisfied that the Respondent provided a sufficient explanation for why the request was refused on reasonable business grounds on 21 February 2024.

### **How would the Flexible Working Arrangement apply?**

[72] The Commission has the power to make an order that a flexible working arrangement is granted or may make specified changes in the employee's working arrangement to accommodate their circumstances if there is no reasonable prospect of the dispute being resolved under s.65C of the Act.

## 65C Arbitration

(1) For the purposes of paragraph 65B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:

(f) subject to subsection (3) of this section:

- (i) an order that the employer grant the request; or
- (ii) an order that the employer make specified changes (other than the requested changes) in the employee's working arrangements to accommodate, to any extent, the circumstances mentioned in paragraph 65B(1)(a).

Note: An order by the FWC under paragraph (e) could, for example, require the employer to give a response, or further response, to the employee's request, and could set out matters that must be included in the response or further response.

(2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.

(2A) The FWC must not make an order under paragraph (1)(e) or (f) that would be inconsistent with:

- (a) a provision of this Act; or
- (b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.

(3) The FWC may make an order under paragraph (1)(f) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.

*order under subsection (1)*

(6) A person must not contravene a term of an order made under subsection (1).

Note: This subsection is a civil remedy provision (see Part 4-1).

**[73]** Generally, it should be open to the employer and the employee to negotiate an outcome which addresses the circumstances. However, I am satisfied that there is no reasonable prospect of the dispute being resolved without making the Order under s.65C(3) of the Act. The phrase 'no reasonable prospect of the dispute being resolved' indicates that the Commission should be cautious in enforcing an order unless it is the only practical way to resolve the matter. I have cautiously determined to issue an Order under s.65(1)(f)(ii) of the Act upon discussions with the parties as to the contents of the Order.

**[74]** Section s.65C(2) of the Act requires to consider fairness between the employer and the employee. Fairness encompasses flexibility, certainty and stability for employers and their employees.<sup>36</sup> It is important that the employer has flexibility to be productive and economically viable. The flexible working arrangement should not impede or burden the employer from making decisions. It is also important to recognise employees' right to access flexible work arrangements under the NES.

[75] I have considered the following factors to achieve the objects of the Act:

1. Account for the processes that the employer took in reviewing the request per s.65A(3) of the Act. The Commission should provide some time for the employer to come up with a solution that is operationally viable taking into account the employees' circumstances. This allows the employer some flexibility. The Employer may be ordered to properly consider the request and provide alternative options, and then report back to the Commission before a final order is made.
2. Account for the operational needs of the employer. Size of business and industry the business operates in are key factors. Particularly in industries where there is a prominence of rostering. Businesses are constantly evolving in response to external markets, regulation, supply and many other factors. They experience growth organically and through acquisition, they morph and change structure in response to market demands and supply and may downsize or reduce when facing market pressures. The order should not inhibit businesses from making operational decisions or to make a lawful and reasonable request of the employee.
3. Account for the circumstances of the employee per s.65 of the Act and the gravity of the circumstance. This recognises that a flexible working arrangement is a National Employment Standard which employers should consider.
4. Account for any other factors that may be relevant in affecting the practicality of the order and whether it can be complied with. This affects certainty and stability for both the employer and the employee.
5. A flexible working arrangement order can be subject to review and should not be indefinite unless there are very good reasons to do so. Upon the expiring of the flexible working arrangement, the employee can make a new request to extend the flexible working arrangement or request a change of the terms of the flexible working arrangement upon trialling the new arrangement. This would be subject to the processes in s.65A of the Act.

#### Arrangements proposed by the Employer and Employee

[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.

[77] The Applicant did not provide an option or compromise. The only option that the Applicant wished to consider was working remotely 4 days a week from home.



### Operational circumstances of FedEx

[78] Although the Respondent did not have reasonable business grounds based on efficiency and productivity, there are legitimate concerns regarding the Applicant's situation and the requirements of his role.

[79] I understand that the Applicant was frustrated with FedEx's response. However, the Applicant has created considerable tension with his managers regarding this situation such as insisting to record calls, to correspond via email, and refusal to work in the office. There are also concerns of the Applicant having a lower output of classifications performed compared to his colleagues. Granting the Applicant's request would inhibit the Respondent from having efficient informal discussions when needed, to address some of these potential concerns. Therefore, it is difficult to accept the Applicant's request for him to be working from home indefinitely until there is enough evidence to establish that the arrangement would not be detrimental.

[80] FedEx have stated that operationally, their final position in accommodating his request was 3 days at home, 1 day at the office as it would still address FedEx's goals of increased collaboration and teamwork. Although I note that this may not be an ideal arrangement for the Applicant, he is provided the opportunity to trial the arrangement and quantify his care requirements to allow the Respondent to better assess his next request for flexible working arrangements.

### Mr Ridings' circumstances

[81] I accept that Mr Ridings working from home has benefits to his ability to care for his family and that his circumstances are challenging and difficult. However, working in the office 1 day a week at this stage should not impose sufficient difficulty that he is unable to provide due care for his family. Noting the Applicant has the assistance of support workers through NDIS funding.

[82] The Applicant's flexible work arrangement request made on 10 January 2024 does not elaborate the changes in his circumstances from his 3<sup>rd</sup> request (3 days working from home, 1 day at the office) to the current and 4<sup>th</sup> request (4 days working from home). This information was needed by the Respondent to understand that would the care requirements have increased such that he requires to work exclusively from home.

[83] The Applicant does not live so far from the office that it would not be unfair for him to travel to and from work one day a week. If the support worker is unavailable last minute, the Applicant may inform his employer of his circumstances to seek flexibility to work at home at that day. In these circumstances, it would make sense for the employer to make the necessary accommodations.

### Practicality

**[84]** The Respondent agreed to trial the Applicant working 3 days a week from home and 1 day a week in the office following the conciliation with the Commission. The Applicant did not agree and has not attended the office since 18 September 2023.

**[85]** If the Applicant demonstrated that he attempted the arrangement and it did not fit his circumstances, I could have considered more alternatives than the current arrangements that were proposed by FedEx. The Commission and the Employer would both be in a better position to assess the effects of collaboration with workforce at home and in the office while considering his circumstances. It would be unfair for the Commission to grant the Applicant his request given his lack of cooperation with FedEx in seeking an arrangement which could work for both parties.

**[86]** However, the Applicant has not demonstrated if this arrangement could work. The Applicant has avoided attending the office at all possible costs. This meant that the Applicant had not worked in the office on most occasions without reason or use of a statutory entitlement. There are concerns he will not follow the order in good faith and will render the flexible working arrangement ineffective.

**[87]** The Applicant expressed on 9 February 2024 that he did not wish to befriend his work colleagues given that he had social interaction at church 3 days a week. It demonstrated Mr Ridings' detachment from work colleagues, and the longer he remains away from the office, the more reluctant he will be to return to the office.

**[88]** Although Mr Ridings is not expected to befriend his work colleagues, FedEx's claim of losing value through missed interaction does carry some weight. It has already affected other co-workers. Mr Ridings was noted to be one of the less efficient and productive classifiers, and attendance of the office could potentially address some solutions that would benefit him and his co-workers.

**[89]** In light of these circumstances, it is appropriate to put certain caveats in the flexible working arrangement order to make this Order effective. The Applicant is entitled to take his statutory entitlements on a working from the office day.

**[90]** However, the Respondent has the right to lawfully and reasonably direct Mr Ridings to attend the office on another day if the Applicant does not attend the office after two consecutive weeks unless he takes a statutory entitlement of leave. This allows FedEx to assess Mr Ridings' situation before considering a request to work fully remotely while ensuring that the Applicant adheres to the Order.

### Timeframe

**[91]** I have determined that 3 months would be an appropriate amount of time to test this arrangement. This will allow the parties to determine any issues arising from the Order and provide the parties' flexibility to have the matter reassessed on their own terms.

## Order

[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.



DEPUTY PRESIDENT

### *Appearances:*

- S. Ridings appearing on behalf of the Applicant.  
C. Tirado for the Respondent

### *Hearing details:*

2024.  
Brisbane  
19 June, 11 July

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<sup>1</sup> Respondent's Outline of Submissions 4.

<sup>2</sup> Statement of Peter Ridings 4.

<sup>3</sup> Ibid 9.

<sup>4</sup> Statement of Jovan Bilic Annexure JB-1.

<sup>5</sup> Ibid Annexure JB-3.

<sup>6</sup> Applicant's Form F10C, Email on 7 August 2023 titled 'FWA 1 AUGUST 2023 END DATE 31 JANUARY 2024'

<sup>7</sup> Statement of Peter Ridings Annexure PR-8.

<sup>8</sup> Applicant's Form F10C, Email on 7 August 2023 titled 'FWA 1 AUGUST 2023 END DATE 31 JANUARY 2024'

<sup>9</sup> Statement of Peter Ridings, Annexure PR10.

<sup>10</sup> Statement of Jovan Bilic, Annexure JB-03.

<sup>11</sup> Statement of Peter Ridings Annexure PR-14.

<sup>12</sup> Ibid Annexure PR-16.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid Annexure PR-8.

<sup>15</sup> Ibid 19.

<sup>16</sup> Ibid Annexure PR-17.

<sup>17</sup> Ibid, Annexure PR-19.

<sup>18</sup> Statement of Jovan Bilic, Annexure JB-03.

<sup>19</sup> Ibid, Annexure JB-7.

<sup>20</sup> Statement of Peter Ridings, Annexure PR-20.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Statement of Jovan Bilic, Annexure JB-9.

<sup>27</sup> Ibid.

<sup>28</sup> *Jordan Quirke v BSR Australia Pty Ltd* [2023] FWCFCB 209 at 22.

<sup>29</sup> Ibid 23.

<sup>30</sup> Ibid 24.

<sup>31</sup> Ibid 25.

<sup>32</sup> Statement of Peter Ridings, Annexure PR-22.

<sup>33</sup> *Fair Work Act 2009* (Cth) s 65A(2).

<sup>34</sup> *B, C and D v Australian Postal Corporation t/a Australia Post* [2013] FWCFCB 6191, [36].

<sup>35</sup> *Construction, Forestry Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51 [37].

<sup>36</sup> *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals* (2020) 271 CLR 495 at [14] (Kiefel CJ, Nettle and Gordon JJ), *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11] (per Giudice J) and [24] (per Watson SDP and Raffaelli C).