



DECISION

Fair Work Act 2009
s.739—Dispute resolution

Elizabeth Naden

v

**Catholic Schools Broken Bay Limited as Trustee for the Catholic Schools
Broken Bay Trust**

(C2024/9205)

COMMISSIONER MATHESON

SYDNEY, 4 FEBRUARY 2025

Dispute about arrangements upon which employee will return from parental leave

[1] On 19 December 2024 Ms Elizabeth Naden (**Applicant**) made an application to the Fair Work Commission (**Commission**) under s.739 of the *Fair Work Act 2009* (Cth) (**FW Act**) seeking that it deal with a dispute pursuant to the dispute settlement clause in the *Catholic Schools Broken Bay Enterprise Agreement 2023* (**Enterprise Agreement**). The Enterprise Agreement has since been replaced with the *Catholic Schools Broken Bay Enterprise Agreement 2024* (**2024 Enterprise Agreement**). The provisions relevant to this dispute are the same in both the Enterprise Agreement and 2024 Enterprise Agreement. The Applicant's employer is Catholic Schools Broken Bay Limited as trustee for the Catholic Schools Broken Bay Trust (**Respondent**).

[2] The Applicant is currently on a period of paid parental leave and the dispute concerns the working arrangements that will apply to her upon her imminent return from parental leave. In those circumstances the matter needed to be heard and determined urgently.

Dispute settlement procedure in the Enterprise Agreement

[3] The dispute settlement procedure in the Enterprise Agreement is found at clause 41 and is applicable to, among other things, matters arising under the Enterprise Agreement and under the National Employment Standards (**NES**).¹

[4] The dispute relates to clause 10 of the Enterprise Agreement which provides:

'10 . RIGHT TO REQUEST FLEXIBLE WORKING ARRANGEMENTS

10.1 The provisions dealing with requests for flexible working arrangements will apply in accordance with the NES.

10.2 Disputes about the application of the provisions of the NES will be dealt with in accordance with **Clause 41 Dispute Resolution Procedure.**'

[5] It is not in dispute that 'Step 1' of the process in clause 41 of the Enterprise Agreement has been exhausted,² that the dispute was unable to be resolved at the workplace³ and that the Commission has the jurisdiction to deal with the dispute under 'Step 2'.

[6] Clause 41.4 of the Enterprise Agreement provides that the Commission may deal with the dispute in two stages. In particular, clause 41.5 provides that the Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation. A conference for this purpose was held on 13 January 2025 and the matter did not resolve. Clause 41.5(b) provides that if the Commission is unable to resolve the dispute at the first stage the Commission may, on application of either party, arbitrate and make a determination that is binding on the parties. As the matter did not resolve the Applicant sought that the matter be arbitrated. The parties are in contest regarding the specific matters about which the Commission may arbitrate and I deal with this further below.

Hearing and representation

[7] A hearing was held across two days on 28 January 2025 and 29 January 2025 in order to urgently determine the matter.

[8] The Applicant was represented by the Independent Education Union of Australia (IEUA).

[9] The Respondent sought to be represented by a lawyer during the hearing. Complexity arises in this matter in that the matter needed to be determined urgently and there were nine witnesses whose evidence needed to be heard within a compacted timeframe. The matter also raises complex considerations as to the scope of the Commission's arbitral powers and how the dispute settlement term in the Enterprise Agreement interacts with the provisions dealing with flexible working arrangements in the FW Act. In these circumstances, there was a need for the matter to proceed as efficiently as possible and I was satisfied that I would be assisted by a lawyer who could ensure that evidence and submissions were directed to those matters relevant to the issues requiring determination. I therefore granted permission to the Respondent to be represented by a lawyer pursuant to s.596(2)(a) of the Act on the basis that it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

Witnesses

[10] The Applicant filed a witness statement and gave evidence during the hearing. The Applicant also filed witness statements from the following persons who gave evidence on her behalf during the hearing:

1. Therese Fitzgibbon, an Official of the IEUA;
2. Charles Wheeler (**Mr Wheeler**), an Official of the IEUA;
3. Megan Bruce (**Ms Bruce**), an Official of the IEUA;

4. Michael Aird (**Mr Aird**), an Official of the IEUA who participated in a meeting between the Applicant and representatives of the Respondent on 12 December 2024.

[11] The Applicant also filed a witness statement and accompanying report in respect of Sara Charlesworth (**Ms Charlesworth**), a Professor Emerita at RMIT University's College of Business Law and who is a socio-legal scholar focused on gender (in)equality in employment in the labour market at industry and organisational levels. The Respondent objected to the admission on the evidence on the grounds of relevance and because it was not filed in the Applicant's evidence in chief but was rather filed late as reply materials when it was not actually in reply to the Respondent's materials. The report addressed the following questions:

- What is the research evidence on the most common working time arrangements used and/or sought by women on their return from maternity leave in Australia and the reasons why they are used or sought?
- What is the research and evidence on the prevalence of part-time work and job-sharing arrangements in Australia and in education?
- What does the research evidence suggest may be the challenges and benefits of implementing part-time and job-share arrangements in organisations generally and in schools in particular, from the perspective of the employee, the employer, and customers, such as students and parents in education. Further, what does the research evidence suggest might be criteria for the successful implementation of part-time or job-share arrangements including in education?
- What is the research evidence, if any, on the impact of part-time or job-share arrangements on educational outcomes for students?
- What might be factors in determining the reasonableness or otherwise of rejecting a flexible work arrangement such as that requested by the applicant?

[12] While the Applicant submitted that the report was of probative value, it is apparent that the report was prepared for another matter rather than the one at hand. Further, it did not address the specific arrangement the Applicant is seeking and did not address the specific circumstances of the Applicant or the Respondent. Given the tight timeframe in which the matter needed to be determined, I considered it appropriate that the evidence be focused on the matters of apparent relevance to the specific circumstances of the dispute before the Commission. The report was not directed toward those circumstances and as such I declined to admit the statement of Ms Charlesworth into evidence.

[13] The Respondent filed witness statements for the following persons who also gave evidence during the hearing:

1. Kerry Paxton (**Ms Paxton**), Principal of Sacred Heart Primary School (**School**), the school where the Applicant works;
2. Karen Pezzuto (**Ms Pezzuto**), Deputy Workstream Lead for the Respondent who is responsible for faith formation in the Respondent's schools;
3. Josie Vescio (**Ms Vescio**), the Respondent's Workstream Lead for Facilities and Procurement; and
4. Scott Cooper (**Mr Cooper**), the Respondent's Senior Executive: Human Resources.

Submissions

[14] The Applicant filed submissions in the Commission on 17 January 2025. The Respondent filed its submissions on 21 January 2025. The Applicant filed submissions in reply on 23 January 2025.

Background

[15] The Applicant has been teaching for around 9 years.⁴ The Applicant completed a Masters in Religious Education in 2020 and has held a leadership role with the Respondent since 2023 when she was appointed to the role of Religious Education Coordinator (**REC Role**) at the School.⁵ While the Respondent is a large employer, the School in which the Applicant works is relatively small with approximately 230 students.⁶

[16] The Applicant commenced a period of parental leave on 31 May 2024 and her child was born in June 2024.⁷ The Applicant's last day of parental leave was 30 January 2025.⁸ The Applicant is seeking to return to work on a part time basis working three days per week being Wednesday, Thursday and Friday, for terms 1 and 2 of the 2025 school year.⁹ The Applicant has been able to secure care for her child on these three days via her husband and mother who both also have work commitments.¹⁰ The Applicant seeks to return in a full time capacity in term 3 2025. The Applicant will be teaching grade 5 students upon her return.

[17] The Respondent's position is that it is unable to accommodate this arrangement if the Applicant is to remain in the REC Role for the period of the arrangement.

What is the Applicant seeking?

[18] The Applicant is seeking a determination of the dispute in accordance with s.41 of the Enterprise Agreement. In particular, the Applicant is seeking that the Commission determine the following questions:

- Pursuant to cl.10 of the Enterprise Agreement, has the Respondent discharged its consultative obligations in regard to the Applicant's request for a flexible work arrangement?
- In responding to the Applicant's request for a flexible work arrangement, did the Respondent comply with the following incorporated provisions of the FW Act?
 - Section 65A(1)?
 - Sub-paragraphs 65A(3)(a)(i) and (ii)?
 - Section 65A(3)(c)?
- Does the Respondent have reasonable business grounds for refusing the flexible work arrangement pursuant to clause 10 of the Enterprise Agreement?¹¹

[19] The Applicant submits that the answers to the above questions is 'no'.¹² It submits that there has been a failure by the Respondent to discharge its obligations pursuant to ss.65A(1), 65A(3)(a)(i), 65A(3)(a)(ii) and 65A(3)(c) and this must see the reasonable business grounds vitiated and the request for flexible working arrangements granted.¹³

[20] By way of remedy, the Applicant seeks an order that the Applicant be permitted to return to work from parental leave in term 1 of 2025 on a part-time basis in the REC Role working three days per week, being Wednesday, Thursday and Friday.¹⁴

[21] The Respondent submitted that the Enterprise Agreement prefigured the provisions in the FW Act in respect of creating a right to arbitration in respect of flexible working arrangements¹⁵ and the Applicant is in effect attempting to use the reference to arbitration in the Enterprise Agreement to obtain an outcome beyond what is provided for in s.65 of the FW Act.¹⁶ The Respondent submitted that the Applicant is seeking that decisions or a declaration should be made that:

- the Respondent has breached various provisions of s.65 of the Act and/or the NES;
- a penalty should in effect be imposed on the Respondent in that the alleged failures in respect of s.65 should mean any judgement as to reasonable business grounds should be estopped and the Applicant's request granted.¹⁷

[22] The Respondent submitted that these requests should be rejected because:

- the substantive argument is about the terms of the Applicant's return to work on a flexible basis as envisaged by both s.65 and the Enterprise Agreement and whether there are reasonable business grounds for refusing the request;
- there is no requirement or need to determine the existence of a breach of s.65 to allow a decision to be made in relation to the Applicant's flexible working arrangement;
- the flexible work request from the Applicant was prescriptive in its terms, the Applicant adopted an approach that her request must be granted in its precise terms and this approach unnecessarily complicates resolution of the matter;
- the Applicant's proposed determination is beyond power and if the Applicant intends to pursue her approach the proceedings should be halted and she should seek an appropriate declaration before the Federal Court.¹⁸

[23] I deal with these objections further below.

The request for flexible working arrangements

[24] It is clear that clause 10 of the Enterprise Agreement provides that the provisions dealing with requests for flexible working arrangements will apply in accordance with the NES.

[25] Having regard to this, I consider it is first necessary to consider whether the request for flexible working arrangements was validly made as contemplated under those provisions, taking into account:

1. whether at least one of the circumstances in s.65(1A) applied to the Applicant at the time of the request;
2. whether the Applicant had served the minimum period of service at the time of making the request as set out in s.65(2)(a);
3. whether the request is in writing (s.65(3)(a));
4. whether the request sets out the details of the change sought and the reasons for the change (s.65(3)(b));

5. whether the changes are sought ‘because of’ one of the circumstances in s.65(1A).¹⁹

[26] Section 65(1) of the FW Act provides that 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.

[27] On 21 September 2024, the Applicant submitted an application to the Respondent for a flexible working arrangement (**Request**).²⁰

[28] It is not in contention and I find that the Applicant is the parent, or has responsibility for the care, of a child who is school age or younger, this circumstance applied to the Applicant when she made her request and is a circumstance referred to in s.65(1A) of the FW Act.²¹

[29] It is not in contention whether the Applicant had served the minimum period of service at the time of making the Request as set out in s.65(2)(a).

[30] The Request is in writing in accordance with s.65(3)(a).

[31] The Request:

1. identified that the Applicant was the parent, or has responsibility for the care, or a child who is of school age or younger;
2. the Applicant was seeking to return to work 3 days per week between 31 January 2025, being the date on which it was proposed she return to work, and 27 July 2025;
3. stated that the Applicant was returning from work after having her first child and was only able to organise child care three days per week so would need to be home with her daughter on the remaining two days.

[32] The three days that the Applicant was seeking to work were Wednesday, Thursday and Friday. During the hearing the Respondent noted that these specific days were not identified in the Request. However that the making of the request was not without context. In particular, on 3 September 2024 the Respondent’s Senior School Services Officer, Michelle Breytenback, sent an email on Ms Paxton’s behalf to all staff, including the Applicant, asking them as to their work intention in respect of the 2025 school year.²² Ms Paxton’s evidence was that the reason the email was sent was because in her experience staff will have various plans such as retirement, leave, change of year group and so on and that asking staff for their intentions was and is an important part of in organising the School for the 2025 School year.²³

[33] Ms Naden gave evidence that the Applicant had indicated in response that working Wednesdays to Fridays suited her best as she had organised care.²⁴ The Applicant’s evidence was that on 21 September 2024 she had a conversation with Ms Paxton about her return from

parental leave and was advised by Ms Paxton to submit a flexible work application which she submitted on 21 September 2024.²⁵ An email from Ms Paxton on 21 September to the Applicant²⁶ suggests that Ms Paxton saw Ms Naden when she has visited her workplace and proceeds to state:

‘I noticed on the form that you would like to return part time. In order to consider this, I need you to complete a Request for Flexible Work Arrangements Application...’²⁷

[34] It seems likely that the catalyst for this request was the Applicant’s response to the 3 September 2024 email in which she indicated she wanted to work part time and that working Wednesday to Friday suited her best for that purpose. The Request to return to work on a 3 day per week arrangement was made in that context and I do not consider that that omission of the specific three days on the Request invalidates it in the circumstances of this matter.

[35] It is clear from the Request that the changes are sought ‘because of’ one of the circumstances in s.65(1A).²⁸

[36] I find that the Request made by the Applicant on 21 September 2024 was validly made.

[37] Ms Paxton’s evidence suggests she was confused about whether the Applicant wanted to return part time in the REC Role when she made the Request or had assumed that she wanted to return only in her capacity as classroom teacher.²⁹ However the Request specifically refers to the Applicant’s position as ‘Classroom Teacher/Religious Education Coordinator’ and there is nothing in the Request or otherwise that indicates that she was seeking to be relinquished from her REC Role in returning on a part time basis as stated in the Request.

Events that followed the Request

[38] The Applicant gave evidence that Ms Paxton had a conversation with her on 3 October 2024 in which Ms Paxton:

- said “You should take a step back from the REC role for a bit. Take this time to be with your little one”;³⁰
- advised the Applicant that she could only have a flexible working arrangement for a full year;³¹
- concluded the conversation by stating “I haven’t forgotten about you, leave it with me, I’ll see what I can do”.³²

[39] On 3 November 2024 Ms Paxton emailed the applicant stating:

“I haven’t forgotten about your FW request. There are a few staffing things that that I am waiting on before I can get all the pieces to fall into place. Thank you for your patience. I hope to be able to get news to you very soon.”³³

[40] The Applicant responded on 4 November 2024 and stated:

“I know we discussed some different options for returning, one of which was me not returning to my REC role, however I was chatting to a friend of my mother’s last week

and she explained that she has been a job-share REC and KLA, I also known Libby Cook from OLPS has been doing job share AP for a couple of years now whilst she has her children. I love being REC and want to return to my REC role for 2025. I really look forward to planning events next year and continuing to with the new RE Syllabus. We have also met with our financial advisors and they have informed me that it would be best for our finances if I were to go back full time in Term 3.

Term 1:- 0.6 including job sharing the REC role.

Term 2:- 0.6 including job sharing the REC role.

Term 3:- Full time - REC

Term 4:- Full time – REC.”³⁴

[41] The On 26 November 2024 the Applicant was contacted by Melissa Sofi (**Ms Sofi**), a human resources manager for the Respondent, and a Microsoft Teams meeting to discuss the Request was arranged for 28 November 2024.³⁵

[42] The Applicant gave evidence that at the meeting on 28 November 2024 Ms Sofi said:

“As a matter of Broken Bay policy, we cannot provide flexible work arrangement for executive roles, including the REC Role”.³⁶

[43] The Applicant ‘s evidence was that the application was dismissed on this basis.³⁷

[44] The Applicant’s evidence was that:

- she was provided with the following options:
 - job share in a classroom teacher position on a 0.6 full time equivalent basis, working Wednesdays to Fridays for the duration of the 2025 school year with a return to the substantive REC Role in 2026 (**Option 1**);
 - job share in a classroom teacher position on a 0.6 full time equivalent basis, working Wednesdays to Fridays for terms 1 and 2 of the 2025 school year with a return to the full time *classroom teacher* role in 2026 (**Option 2**);
 - job share in a classroom teacher position on a 0.6 full time equivalent basis, working Wednesdays to Fridays for terms 1 and 2 of the 2025 school year with a return to the substantive REC Role in terns 3 and 4 of the 2025 school year (**Option 3**);
 - return on a full time basis to the REC Role (**Option 4**);³⁸
- she was advised that she had until 2 December 2024 to make a decision.³⁹

[45] Mr Wheeler gave evidence that on 28 November the Applicant contacted him following the meeting and reported that in the meeting Ms Sofi had advised her that the Respondent had a policy which stated that teachers in executive roles are not able to job-share or work part-time.⁴⁰ Mr Wheeler said he advised the Applicant to request this policy and Ms Sofi provided the Policy as an attachment in an email to the Applicant and Mr Wheeler in an email on 29 November 2024.⁴¹ Mr Wheeler’s evidence was that the Policy contained no such statement and from my reading of the Policy it is apparent this is this case.⁴²

[46] On 29 November 2024 the Applicant emailed Ms Sofi:

- indicating that she had been in communication with representatives of the IEUA who were not aware of any policy that stated staff could not job share or work part time in an executive role;
- indicating that the IEUA representatives have told her that the respondent needed to give written reasons as to why her Request had been denied based on reasonable business grounds;
- seeking a copy of the policy and any other reasons as to why her request had been denied;
- indicating she felt rushed in making a decision.⁴³

[47] Ms Sofi responded to the Applicant's email and indicated:

- the purpose of the meeting on 28 November 2025 was to discuss the Request and outline how the Respondent would engage in a consultation process regarding the request;
- students were central to the Respondent's decision making;
- "the goal of consultation" was "to collaboratively discuss a solution that balances the needs of the school and the students entrusted in [the Respondent's] care";
- on 4 November the Applicant emailed Ms Paxton with additional details regarding her flexible working arrangement that were not included in her initial Request;
- in an effort to resolve the matter, the Respondent provided the Applicant with several options to consider and extended an invitation for the Applicant to provide alternative options;
- the Respondent would extend the period for response until 6 December 2024.⁴⁴

[48] On 6 December 2024 the Applicant, via the IEUA, formally notified the Respondent of the dispute, contending:

- there had been a serious failure to progress the request in accordance with the obligations in the FW Act, including timelines for responses and in regard to consultative obligations;
- there were no reasonable business grounds, and none had been provided, as to why the request could not be accommodated; and
- the request could be reasonably accommodated.⁴⁵

[49] The IEUA proposed a meeting.⁴⁶

[50] On 12 December 2024, prior to the meeting the Respondent provide the Applicant with a letter (**12 December Letter**).⁴⁷ The 12 December Letter has the subject heading 'Re: Response to Dispute Notification and Flexible Work Request' and states that:

'On 4 November 2024, [the Applicant] submitted a flexible work request to temporarily work part-time 0.6 FTE as REC in Term 1 and 2, 2025 (in a part-time REC job shar) working Wednesdays to Fridays, before returning to her substantive full-time REC role in Term 3, 2025...'

[51] The 12 December 2024 Letter states that the Respondent is unable to agree to the Applicant's request for four overall reasons being:

1. The Request is not in the best interest of students, and will be detrimental to student achievement and student wellbeing.
2. Accommodating the Request would impose a significant cost increase which is not reasonable.
3. Accommodating the Request would adversely impact the workload of [the Applicant's full-time Stage Partner].
4. The Request would reduce the strength, availability and support of executive leadership for staff and students at the School.

[52] The 12 December 2024 Letter went on to explain these reasons in more granular detail as follows:

'Adverse impact on Student Achievement

The Request would result in having 3 teachers on a single class each week throughout the 2025 school year. The time breakdown would be as follows:

- *Monday & Tuesday – Teacher "1"*
- *Wednesday & Thursday – Ms Naden on class – Teacher "2"*
- *Friday – Ms Naden for half the day on class, before she would need to receive her 1/2 day REC release. The Assistant Principal – Teacher "3" – would need to cover her class for the rest of the day.*

Having 3 teachers for a single class would result in significant disruption to the continuity of teaching and learning, adversely impacting student achievement and wellbeing. It would have a detrimental impact on our ability to effectively track learning outcomes day-to-day and make necessary adjustments based on student need, including our ability to respond effectively to diverse learners and students with challenging behaviours. Such a practice is inconsistent with the objectives of our Towards 2025 Strategy, a requirement of our Enterprise Agreement, particularly Goal 3: We will maximise the learning growth of each student.

Parents are engaged in the teaching and learning at the School and would be strongly opposed to having 3 regular classroom teachers for their children throughout the entire year, for the same reasons expressed above.

These concerns align with the following reasonable business grounds set out in subsection 65A(5)(d)&(e) of the Fair Work Act:

- (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.*

Significant cost increase

We have further considered whether it would be possible to change the School's settled staffing arrangements for 2025 to accommodate the Request without having 3 regular teachers on a single-class.

The only way this could work is if Teacher "1" took the class on Monday and Tuesday, and also released Ms Naden for her REC release on Friday, rather than the Assistant Principal performing the REC release. However, this would require an increase in the staffing budget of 0.2 FTE as Teacher "1" would need additional hours and the Assistant Principal would be under the required class load. This cost increase is not reasonable nor is it equitable.

In addition, it assumes that Teacher "1" is able to increase their working hours which may not be possible.

These concerns align with the following reasonable business grounds as set out in sub-section 65A(5)(a) – (c) of the Fair Work Act:

- (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.*

Adverse workload impact on other staff

A further concern, should we accommodate the Request, is the adverse impact on the workload of Ms Naden's full-time stage partner. The Principal has advised that a likely consequence is given the lack of continuity in one class, those students will naturally gravitate to another full-time teacher for their stage who is consistently present at School for their enquiries and concerns. This would be inequitable. Our concern on this point also aligns to sub-section 65A(d)&(e) of the Fair Work Act as copied above.

Reduced leadership at the School

As stated above, the REC role is a critical executive leadership position at the School. Having a part-time REC, or an REC job-share (if possible), would reduce the strength, availability and continuity of leadership support for staff, students and parents at the School, and will add workload pressures onto other roles, especially the Assistant Principal and the Principal.

As stated above, we have a genuine need for the REC at the School to be available to lead and support staff and students' learning and wellbeing, as well as deliver faith leadership in the community including coordination of liturgies and events, across five days of the week.

While there may be some occasions where a temporary part-time arrangement for a REC or Assistant Principal could be accommodated without the adverse impacts set out in this letter, this will depend on the size, resources, flexibility and local context of the school. Unfortunately, in the case of Sacred Heart Pymble, a small primary school, we cannot accommodate the Request for the reasons stated above.'

[53] On 12 December 2024 a meeting was attended by the Applicant, Mr Aird and Mr Wheeler of the IEUA, Mr Cooper, Ms Paxton and Ms Sofi.⁴⁸

[54] Mr Wheeler gave evidence that the meeting lasted for approximately 90 minutes and was largely led by Mr Cooper and Ms Paxton.⁴⁹ The Applicant's evidence was that during the meeting Mr Cooper and Ms Paxton:

- were defensive and aggressive;
- did not want to discuss her request for flexible working arrangements;
- seemed to regard the grounds for refusal as being non-contestable;
- did not explore ways the flexible working arrangement she proposed could work.⁵⁰

[55] Mr Wheeler gave evidence that both Mr Cooper and Ms Paxton spoke to the Applicant in an aggressive, patronising, dismissive and accusatory manner⁵¹ and that on several occasions he witnessed Mr Cooper and Ms Paxton interrupt her and accuse her of being inflexible.⁵²

[56] Mr Aird's evidence was that during the meeting Ms Paxton was dismissive, aggressive and dogmatic.⁵³ Mr Aird said that when discussing the 'leadership meeting' that is currently timetabled to occur on a Monday:

- Mr Wheeler suggested a change to the date of the leadership meeting to which Ms Paxton responded that it was impossible;
- the Applicant advised that she would be happy to attend the Monday leadership meetings remotely to which Mr Cooper stated that the Respondent could not ask someone to work on their day off as it would be illegal;
- he tried to explore the principle of attending remotely as a resolution to the specific issue raised by Ms Paxton, separate to any legal issue that could be subsequently reviewed and was advised by Mr Cooper that '*we have provided our answer*'.⁵⁴

[57] Mr Aird's evidence was Mr Cooper and Ms Paxton became increasingly agitated as they wanted the Applicant to simply advise which of their four options she would choose.⁵⁵

[58] Ms Paxton's evidence was that Mr Aird was aggressive and confrontational during the meeting⁵⁶ and that the Applicant didn't really talk other than to say she wanted to come back to the job.⁵⁷

[59] Mr Cooper provided another account of the meeting and acknowledged there was tension.⁵⁸ Mr Cooper's evidence was he and Ms Paxton were interrupted when talking and there were occasions where he and Mr Aird complained of each other talking over the other.⁵⁹ Mr Cooper's evidence was that while consideration was given to what the Applicant and her representatives were saying, he and Ms Paxton did not agree with their viewpoints and were

not persuaded that their suggestions would have satisfied their concerns, especially around the impact of having three regular teachers on a single class.⁶⁰

[60] The Applicant's evidence was that there was no discussion during the meeting on 12 December 2024, and nor had there been at any stage, a discussion of her circumstances, her desire to maintain her leadership role, her financial needs and the loss she would suffer, or how she might be able to be supported with having a baby and trying to get back to work.⁶¹

[61] While there was contention between the parties as to what transpired and who was acting unreasonably during the meeting it is clear that there was tension between the parties, the meeting did not progress constructively and it did not resolve at that meeting. It was apparent that the parties were at an impasse. The Applicant wanted her Request granted and the Respondent did not want to grant it on her terms and the closest arrangement it was prepared to agree to accommodate her caring responsibilities for her baby was an arrangement in which she returned in a classroom teacher capacity working Wednesday through to Friday.

[62] On 17 December 2024 Mr Cooper confirmed this and wrote to the Applicant's representative indicating:

- the Respondent remained 'firmly of the view' that it had reasonable business grounds to decline the Request for the reasons set out in the 12 December Letter;
- having three regular teachers in a single class throughout the year was disruptive to the continuity of teaching and learning and was not in the best interests of the students and their parents;
- the Respondent had considered the input of the Applicant and IEUA but this had not convinced it to change its thinking;
- it could not agree to continue to pay the Applicant at the REC Role salary during Term 1 and 2 if the Applicant chose Option 3 as she would not be performing the REC Role during that period, it would be unfair to staff and it could not use Government money and parents' fees to pay for a job someone was not doing and this would raise concerns about compliance with s.83C of the *Education Act*;
- Mr Paxton had been flexible in trying to find a mutually beneficial solution which could be accommodated and the alternative options remained available to the Applicant;
- Ms Paxton had explored with the Applicant whether she had any other flexibility to work on Mondays and Tuesdays or could work 0.5 FTE in a teaching job-share arrangement in Term 1 and 2 to enable both job-share partners to access collaborative coaching and staff meetings in an equitable way;
- the school community needed certainty and Ms Paxton needed to be able to communicate to parents who their class teachers for 2025 would be;
- it believed the Applicant had a reasonable period of time to consider the alternative options as they were first discussed with her on 28 November 2024;
- it required a response from the Applicant indicating whether she was willing to accept any of the options by 19 December 2024;
- if agreement could not be reached, the Applicant would need to return to her substantive full-time REC Role from the commencement of the 2025 school year.⁶²

[63] On 19 December 2024 the Applicant filed her application in the Commission to deal with this dispute.

Approach to determination of the dispute

[64] As noted above, the Applicant is seeking that I determine whether the Respondent has complied with certain obligations under the Act in responding to the request.

[65] Section s.65A sets out the obligations of an employer which arise when an employee makes a request under s.65(1) and provides that regardless of outcome, the response is required to:

- be in writing; and
- be provided to the employee within 21 days (s.65A(1)).

[66] The balance of the requirements relate to form, process and substance and differ depending on the employer's response to the request. In circumstances where an employer refuses the request the requirements for responding relate to:

- *form* in that the written response needs to:
 - state that the employer refuses the request (s.65A(2)(c));
 - include the details of the reasons for the refusal (s.65A(6)(a));
 - set out the employer's particular business grounds for refusing the request (s.65A(6)(b)(i));
 - explain how those business grounds apply to the request (s.65A(6)(b)(ii));
 - either:
 - 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 (s.65A(6)(c)(i)); or
 - state that there are no such changes (s.65A(6)(c)(ii))
 - set out the effect of ss.65B and 65C of the Act (s.65A(6)(d));
- *process* in that the employer may refuse the request only if:
 - the employer has discussed the request with the employee (s.65A(3)(a)(i)); and
 - the employer has genuinely tried to reach agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances in subsection 65A(1) (s.65A(3)(a)(ii)); and
 - the employer and employee have not reached such an agreement (s.65A(3)(b)); and
 - the employer has had regard to the consequences of the refusal for the employee (s.65A(3)(c));
- *substance* in that the employer may refuse the request only if the refusal is on reasonable business grounds (s.65A(3)(d)).

[67] The dispute before the Commission is a dispute brought under s.739 of the FW Act. Arbitration of the dispute is not available unless the parties have agreed that the Commission may arbitrate the dispute.⁶³ I note that neither party submitted that I am prevented from arbitrating a dispute about whether there were reasonable business grounds for refusing the request. It does however seem that the parties are in disagreement about the extent to which the parties have agreed, via the dispute settlement term in their Enterprise Agreement, that the

Commission's arbitral powers under the Enterprise Agreement extend to the *form* and *process* requirements in the FW Act as set out above.

[68] As noted above, the Respondent submitted that the Applicant is in effect attempting to use the reference to arbitration in the Enterprise Agreement to obtain an outcome beyond what is provided for in s.65 of the FW Act.⁶⁴ It submits that the powers for arbitration are limited to the same powers as set out in s.65 of the Act and that a reading of the textural structure of s.65 demonstrates that it is designed to provide a process where the parties manage the process of dealing with a flexible working arrangement with the Commission empowered at various states of the process to issue orders to keep parties within the framework of managing flexible working arrangements as envisaged by the FW Act.⁶⁵

[69] The Applicant submitted that cl.41 of the Enterprise Agreement places no restrictions on the Commission's ability to arbitrate a dispute and pointed to the following note appearing under cl.41.5(b):⁶⁶

‘(Note: if the FWC arbitrates the dispute, it may also use the powers that are available to it under the Act. A decision that the FWC makes when arbitrating a dispute is a decision for the purpose of Div 3 of part 5-1 of the Act. Therefore an appeal may be made against the decision).’

[70] The Applicant submitted that the use of the word ‘also’ in the note is of assistance as it indicates that the Commission should have broad powers to operate as a private arbitrator in relation to any dispute as to the Enterprise Agreement's operation.⁶⁷ The Applicant submitted that it is settled that, when acting as a private arbitrator in relation to a dispute resolution mechanism of an agreement, the Commission is able to exercise powers provided to it in that agreement and thereby finally decide questions of fact and law.⁶⁸ The Applicant submits the Commission has the jurisdiction and power to make the determination she seeks.⁶⁹

[71] As noted above, clause 10.1 states:

‘10.1 The provisions dealing with requests for flexible working arrangements will apply in accordance with the NES’.

[72] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* passed both House of Parliament with the effect that from 6 June 2023 the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* amended the FW Act provisions regarding flexible working requests. At the time the Enterprise Agreement was made it is apparent the parties had intended that the scheme of the FW Act as set out in the NES dealing with flexible working arrangements would apply.

[73] Clause 10.2 goes on to say:

‘10.2 Disputes about the application of the provisions of the NES will be dealt with in accordance with **Clause 41 Dispute Resolution Procedure**.’

[74] Clause 10.2 needs to be read in context with clause 10.1 and follows that if there is a dispute about the way in which the NES provisions dealing with flexible working arrangement

provisions have been applied, the Commission is empowered to deal with it in accordance with clause 41 and subject to the jurisdictional prerequisites in clause 41 having been met.

[75] Further, the FW Act itself contemplates powers of Commission intervention in circumstances where there are deficiencies in an employer response. In particular, section 65C(1)(a) provides that in circumstances where the employer has not given the employee a written response to the request under s.65A, the Commission may make an order that the employer be taken to have refused the request. Further, s. 65C(1)(e) provides that if the Commission is satisfied that the Respondent has not responded, or has not responded adequately, to the employee's request under s.65A, it may make an order that the employer take such further steps as the Commission considers appropriate, having regard to the matters in s.65A, which I have set out earlier above. This confers broad discretion on the Commission as to the orders that it can make if it considers that an employer has not responded adequately to a flexible working arrangements request validly made under s.65.

[76] The Applicant disagrees with the Respondent's position that it has fulfilled its *form* and *process* obligations because it:

- failed to provide a written response within 21 days;
- made a number of misrepresentations to the Applicant in relation to her request for a flexible working arrangement;
- failed to hold discussions or genuinely seek to reach agreement with the Applicant; and
- failed to have regard to the consequences which the Applicant would suffer should it refuse her Request.⁷⁰

[77] The Applicant took me to the matter of *Fyfe v Ambulance Victoria*⁷¹ in which the Commissioner at first instance found that the employer should have tried to genuinely reach agreement with the employee and absent that attempt, any purported reasonable business grounds were vitiated by the failure to do so.⁷²

[78] I note this matter was the subject of an appeal and in *Ambulance Victoria v Fyfe*⁷³ a Full Bench of the Commission found that under the relevant clause of the enterprise agreement in that matter, the question of whether or not there had been discussions regarding a request for a flexible working arrangements did not form part of the assessment of whether there were reasonable business grounds for the refusal of the request under that clause.⁷⁴ The Full Bench found that the Commissioner's conclusion that the employer had acted unreasonably had taken hold (as evidenced in his additional comments at paragraphs [80] – [82]), had permeated his assessment of whether the employer had reasonable business grounds to refuse the request and this amounted to a misconstruction.⁷⁵ However in determining whether there were reasonable business grounds for refusal of the request,⁷⁶ the Full Bench:

- found the terms of the relevant clause of the enterprise agreement demonstrated that at the time it was made the parties had agreed to incorporate aspects of the s.65 provisions then in operation;
- inferred that the parties had intended that regard could be had to the non-exhaustive list of 'reasonable business grounds' in the FW Act⁷⁷ as well as the employer's procedure and policy dealing with flexible working arrangements;⁷⁸

- noted that the employer policy and procedure framework made clear that flexible working arrangements are not an automatic entitlement but were rather to be negotiated so as to balance the reasonable operational and business requirements and the personal needs of employees and whilst it contemplated discussion and negotiation, it did not do so in mandatory terms;⁷⁹
- accepted that there were reasonable business grounds for the refusal of the request but was not persuaded that the employer response directly engaged with the reasonable business grounds then set out in s.65(5A) of the Act nor was it persuaded that an assessment of reasonable business grounds was performed with due consideration to the operational and business requirements and the Respondent's circumstances, as required by the Respondent's policy and procedure framework;⁸⁰
- concluded that the Commissioner's decision was nonetheless correct.⁸¹

[79] However the matter is distinguishable from *Ambulance Victoria v Fyfe*.⁸² In the current matter the Enterprise Agreement came into effect from 26 June 2023.⁸³ Clause 10 of the Enterprise Agreement is in different terms to the relevant provisions in *Ambulance Victoria v Fyfe*,⁸⁴ it is not prescriptive and it simply states that provisions dealing with requests for flexible working arrangements will apply in accordance with the NES.

[80] The Respondent's policy framework is also different to the framework that the Full Bench considered in *Ambulance Victoria v Fyfe*.⁸⁵ The Respondent's Flexible Work Policy⁸⁶ (**Policy**) refers to the reasonable business grounds for refusal in s.65A(5) and then goes on to include additional considerations for school-based employees including:

- The capacity of a school to meet the needs of the students, including their teaching and learning needs and prior history of teacher continuity.
- Timetabling options and/or the need to accommodate RFF.
- The number of flexible working arrangements already in place and other flexible work requests that have been made.
- The size and needs of the school, overall staffing, and the directions of the school's strategic plan.
- Whether the arrangement would hinder the professional learning of the employee or the continuity of school based professional learning.
- Supporting the careers of staff who have a right to request flexible work and the careers and professional needs of other staff where relevant.

[81] The Policy provides that the responsibilities of Principals/Workstream Lead under the Policy are to:

- inform employees of the Policy;
- 'genuinely consider flexible work requests (including discussion with an employee) and respond in writing within 21 days of a written request '
- 'staff their school or service area according to need and available resources';
- 'balance the needs of all staff requesting flexible working arrangements and the needs of the school or service area';
- 'ensure flexible working arrangements are appropriately documented and filed' and
- consult a human resources business partner before refusing a request.

[82] However the Policy makes clear that:

- its purpose is to set out the procedure for making and responding to requests for flexible working arrangements and identify the ‘guiding principles’ to be used when considering a request for flexible working arrangements;
- it is not intended to be contractual in nature, or to create an entitlement to request a flexible working arrangement beyond that set out in the Agreement or legislation and to the extent of any inconsistency between the Policy and such instruments, the latter will prevail’
- the Respondent is not responsible for any implications to an employee’s personal financial circumstances resulting from a change in working arrangements and employees are encouraged to seek independent financial advice before making requests.⁸⁷

[83] In terms of the *form* and *process* requirements of the FW Act there are some factual matters that are evident in this matter. The Request was made on 21 September 2024 and written reasons for refusal were not provided until 12 December 2024. It is apparent that the Respondent did not respond in writing to the request within 21 days as required by the FW Act⁸⁸ or indeed the Policy.

[84] It seems likely that it was Ms Sofi who first refused the request when she provided four alternative options to the Applicant on 28 November 2024 and asked the Applicant to make a decision about which of Options 1, 2, 3 or 4 she would take. Aside from the discussion between the Applicant and Ms Sofi on 28 November, the evidence in these proceedings suggests that Ms Paxton had also discussed the Request with the Applicant on 4 October 2024. The Respondent has discussed the Request with the Applicant.⁸⁹

[85] The Applicant submits that the evidence demonstrates that the Respondent failed to make a genuine attempt to reach an agreement with her regarding the request⁹⁰ and that while the legislation does not stipulate what steps an employer must take to demonstrate this, a common sense and practical response would require:

- initiating meaningful discussions with the Applicant to explore whether she was open to adjustments to her request, such as considering alternative leadership roles that acknowledged her skills and providing clear feedback on the potential benefits or challenges of those options;
- evaluating whether the proposed arrangement could benefit the organisation, for example, by enabling experienced teachers to job-share with an early-career teacher;
- identifying the actual changes required to accommodate the request and communicating these considerations to the Applicant prior to the refusal;
- assessing the request on its individual merits, rather than applying a blanket approach which the Applicant says is evidenced by the interactions between Ms Paxton and Ms Naden prior to the meeting on 12 December 2024.⁹¹

[86] The Applicant submitted that it is open to the Commission to infer that the Respondent was predisposed to rejecting the Applicant’s flexible working arrangement request and this inference is supported by the communications between Ms Paxton and Ms Naden prior to the meeting on 12 December 2024 and the Respondent’s approach to that meeting.⁹²

[87] The Applicant also submitted that there should have been extensive consultation, discussion and review of possible timetables before any denial of the flexible working arrangement and that this is a clear failure of the Respondent to comply with s.65A(3)(a)(i) and (ii).⁹³

[88] While I consider that the Respondent should have responded to the Applicant in a more timely way and identified the specific concerns it had in accommodating the requested arrangement sooner, including from a timetabling perspective, Ms Sofi did put three alternative options to the Applicant which involved the Applicant working Wednesday to Friday, being the days on which she had secured alternative care. Option 3 involves the Applicant returning to work in a classroom teacher role on Wednesday, Thursday and Friday from 31 January 2025 and this option enables the Applicant to provide care for her child at the times where she has not been able to secure care via her husband and mother and involves her returning to the REC Role on a full time basis from term 3 as she desires. While it is apparent that the options were not attractive to the Applicant I consider that the Respondent has genuinely tried to reach agreement with the Applicant about making changes to her working arrangements to accommodate her *specific circumstances in s.65(1A)*,⁹⁴ being that she is the parent, or has responsibility for the care, of a child who is school age or younger, and that is why part time classroom teacher options were presented to her.

[89] The refusal of the Request to return to the REC Role on a part-time basis for terms 1 and 2 is not without consequence for the Applicant. One obvious impact is that the Applicant will receive a lower rate of pay if she is not performing the REC Role. The Applicant's evidence was that her personal circumstances involve the management of a substantial mortgage and other financial concerns and that the financial loss of the REC Role would have a serious impact on her and her family.⁹⁵ The Applicant also gave evidence that she is a practicing Catholic with a strong commitment to her faith and that the REC Role means a great deal to her.⁹⁶ The Applicant submits that there is a risk that she would be at a distinct disadvantage for future career advancement.⁹⁷

[90] The Applicant submits that the Respondent has not provided the Applicant with the opportunity to put forward her concerns and the impact of not accommodating the flexible working request on her and that this establishes a failure by the Respondent to comply with s.65A(3)(c).⁹⁸ Ms Sofi appears to be the first person to have refused the request for the Applicant to return part-time in the REC Role in the meeting on 28 November 2024. Ms Sofi did not give evidence to the Commission. The evidence of Ms Paxton and Mr Cooper does not point to a consideration of the consequences of the refusal of this aspect of the request for the Applicant. In her response of 4 November 2024 the Applicant said:

“I love being REC and want to return to my REC role for 2025. I really look forward to planning events next year and continuing to with the new RE Syllabus. We have also met with our financial advisors and they have informed me that it would be best for our finances if I were to go back full time in Term 3.”

[91] However there is limited evidence that the Applicant disclosed what the other consequences of refusal, whether financial or otherwise, would be upon her in any of the

conversations had with representatives of the Respondents such that their consequences could be meaningfully considered.

[92] I also note that Ms Paxton caused the email of 3 September 2024 enquiring about the intention of employees for the 2025 School year, the Applicant answered “no” to the question “Would you like to have a conversation with me about your intentions or goals for next year”⁹⁹ and there is no evidence that the Respondent had any further context through information volunteered earlier by the Applicant.

[93] Ms Paxton’s evidence suggests that:

- it was Ms Paxton who proactively initiated the discussion about the Applicant’s return to work when she learned from the response to the email of 3 September that the Applicant wanted to return to work part time;¹⁰⁰
- on 3 October she called the Applicant to discuss the possibilities around her flexible work request and:
 - Ms Paxton said words to the effect that: “I want to understand what flexibility you have and what is possible, are you able to work the start of the week instead of the end as this would work better with collaborative coaching, RFF (release from face to face teaching) timetables and would allow you to set up the class for the week”;
 - the Applicant replied: “I am not able to be flexible with the workdays due to the child care arrangements I have made”;
 - there was no discussion about the days prior to the Applicant making the care arrangements despite leadership meetings at the school occurring on Monday;
 - Ms Paxton asked the Applicant whether she would “consider a 0.5 FTE on a three day/ two day alternating fortnight so as to allow an equal job share arrangement and the Applicant said no.”¹⁰¹

[94] The communication between the Applicant and Respondent about the arrangements upon which the Applicant should return to work could have been better from both parties and as a result there is now a rush to determine what those arrangements will be. However a finding that the Respondent’s approach in responding is somewhat deficient in terms of the *form* and *process* requirements of the FW Act, the Policy or otherwise would not, in my view, resolve the substance of this dispute in the timeframe required.

[95] The Respondent is prepared to allow the Applicant to return to a part time classroom teacher role working Wednesday to Friday in terms 1 and 2 of the 2025 school year however the Respondent has clearly refused the Request and is firm in its view that she cannot do this in the REC Role. The Applicant is firm in her view that she should be able to return to the REC Role working Wednesday through to Friday. It is apparent this is the catalyst for the application before the Commission. At the heart of the dispute is the question of whether the Respondent has reasonable business grounds for refusing to allow that Applicant to return to her REC Role on a part time basis working Wednesday, Thursday and Friday in terms 1 and 2 of the 2025 school year.

[96] It is apparent that the parties intended that the provisions dealing with requests for flexible working arrangements will apply in accordance with the NES and pursuant to that framework. It does not automatically follow that a deficiency in the *form* and *process* requirements above otherwise prevent the Commission's consideration of the *substance* of the response, being a consideration of the grounds for the request and whether they constitute reasonable business grounds or not.

[97] I have considered the appropriate approach to take in the determination of this matter. It is apparent that attempts to resolve the dispute at the workplace level were unsuccessful and the matter did not resolve at a conference held by the Commission. The parties are at an impasse, the commencement of the 2025 school year is upon them, the Applicant has an immediate need to care for her baby on Mondays and Tuesdays, both parties need to know the arrangements upon which the Applicant will be returning and this matter needs to be determined urgently. The most direct pathway to resolving the dispute on an urgent basis is to consider whether the Commission should make orders that:

1. it is appropriate for the grounds on which the employer refused the Request to be taken to have been reasonable business grounds or not; and
2. the Respondent grant the Request or make specified changes to accommodate the Applicant's circumstances.

The REC Role

[98] The Applicant is employed in the REC Role.

[99] Ms Pezzuto is a Deputy Workstream Lead for the Respondent who has also been Religious Education Coordinator (REC) in a number of the Respondent's Primary Schools.¹⁰²

[100] Ms Pezzuto gave evidence that the REC Role:

- is central to faith formation of staff, parents and students;¹⁰³
- is expected to lead liturgies at the school and be available throughout the school week to each of these groups;¹⁰⁴
- is responsible for the implementation of the Religious Education curriculum at the school including undertaking classroom teaching duties.¹⁰⁵

[101] Ms Pezzuto's evidence was that typically Principals, Assistant Principals and RECs constitute the leadership group of the school, that group is responsible for leadership decisions in the school and will typically meet at least weekly.¹⁰⁶

[102] Ms Vescio gave evidence that the REC Role supports the Principal and other leadership team members in their day to day leadership at the School and she did not believe it could be done on a part-time basis because leadership challenges occur daily and cannot be timetabled.¹⁰⁷

Industrial arrangements applicable to the REC Role

[103] As noted earlier in this decision, the 2024 Enterprise Agreement is now in force.

[104] Mr Cooper gave evidence that another unregistered industrial instrument applies to the Applicant and Respondent being the ‘Operational Framework’ which commenced operation on 1 January 2025 and is a document that has been negotiated and agreed between the Respondent and IEU.¹⁰⁸ The Operational Framework covers certain aspects of employment regulation for teachers employed by the Respondent including release time and an entitlement to Collaborative Coaching Time.¹⁰⁹

[105] Mr Cooper’s evidence is that it has always been assumed and it is established custom and practice that those in the REC Role receive additional release under the Operational Framework and its predecessor document, the Work Practices Agreement for Primary Teachers.¹¹⁰ Mr Cooper’s evidence was that by some historical anomaly REC Role release was left out of the Operation Framework and its predecessor document but it was never the intention of the Respondent or IEUA and it follows that those in the REC Role receive additional release on top of Teacher RFF and ‘Collaborative Coaching Time’.¹¹¹

[106] Mr Cooper gave evidence that Collaborative Coaching is a major financial investment of approximately \$9.2 million per annum that has been made by the Respondent to enhance learning effectiveness.¹¹²

[107] Ms Bruce’s evidence indicates that in some circumstances there are multiple teachers teaching a class and this is in part because of release time arrangements.¹¹³ Ms Bruce gave evidence explaining the different executive release time arrangements for different roles including that:

- Assistant Principals are either designated as a non class teaching role or if in a class teaching role, are facilitated through a job share arrangement;¹¹⁴
- Assistant Principals with class responsibilities require release time and have this release facilitated by a job share arrangement on an ongoing basis;¹¹⁵
- students in the classes of Assistant Principals with class responsibilities may have at least two teachers, in addition to specialist teachers;¹¹⁶
- REC Roles require executive release time;¹¹⁷
- RECs who have classroom teaching responsibilities are allocated a job share partner;¹¹⁸
- students in classes led by RECs will have at least two teachers each week, in addition to specialist teachers.¹¹⁹
- Coordinator positions also require executive release time and students in classes led by Coordinators will have at least two teachers each week, in addition to specialist teachers.¹²⁰

[108] In addition to executive release time, there is release from face-to-face teaching time (RFF Time) for teachers. Ms Bruce’s evidence was that:

- teachers are allocated 120 minutes of RFF Time per week;
- during RFF Time the classroom teacher is replaced and the class is taught by specialist teachers responsible for delivering specific curriculum areas;
- this leads to classes that may have two to three different teachers.¹²¹

[109] Teachers are also allocated time for Collaborative Coaching. Ms Bruce’s evidence was that:

- this equates to 60 minutes per week or 120 minutes per fortnight; and
- during this time, the teacher is replaced and the class is taught by specialist teachers or part-time teachers responsible for delivering curriculum areas;
- this leads to classes that may involve one to two different teachers.¹²²

[110] Mr Cooper’s evidence also gave evidence that there is:

- a legal obligation under cl.32.(c) under the Enterprise Agreement and 2024 Enterprise Agreement to achieve specified goals, most relevantly to ‘maximise the learning growth of every student’;¹²³
- a legal obligation under the *Catholic Schools Broken Bay Principals Enterprise Agreement 2024 (Principals EA)* for Principals in respect of :
 - ‘accompanying students, families and staff to know Christ and to grow in faith;
 - ‘maximising the learning growth of each student’; and
 - ‘ensuring the delivery of curriculum and assessment’.

What were the grounds for the Respondent’s refusal of the Request?

[111] Before dealing with the question of whether it is appropriate for the grounds on which the Respondent refused the Request to be taken to be reasonable business grounds it is first necessary to identify the grounds for the Respondent’s refusal of the Request.

[112] As noted above, the Applicant gave evidence that at the meeting on 28 November 2024 Ms Sofi said:

“As a matter of Broken Bay policy, we cannot provide flexible work arrangement for executive roles, including the REC Role”.¹²⁴

[113] The Applicant ‘s evidence was that the Request was dismissed on this basis.¹²⁵

[114] The Applicant also gave evidence that Ms Paxton:

- had a conversation with her on 3 October 2024 in which she said:

“You should take a step back from the REC role for a bit. Take this time to be with your little one”¹²⁶

- stated that she could only have a flexible working arrangement for a full year.¹²⁷

[115] Ms Paxton denies that she made these comments.¹²⁸ Ms Paxton also gave evidence that she said words to the effect that flexible working arrangements are usually for a full year,¹²⁹ that this was consistent with the Policy but that it did not mean an application could not be for a shorter term.¹³⁰ In this regard I note the Policy states:

‘In schools, flexible working arrangements will generally be agreed to for the duration of a school year’.¹³¹

[116] Ms Paxton's evidence in this regard was that the Respondent aims for consistency of staffing across the School year because in primary education, developing a relationship between the teacher and student is an important part of the education process and is impacted where that relationship is not developed.¹³²

[117] The Respondent submitted that there is no policy or blanket prohibition in respect of flexible working arrangements, that these are determined on their merits and are subject to the limitations imposed on the Respondent principally by curriculum, student needs and limited financial resources.¹³³ Mr Cooper's evidence in this regard was that:

- it employs approximately 1,610 teachers;
- approximately 619 of these teachers are employed part-time, most of which have been granted or negotiated flexible work arrangements which are mostly in place for the entire school year;
- about 30 percent of teachers have a flexible work arrangement in the 2025 school year;¹³⁴
- there is no blanket policy ban on executive leadership roles having flexible work arrangements where such requests can be accommodated and every request is considered on its merits in light of the unique local circumstances of each individual school.¹³⁵

[118] Mr Cooper also gave evidence was that there are four temporary flexible work arrangements that have been granted for the 2025 school year in relation to executive employees.¹³⁶ In relation to those four roles Mr Cooper's evidence suggests that the circumstances of the individual arrangements are different from those of the Applicant and I am persuaded that this is the case.¹³⁷ The Applicant pointed out that the number of employees in leadership roles and who have flexible work arrangements represents only a little over 3.5% of the total leadership roles and submitted that this represents a significant underrepresentation.

[119] Ms Paxton's evidence was that she always tries to accommodate flexible working arrangements but flexible working arrangements for leadership positions are highly unusual because it is difficult to accommodate a division of teaching and leadership duties without impacting student learning and meeting requirements for teacher RFF.¹³⁸

[120] The Respondent submitted that in terms of leadership roles (including the REC Role, Assistant Principal and Principals) the evidence shows that such positions are not commonly the subject of flexible working arrangements or job sharing because:

- leadership positions have fixed responsibilities during the week which typically cannot be split such as attendance at leadership meetings and additional release from face to face teaching time;
- there is limited ability to schedule handover of work with anybody sharing the responsibility of a leadership role.¹³⁹

[121] Ms Paxton's evidence in this regard was that leadership responsibilities (including those in the REC Role) are ongoing throughout the week and this would mean that other members of the leadership group would have to take up duties which she would otherwise have performed.¹⁴⁰

[122] The Respondent put forward different reasons for the refusal and relies on the grounds set out in the 12 December Letter which are included earlier in this decision.¹⁴¹

[123] Those grounds are reiterated in Mr Cooper's evidence¹⁴² and by way of summary include:

1. Ground 1: Adverse impact on student achievement and wellbeing;¹⁴³
2. Ground 2: Significant cost increase;¹⁴⁴
3. Ground 3: Adverse workload impact on other staff;¹⁴⁵
4. Ground 4: Reduced leadership at the School.¹⁴⁶

[124] I accept that the Respondent does not have a blanket policy prohibiting flexible working arrangements for employees in leadership roles. However it is apparent that the incidence of these is rare within the Respondent's workforce and it is apparent that the Respondent is predisposed to the following:

1. it is too difficult to accommodate flexible working arrangements for leadership roles; and
2. if flexible working arrangements are accommodated they should generally be for the entire duration of the school year and not for a part of the school year.

[125] While Mr Cooper's evidence suggests he was the decision maker it is apparent that his decision was highly influenced by Ms Paxton. Ms Paxton's evidence was that in considering the Applicant's Request and need to work Wednesday through to Friday because of her predetermined care arrangements, the following issues applied:

- the Applicant would need to miss leadership positions meetings;
- the teacher sharing her teaching duties would have to miss professional development meetings on Wednesdays;
- three classroom teachers would have to be allocated to the Applicant's class, meaning there would be no continuity for Mathematics and English classes;
- student wellbeing and learning would be impacted as classes have students with learning challenges and diverse needs, those students benefit from stability and continuity in teaching and requiring three teachers would impact the ability to establish positive teacher student relationships.¹⁴⁷

[126] Notwithstanding its view that flexible working arrangements should generally be for the entire duration of the school year, the Respondent has presented options to the Applicant to enable her to continue in a part time capacity in terms 1 and 2. However it is apparent the Respondent is unmoved from its default view that it is too difficult to accommodate flexible working arrangements for leadership roles, in this case the REC Role, and its basis for this is reflected in the 12 December Letter which also covers Ms Paxton's concerns. I find that the grounds in the 12 December Letter are the grounds on which the Respondent has refused the Request.

Is it appropriate for the grounds on which the Respondent refused the request to be taken to be reasonable business grounds?

[127] In answering the above question, I do not consider it the role of the Commission to stand in the shoes of the employer and consider whether it would have refused the request, substituting its own reasons. Rather, the task is to make an assessment about whether the employer's grounds are reasonable business grounds in the circumstances. Notwithstanding that it is the Respondent's reasons that are the subject of the assessment, the task requires an objective assessment of those reasons.

[128] In this regard, s.65A(5) provides:

‘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))’.

Submissions

[129] The Respondent submitted that its decision to decline the flexible working arrangement in respect of the REC Role constitutes reasonable business grounds and that:

- it is meeting exactly the Applicant's time in respect of working time (i.e. Wednesday through to Friday) albeit in respect of only the substantive teaching position;
- the structure of the Enterprise Agreement is that the Applicant will receive approximately 85 percent of her earnings on a part time basis under the Respondent's proposed response;
- realising the balance of 15 percent earnings associated with the REC Role will require having three teachers being appointed to teach Mathematics and English across one class with impacts on student outcomes and a need to backfill the teacher on Friday;
- the impacts for the Respondent's school provide a reasonable basis for declining the Applicant's flexible working arrangement.¹⁴⁸

[130] The Applicant submitted that the reasonable business grounds that have been asserted by the Respondent are not sufficient and/or of sufficient probative value to deny the Applicant's Request.¹⁴⁹ In particular, the Applicant submits that:

- the Respondent's suggestion that three classroom teachers will be damaging to student learning lacks evidence;¹⁵⁰
- in the Respondent's own schools it is common for students to be taught by between three and five teachers over the course of a typical week due to its current practices over release from face to face teaching time;¹⁵¹
- the 'third' teacher which would be timetabled for Friday under the Applicant's Request would be Mr Bennet, the Assistant Principal who is a highly experienced executive teacher and saying that his addition in children's learning schedules would detract from students' outcomes and learnings is without basis;¹⁵²
- the Respondent has not submitted any evidence that the issues it refers to in relation to an increased burden of '0.2 FTE' or '\$30,000' is not in fact merely a timetabling issue in relation to release time;¹⁵³
- the fact that the 'cost increase' is merely associated with release time from face-to-face teaching and could have been alleviated with proper consultation about the proposal with the Applicant and affected persons;¹⁵⁴
- even if this was not the case and the Respondent needed to bear an additional burden of \$30,000, this would not be sufficient in the case of a large employer such as the Respondent, to deny the Applicant's flexible working request;¹⁵⁵
- it is insufficient for an employer to point to any cost or business difficulty and to do so would mean that the 'practical right intended [the right to request flexibility] would become illusory';¹⁵⁶
- that a colleague will need to adapt to a working arrangement cannot be said in any event to be sufficient to ground a decision that it 'would be likely to' either 'result in a significant loss in efficiency or productivity' or 'have a significant negative impact on customer service';¹⁵⁷
- the Respondent's position fails to take into account the obligations upon the Respondent to genuinely consult with the employee and have regard to their circumstances;¹⁵⁸
- the Respondent's position is such that someone in the REC Role in a smaller school run by the Respondent can never have an arrangement made to return to that role in any capacity other than full time and it is not possible for an employer to assert that they genuinely consider each flexible working request on its merits while also having a policy, written or otherwise, which prevents some types of requests from ever being considered.¹⁵⁹

The Timetable

[131] Before turning to the specific four grounds put forward by the Respondent, which I have found are its grounds for refusal of the Request, it is helpful to identify what the Respondent says is the practical implication of the flexible working arrangement it is seeking.

[132] The Respondent submitted that it is important to note that the Respondent has 14.5 staff allocated to the School and any timetabling arrangement which accommodates the Applicant

also impacts other staff at the Applicant's school.¹⁶⁰ In this regard Ms Paxton gave evidence that:

- she was responsible for setting the timetable for the School;
- within her 14.5 FTE allocation she needs to provide teachers for all classes as well as providing RFF and collaborative coaching time for teaching staff which occurs on Tuesday and Wednesday;¹⁶¹
- RFF is provided to teaching staff to undertake duties outside of the classroom and staff in leadership positions, including the Applicant, have additional release time provided to discharge their leadership duties.¹⁶²

[133] When the Applicant returns she will teach a year 5 class at the School. Mr Cooper's evidence is that under the arrangement the Applicant is seeking she would be the main teacher on her class because she would be 0.6 FTE.¹⁶³

[134] However the Respondent submits that the practical impact of the arrangement sought by the Applicant is that it would need to timetable three teachers across the class throughout the week which it says means students would have no continuity across teachers, resulting in a sub-optimal educational outcome for students.¹⁶⁴

[135] To illustrate this, in its response to the application filed with the Commission on 12 January 2025 the Respondent filed a copy of a draft timetable that it says would need to be implemented in the event that the Applicant's request was accommodated (**Timetable**).¹⁶⁵

[136] The Timetable depicts that:

- on Monday 'Teacher A' would teach students for the entire day which would include:
 - taking a 15 minute assembly;
 - teaching 105 minutes of English
 - teaching 60 minutes of Mathematics;
 - teaching 60 minutes of Science and Technology; and
 - teaching 60 minutes of HSIE – History;
- on Tuesday:
 - 'Teacher A' would:
 - teach 90 minutes of English;
 - teach 60 minutes of Mathematics;
 - teach 60 minutes of Religious Education;
 - a library teacher would teach 60 minutes of English/library;
- on Wednesday:
 - an Art teacher would teach 60 minutes of Creative Arts (Visual Arts);
 - a Sport teacher would teach 60 minutes of PDHPE (PE);
 - the Applicant would teach:
 - 60 minutes of Mathematics; and
 - 60 minutes of HSIE – History;
 - a Music teacher would teach 60 minutes of Creative Arts (Music, Dance and Drama);
- on Thursday the Applicant would teach:
 - 90 minutes of English;

- 60 minutes of Mathematics;
- 60 minutes of Religious Education;
- 60 minutes of Science & Technology;
- on Friday:
 - Mr Bennett would teach:
 - 60 minutes of English;
 - 60 minutes of Mathematics;
 - 60 minutes of PDH – Health;
 - the Applicant would teach:
 - 30 minutes of Religious Education;
 - 30 minutes of PDHPE (PE)
 - 60 minutes of ‘Genius Hour’ or 30 minutes each of English and Assembly.

[137] The Respondent’s notes to the Timetable express a number specific concerns about the above arrangement which are also reflected in Ms Paxton’s evidence¹⁶⁶ and Mr Cooper’s evidence including:

- that the Applicant would be the main teacher on the class but would not teach English lessons;¹⁶⁷
- the class would have three different teachers for English and three different teachers for Mathematics and this would have implications for:
 - planning;
 - monitoring/tracking of student progress;
 - providing feedback to students and parents; and
 - effective participation in collaborative coaching sessions;¹⁶⁸
- all Key Learning Areas on the Applicant’s teaching days are following on from lessons earlier in the week and it is unlikely that the Applicant would be able to take primary responsibility for any of the planning/preparation for these lessons (with the exception of the 20 minute PE lesson and Genius Hour on Friday);¹⁶⁹
- the two-hour Stage 3 Collaborative Coaching session occurs on Wednesday morning, having been moved from Tuesday to allow the Applicant to attend, however it would be difficult for the time to be productive if the Applicant does not teach all English classes and teaches only two Mathematics lessons across the week.¹⁷⁰
- the arrangement would not be in the best interests of students and would not be well-received by parents;
- the structure places an additional burden on the Applicant’s Stage Partner, an Early Career Teacher, as she would be the consistent presence across the week and would be forced to step up to lead and coordinate the week.¹⁷¹

[138] Mr Cooper contended that these concerns align with the following reasonable business grounds set out in s.s.65A(5)(d) and (e) of the FW Act being:

- (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.

[139] The Applicant said that there were changes that could be made to the Timetable to share the load of all Key Learning Areas more equally amongst the teachers¹⁷² and that if the Applicant and her job share partner and Stage Partner have the chance to work on the timetable, they would be able to equally share the planning, preparation and programming of each subject.¹⁷³

[140] The Applicant noted that in the Timetable the Applicant would only be teaching two out of five Mathematics lessons and one English block each week however suggested that with a simple change of Mr Bennet teaching the class on a Friday afternoon instead of the morning block:

- this could allow the Applicant to teach English, Mathematics and Religion lessons;¹⁷⁴
- during the two hours of face to face teaching on a Wednesday, students would do a one hour English lesson followed by a one hour Mathematics lesson, allowing the Applicant to teach three Mathematics lessons and three English blocks across her two and a half days of teaching the class;
- the Applicant could then participate in Collaborative Coaching which would be beneficial to students;¹⁷⁵
- Mr Bennet would be responsible for teaching health, genius hour and taking students to Assembly as he did during the 2024 school year.¹⁷⁶

[141] The Applicant's evidence was that usually the organisation of the timetable is the job of the classroom teacher along with the Stage Partner.¹⁷⁷ The Applicant expressed the view that if she and the Respondent reviewed timetabling and how the Request could be accommodated back in September 2024 when she made it, the matter would have resolved.¹⁷⁸ The Applicant provided an alternative timetable to reflect the changes she suggested above.¹⁷⁹

'Ground 1 – Adverse impact on student achievement and wellbeing'

[142] The key concern for the Respondent appears to be that the arrangement the Applicant is seeking would, in addition to specialist teachers, require three teachers teaching the remaining key learning areas rather than one or two.

[143] Ms Vescio is the Respondent's Workstream Lead for Facilities and Procurement, site on the Respondent's Executive Team and is a former primary school Principal. Ms Vescio's evidence was that in her experience, having more than two teachers with a primary class ordinarily only works where students are participating in a specialist activity such as PE, Music or Library because they are specific lessons of short duration for which students are prepared or expecting to undertake and this is very different to core curriculum such as Mathematics or English.¹⁸⁰

[144] Ms Vescio expressed an opinion that having three teachers on a class would create a variety of challenges which would impact student learning including:

- a requirement for students to adapt to different teaching styles which can create stress for students, particularly for those with a disability or learning challenges;
- constant change in routine making it difficult for students to apply themselves to their learning;

- communication between three teachers creating extra work above and beyond a regular two teacher job share;
- unclear responsibilities for liaising with parents and confusion about which teacher is responsible;
- a new dimension of workload for teachers taking the class in a context where Mathematics and English are key learning areas that require a consistent and uninterrupted approach to delivery of the curriculum and coordination would be required;
- complexities of timetabling impacted access to professional development.¹⁸¹

[145] Mr Cooper’s evidence was, by way of summary, that having three teachers for a single class would:

- result in significant disruption to the continuity of teaching and learning, adversely impacting student achievement and well-being;
- have a detrimental impact on the Respondent’s ability to effectively track learning outcomes day-to-day and make necessary adjustments based on student need, including the ability to effectively respond to diverse learners and students with challenging behaviours.¹⁸²

[146] Mr Cooper said these activities are critical for each teacher and the Respondent to ensure adherence to the AITSL *Professional Standards for Teachers* (**Teaching Standards**) and are requirements of the Towards 2025 Strategy which is referred to in clause 3.2 of the Enterprise Agreement.¹⁸³

[147] Mr Cooper’s evidence was that the Teaching Standards require that Teachers “know their students” and that having three regular classroom teachers, no matter how experienced or skilled they may be, will disrupt continuity of learning and have a negative impact on the development progress of the students in their formative years.¹⁸⁴

[148] The Applicant contested this ground and gave evidence that:

- she is an experienced and skilled classroom and executive teacher;
- she is highly experienced in managing job share arrangements;
- the REC Role requires classroom duties to be shared even if carried out on a full-time basis;¹⁸⁵
- during a normal teaching week at the school, students in all classes are taught by a minimum of five teachers being four specialty teachers (e.g. for music, sport, library and art) and their regular classroom teacher or teachers;
- during the 2024 school year early career teachers were assigned to a class and given extra release time every second Monday for the entire year such that students were taught by five or six teachers per week;
- students being taught by multiple teachers is a normal part of life at the School;¹⁸⁶
- the ‘extra teacher’ or requirement for a third teachers for 2-3 hours on Friday is to be filled by the Assistant Principal, Mr Bennet, and the suggestion that a highly experienced teacher such as Mr Bennet taking the class for a period of time on a Friday would be damaging to students is not reasonable.¹⁸⁷

[149] Ms Bruce also gave evidence that in some circumstances primary students are taught by at least three and up to five different teachers over the course of a typical week and this is partly due to release times allocated for Assistant Principals, RECs, other coordinator positions and flexible working arrangements.¹⁸⁸

[150] Ms Paxton's evidence acknowledged that the School does have specialist teachers in music, sport, library and art and that this was beneficial for students¹⁸⁹ but gave evidence that this arrangement is coupled with providing stability and consistency in regular class teachers to focus on core subjects being Mathematics, English, Religion, Science and Human Society and its Environment.¹⁹⁰ Ms Paxton said that it is difficult for students to establish rapport with a teacher when they have shorter periods of time with them and an established rapport will often mean, for example, that a shy or anxious student can be more willing to seek assistance from their teacher with a Mathematics or English problem.¹⁹¹

[151] Mr Cooper gave evidence that parents would be opposed to having three regular classroom teachers for their children for a lengthy period.¹⁹² Ms Pezzuto also said she would expect parents to be unhappy with having three teachers across a class.¹⁹³ The Applicant said the suggestion that parents would complain is without evidence, parents are used to job share arrangements and she has an excellent relationship with parents.¹⁹⁴

'Ground 2 – Significant cost increase

[152] Mr Cooper's evidence was that the Respondent had considered whether it would be possible to change the School's staffing arrangements for 2025 to accommodate the Request without having three regular teachers on a single class and the only way it could work is if Teacher 'A' took the class on Monday and Tuesday and also released the Applicant for her REC release for three hours on Friday rather than the Assistant Principal performing the REC release under the Timetable.¹⁹⁵ However Mr Cooper's evidence was that this would require an increase in the staffing budget of 0.2 FTE as 'Teacher A' would need additional hours and the Assistant Principal would be under their required case load.¹⁹⁶ Mr Cooper's evidence was that this would result in an additional cost of approximately \$12,827 plus on costs for terms 1 and 2 or \$25,654 plus on costs for the full year if it could not recruit for six months and assumes that 'Teacher A' will increase their working hours which may not be possible.¹⁹⁷

[153] Ms Paxton also gave evidence that the Respondent would be required to hire a new teacher under the Applicant's alternative timetable proposal.¹⁹⁸

[154] In response to the Respondent's contention that '[a]ccommodating the Request would impose a significant cost increase which is not reasonable' the Applicant said:

- she did not understand how a return to work part-time should impose a significant cost increase;
- the staffing profile of schools (including new skills sets) and a changing student number can lead to some 'ebb and flow' with timetabling efficiency;
- there were multiple examples of job share arrangements across the education system, including in executive roles;
- in a job share arrangement teachers 'share' the wages.¹⁹⁹

Ground 3 – Adverse workload on other staff

[155] The Respondent also raises a concern in the Timetable that in 2024 staff changes saw the students seek the Early Career Teacher out for both learning support, feedback on their work and to help with mediation on social issues. Ms Paxton’s evidence in this regard was that the Early Career Teacher, Ms Ingham, would be the consistent presence in the classroom and this would mean that most issues for the class would come to her and this was an unreasonable load to impose on the Early Career Teacher.²⁰⁰

[156] In response to this the Applicant said that she believed this was due to the fact that a new teacher joined the school to replace her once she commenced parental leave in June 2024 and that students would have approached the teacher that they already knew.²⁰¹ The Applicant said that this would not be the case in the 2025 school year as students would be very familiar with all members of the teaching team working with them and the same two or three teachers would be with the students from the start of the year, allowing continuity and familiarity of teachers in the room on specific days.²⁰²

[157] Ms Pezzuto’s evidence was that if the Request was accommodated there would need to be a REC appointed for the balance of the 0.4 FTE, one of the RECs would be required to attend leadership meetings and there would also need to be communication about what took place at leadership meetings or leadership decisions.²⁰³

[158] In response to the Respondent’s contention that ‘[a]ccommodating the Request would adversely impact the workload of the Applicant’s full-time Stage Partner the Applicant said:

- she was conscious of workload and would ensure her stage partner is fully supported;
- she had worked with Ms Ingham, the person who she would be job sharing with, she was the mentor and supervisor for Ms Ingham when she was completing her teaching practicum and she had a strong working relationship with her;²⁰⁴
- she believed she could make a meaningful contribution to the professional development of her Stage Partner.²⁰⁵

Ground 4 – Reduced leadership at the school

[159] Mr Cooper’s evidence was that the REC Role is a critical executive leadership position at the School²⁰⁶ and there is a need for the REC to be available to lead and support staff and students’ learning and wellbeing, as well as deliver faith leadership in the community including coordination of liturgies and events, across five days of the week.²⁰⁷

[160] Mr Cooper’s evidence was that having a part time REC, or a REC job-share (if possible), would reduce the strength, availability and continuity of leadership support for staff, students and parents at the School, and will add workload pressures onto other roles, especially the Assistant Principal and the Principal.²⁰⁸

[161] Ms Paxton gave evidence that staff in leadership positions at the School are required to attend leadership meetings on Monday of each School week and to attend to leadership meetings on an ad hoc basis.²⁰⁹ The Respondent submitted that because the Applicant indicated

she had to return to work Wednesday through to Friday due to the care arrangements she had concluded with family members:

- this precluded her from being able to participate in leadership meetings which are held on Mondays;²¹⁰
- given that participation in leadership meetings logically follows from being in a leadership position it is arguable that the Request as proposed would require the Respondent to provide payment for the REC Role in circumstances where the Applicant could not fully discharge the duties;²¹¹
- as the School holds professional development on Wednesdays, anybody job sharing with the Applicant would have to miss out on professional development.²¹²

[162] In response to the Respondent's contention that the 'Request would reduce the strength, availability and support of executive leadership for staff and students at the School' the Applicant contended that the reverse would be the case because:

- job sharing the REC Role would see an additional staff member in an executive role and she could continue her own leadership development;
- being forced to step down from a leadership role in order to work part time does not appear to be in the interests of developing leaders and ensuring access to leadership roles for women.²¹³

[163] Ms Paxton's evidence in this respect is that the Applicant assumes that the School will have existing staff who want to work and are qualified and of a suitable standard to work 0.4 FTE.²¹⁴ Ms Paxton also gave evidence that this person would have to come to leadership meetings on Monday and receive less RFF and would also receive a lower amount of REC Allowance than the Applicant for performing more work and duties and she considered this would be unfair.²¹⁵

[164] The Applicant put forward evidence supporting the proposition that flexible working arrangements in leadership and executive positions exist including Ms Fitzgibbon's evidence that there are four REC Roles being performed on a job share basis in the Diocese of Maitland Newcastle including at:

- St Columbia Primary School in Adamstown where there are approximately 194 students;
- Our Lady of Lourdes Primary School in Tarro where there are approximately 210 students;
- St Mary's Primary School in Warners Bay where there are approximately 410 students;
- St Josephs Primary School where there are approximately 143 students.²¹⁶

[165] Ms Fitzgibbon's evidence was that all of the above schools, with the exception of Our Lady of Lourdes Primary School, provide the REC Role on a job share arrangement with the role shared on a 0.6 and 0.4 FTE basis consistent with the job share arrangement sought by the Applicant.²¹⁷ Ms Fitzgibbon indicated during cross examination that she obtained this information from a human resource representative.

[166] Cooper’s evidence was that the Diocese of Maitland Newcastle does not have these Collaborative Coaching arrangements that have substantial timetabling requirements affecting the whole of the School and nor does it have certain industrial obligations²¹⁸ including:

- a legal obligation under cl.32.(c) under the Enterprise Agreement and 2024 Enterprise Agreement to achieve specified goals, most relevantly to ‘maximise the learning growth of every student’;²¹⁹
- a legal obligation under the *Catholic Schools Broken Bay Principals Enterprise Agreement 2024 (Principals EA)* for Principals in respect of :
 - ‘accompanying students, families and staff to know Christ and to grow in faith;
 - ‘maximising the learning growth of each student’; and
 - ‘ensuring the delivery of curriculum and assessment’.

Consideration and determination

[167] ‘Ground’ 1’ put forward by the Respondent as a basis for its refusal of the Request is that granting it would result in an adverse impact on student achievement and wellbeing. A key basis for this appears to be the Respondent’s concerns about having three teachers teaching a class, other than specialist teachers, if the Applicant is to remain in her REC Role.

[168] In her capacity as a REC the Applicant essentially has two functions, she is both a classroom teacher and REC in a leadership position. It is apparent that three teachers, other than specialist teachers, will be required because the Respondent needs to provide:

- two hours of RFF Time to Applicant in respect of her classroom teacher duties;
- additional release time in respect of her REC Role.

[169] Additionally, the Respondent has made a major financial investment of approximately \$9.2 million per annum in Collaborative Coaching to enhance learning effectiveness²²⁰ and under these arrangements a Collaborative Coaching session in which the Applicant is required to participate occurs on Wednesdays.

[170] For the Applicant to access RFF Time, additional release time in respect of her REC Role and Collaborative coaching, it will require that another teacher undertake face to face teaching duties for that time. This may be undertaken by a job share partner or specialist teachers.

[171] An examination of the Timetable draws out the following:

- the Applicant would teach the following across three days:
 - 120 minutes of Mathematics;
 - 90 or 120 minutes of English, depending on the week;
 - 90 minutes of Religious Education;
 - 60 minutes of Science & Technology;
 - 60 minutes of HSIE – History;
 - 30 minutes of PDHPE (PE)
 - 60 minutes of genius hour every second week;

- 30 minutes of Assembly every second week (which I understand involves taking the children to assembly);
- Teacher A would teach the following across two days:
 - 195 minutes of English;
 - 120 minutes of Mathematics;
 - 60 minutes of Science and Technology;
 - 60 minutes of HSIE – History;
 - 60 minutes of Religious Education;
- Mr Bennet would teach:
 - 60 minutes of English;
 - 60 minutes of Mathematics;
 - 60 minutes of PDH – Health;
- a ‘Library Teacher’ would teach 60 minutes of English/library;
- an ‘Art teacher’ would teach 60 minutes of Creative Arts (Visual Arts);
- a ‘Sport teacher’ would teach 60 minutes of PDHPE (PE);
- a Music teacher would teach 60 minutes of Creative Arts (Music, Dance and Drama).

[172] In practice, this means that there are up to seven teachers teaching the class, not three. I accept that at the School, students are accustomed to having multiple teachers including teachers taking specialist classes and Ms Paxton suggests this practice is beneficial for students. In that context I do not consider that it is the quantum of teachers considered in isolation that is of concern. The Respondent’s own practices of utilising specialist teachers in this way also weakens the argument that it is difficult for students to establish rapport with a teacher when they have shorter periods of time. The contention that parents would complain about the arrangement appears to be speculation.

[173] It is however apparent that the teaching of subjects, other than the specialist subjects, is split by up to three teachers, including the Key Learning Areas of Mathematics and English. I accept that there is a need for continuity of learning and teaching across these subjects and that the arrangement would likely detract from this outcome, particularly taking into account that different teachers have different teaching styles and students would need to adapt to this, it may be confusing as to who is ultimately responsible for learning outcomes in this area and who a student or parent should seek assistance from if a child encounters difficulties with Mathematics or English. I also accept that a lack of continuity in teaching a child in a subject would make it more difficult to track daily learning outcomes and make adjustments where students need them.

[174] ‘Ground 2’ put forward by the Respondent as a basis for its refusal of the Request is that it would result in a significant cost increase. Section s.65A(5)(a) calls up cost as a relevant consideration, providing that reasonable business ground for refusing a request will be if the ‘new working arrangements requested would be too costly for the employer’. In this regard, the Respondent’s reasons turning to cost appear to be largely predicated on its desire to avoid having three teachers on the class, other than specialist teachers, teaching classes across Key Learning Areas.

[175] Mr Cooper’s evidence was that accommodating the Request without having three regular teachers on a single class would involve:

- ‘Teacher ‘A’ taking the class on Monday and Tuesday; and
- ‘Teacher A’ also releasing the Applicant for her REC release for three hours on Friday rather than the Assistant Principal performing the REC release under the Timetable.²²¹

[176] Mr Cooper’s evidence was that:

- this would require an increase in the staffing budget of 0.2 FTE to accommodate the additional hours given ‘Teacher A’;
- the Assistant Principal would be under their required case load.²²²

[177] Mr Cooper’s evidence was that this would result in an additional cost of approximately \$12,827 plus on costs for terms 1 and 2 or \$25,654 plus on costs for the full year if it could not recruit for six months.

[178] I accept that to change the Timetable such that Mr Bennet is not required to teach would require ‘Teacher A’ to increase their hours and that there would be a cost increase associated with this.

[179] ‘Ground 3’ that the Respondent advances is that there would be an adverse workload impact on other staff. It is apparent that the arrangement would need to be supported by an Early Career Teacher and a person who was sharing the REC Role. I do not find Ms Paxton’s evidence that most issues for the class would come to this teacher to be compelling. Parents and students may come to this teacher however there is no guarantee that they would not do so anyway under an alternative arrangement. There will be a raft of reasons motivating a parent or child’s decision to go to one teacher or another. I do however accept that to accommodate three teachers across a single subject this would require a high level of communication across the three teachers and it is unclear how or when that would occur. It seems likely that this would result in additional associated workload.

[180] Ms Pezzuto also gave evidence that if the Request was accommodated there would need to be a REC appointed for the balance of the 0.4 FTE. Ms Paxton’s evidence in this respect is that the Applicant assumes that the School will have existing staff who want to work and are qualified and of a suitable standard to work 0.4 FTE.²²³ Given the critical nature of the REC Role for the School I consider it likely that:

1. if the Respondent backfilled the REC Role there would need to be communication about what took place at leadership meetings or leadership decisions²²⁴ and while it is unclear as to when or how this would occur but it would create additional work that would not otherwise exist if there was only one person in the role; or
2. if the REC Role is carried out by the Applicant on a part time basis and an additional person is not brought into this role to discharge these responsibilities on the days where the Applicant is not available, this would result in reduced leadership at the school as the Respondent has advanced in ‘Ground 4’.

Conclusion

[181] Aside from the matters traversed above, the Applicant puts forward a number of policy considerations in her submissions and evidence in support of the contention that flexible

working arrangements deliver significant benefits, including in addressing imbalance and supporting women to obtain and maintain leadership positions. I agree that flexible working arrangements play a critical role in our society in this regard. However the FW Act also provides a basis for their refusal, provided that the basis for this is that the employer has 'reasonable business grounds' for doing so.

[182] In this regard s.65A(5) of the FW Act provides:

'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))'.

[183] The note to s.65A(5) above clearly contemplates that 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 s.65A(3)(d) and s.65A(4). These are relevant considerations for this matter.

[184] Section 65A(5)(e) of the Act contemplates that a reasonable business ground for refusal is that the new working arrangements would likely to have a significant impact on customer service. It is apparent that the REC Role the Applicant seeks to return to:

- is central to faith formation of staff, parents and students;²²⁵
- is expected to lead liturgies at the school and be available throughout the school week to each of these groups;²²⁶
- is responsible for the implementation of the Religious Education curriculum at the school including undertaking classroom teaching duties.²²⁷

[185] It is clearly a critical role for the School and is a role that needs to be available across the School week. If someone else cannot be found to undertake it on Monday and Tuesday

when the Applicant is not available to undertake this role, I accept that it will have negative ramifications for the Respondent and its leadership in this area. The difficulty I am confronted with in this matter is that it is unclear as to whether there is another person who is qualified and able to take on the REC Role alongside the Applicant. If the Respondent was unable to backfill the REC Role it should have led evidence to this effect and it did not.

[186] The Respondent puts forward the Timetable to demonstrate the impacts of the arrangement. In this regard its submissions on cost are confusing as they contemplate a circumstance where the Timetable would not be implemented, that there would be an increase in the staffing budget of 0.2 FTE to accommodate the additional hours given to ‘Teacher A’ and a consequential cost associated with this. However on the other hand it raises uncertainty about whether Teacher A could even take on the additional hours required to support this arrangement. It seems that the submissions in this regard are somewhat of a distraction and the real case that the Respondent is putting forward is that accommodating the Request would require three teachers to be teaching those subjects across its key learning areas as described in the Timetable.

[187] In this regard, I accept that Ms Paxton has a difficult task in having to set timetables to accommodate RFF Time, additional executive release time and Collaborative Coaching whilst working within a small cohort of staff equating to 14.5 FTE positions at a relatively small school with only around 230 students. The school’s model of bringing in specialist teachers such as Sport, Art and Music teachers for specialist subjects creates another layer of complexity. In September Ms Paxton proactively sought to understand the plans of her teaching cohort in sending an email to gauge their plans for the 2025 teaching year. Within her small cohort of teachers Ms Paxton needs to set a timetable to accommodate all within her teaching cohort and which takes of the above factors into account. While the Applicant has provided her own timetable and is critical that she was not engaged in a timetabling discussion sooner, it is apparent that Ms Paxton has sought to understand the needs of the staffing cohort, has considered how she can design a timetable taking into constraints regarding collaborative coaching and release time (including additional executive release time) and has understandably proceeded on the basis that the Applicant’s availability was on Wednesdays, Thursdays and Fridays. This has further constrained the extent to which the Applicant’s Request is able to be accommodated within any timetabling arrangements.²²⁸ The practical reality is that it is very unlikely that the Respondent will be able to recruit new teachers ready to start the school year which is now upon the parties and changing the arrangements of other teachers at this late stage is now likely going to be difficult. I accept Ms Paxton’s evidence that the Timetable is the timetable that she would need to implement this week if the Applicant’s flexible working arrangement is to be implemented across the 2025 school year.

[188] The FW Act contemplates a consideration of fairness between the employer and employee before the Commission makes any orders.²²⁹ In circumstances where it is apparent that the parties have agreed, via clause 10.1 that ‘the provisions dealing with requests for flexible working arrangements will apply in accordance with the NES’ I find that fairness between the parties is something that needs to be taken into account in the current matter.

[189] If the Request is not accommodated it is my understanding that the Respondent will allow the Applicant to return to work under the arrangements in Option 3. The Applicant’s evidence was that her personal circumstances involve the management of a substantial

mortgage and other financial concerns and that the financial loss of the REC Role would have a serious impact on her and her family.²³⁰ The Applicant submits that there is a risk that she would be at a distinct disadvantage for future career advancement.²³¹ However in accommodating Option 3, the Applicant will still be able to care for her child on the days that she needs to and will still be earning around 85 percent of the income that she would otherwise have been entitled to receive if she continued on a part-time basis in the REC Role.

[190] There are other impacts that need to be considered and the most compelling reason the Respondent has put forward for refusing the Request is that in order to implement the Timetable, the teaching of subjects, other than the specialist subjects, is split by up to three teachers, including the Key Learning Areas of Mathematics and English. I have earlier accepted that there is a need for continuity of learning and teaching across these subjects and that the arrangement would likely detract from this outcome. The extent of the impact and whether it will be 'significant' is not fully known but I accept that the approach gives rise to a risk of detriment to learning outcomes and the students undertaking those subjects.

[191] I accept that there is a need for continuity of learning and teaching across the Respondent's key learning areas and that having three teachers spread across the teaching of these subjects would likely detract from this outcome, particularly as different teachers have different teaching styles and students would need to adapt to this, it may be confusing as to who is ultimately responsible for learning outcomes in the subject and who a student or parent should seek assistance from if a child encounters difficulties with the subject. I accept that three teachers would lead to a lack of continuity in teaching a child in a subject and would make it more difficult to track daily learning outcomes and make adjustments where students need them. The Respondent is not serving customers who are buying widgets. Its product is of critical value to society, being the provision of education to primary school children in the formative years of their life, and proposals that impact the School's capacity to effectively deliver education effectively and which risk detriment to student learning should not be taken lightly. Having regard to the above matters and having considered fairness between the parties I find that it would be appropriate for the grounds on which the Respondent refused the request to be taken to have been reasonable business grounds.

[192] The practical reality is that the Applicant has care arranged for her child on Wednesdays through to Friday. I understand that the Respondent is able to accommodate Option 3, including because it does not present the additional difficulties arising from additional executive release time that would see the introduction of the third teacher in the timetable teaching key learning areas. On that basis and taking into account fairness between the parties I consider it appropriate that if the Applicant does not wish to return to her role on a full-time basis in terms 1 and 2 that she be permitted to return in a classroom teacher capacity working on a 0.6 FTE basis Wednesday to Friday for terms 1 and 2 until her return to the REC Role on a full time basis in terms 3 and 4 of the 2025 school year and I make orders to that effect.



COMMISSIONER

Appearances:

Mr Aird of the Independent Education Union of Australia for the Applicant.
Mr Klepac for the Respondent.

Hearing details:

2025

28 January and 29 January at the Fair Work Commission in Sydney.

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¹ *Catholic Schools Broken Bay Enterprise Agreement 2023*, cl. 41.1 (a) and (c).

² *Catholic Schools Broken Bay Enterprise Agreement 2023*, cl. 41.2.

³ *Catholic Schools Broken Bay Enterprise Agreement 2023*, cl. 41.4.

⁴ Applicant's Statement at [2].

⁵ Applicant's Statement at [2].

⁶ Cooper Statement at [11].

⁷ Applicant's Statement at [6].

⁸ Applicant's Statement at [7].

⁹ Applicant's Statement at [8].

¹⁰ Applicant's Statement at [8].

¹¹ Applicant's Submissions at [5].

¹² Applicant's Submissions at [5].

¹³ Applicant's Submissions at [30].

¹⁴ Applicant's Submissions at [37].

¹⁵ Respondent's Submissions at [3].

¹⁶ Respondent's Submissions at [6].

¹⁷ Respondent's Submissions at [6].

¹⁸ Respondent's Submissions at [7].

¹⁹ [\[2023\] FWCFB 209](#) at [25].

²⁰ Applicant's Statement at [8].

²¹ *Fair Work Act 2009* (Cth), s.65(1A)(a)

²² Naden Statement at [8].

²³ Paxton Statement at [9].

²⁴ Transcript of proceedings 28 January 2025, PN1560.

²⁵ Applicant's Statement at [8].

²⁶ Applicant's Statement, Attachment EN2.

²⁷ Applicant's Statement, Attachment EN2.

²⁸ [\[2023\] FWCFB 209](#) at [25].

²⁹ Paxton Statement at [16].

³⁰ Applicant's Statement at [9].

³¹ Applicant's Statement at [10], [11].

³² Applicant's Statement at [10].

³³ Applicant's Statement, Attachment EN3.

³⁴ Applicant's Statement, Attachment EN3.

³⁵ Applicant's Statement at [13].

³⁶ Applicant's Statement at [13].

³⁷ Applicant's Statement at [13].

³⁸ Applicant's Statement at [13], Attachment EN-4.

³⁹ Applicant's Statement at [13].

⁴⁰ Wheeler Statement at [11].

⁴¹ Wheeler Statement at [11].

⁴² Wheeler Statement at [11].

⁴³ Applicant's Statement, Attachment EN-5.

⁴⁴ Applicant's Statement, Attachment EN-5.

⁴⁵ Applicant's Statement, Attachment EN-6.

⁴⁶ Applicant's Statement, Attachment EN-6.

⁴⁷ Applicant's Statement at [16], Attachment EN-7.

⁴⁸ Wheeler Statement at [14].

⁴⁹ Wheeler Statement at [16].

⁵⁰ Applicant's Statement at [18].

⁵¹ Wheeler Statement at [16].

⁵² Wheeler Statement at [17].

⁵³ Aird Statement at [7].

⁵⁴ Aird Statement at [8].

⁵⁵ Aird Statement at [11].

⁵⁶ Paxton Statement at [19].

⁵⁷ Paxton Statement at [19].

⁵⁸ Cooper Statement at [63].

⁵⁹ Cooper Statement at [63]

⁶⁰ Cooper Statement at [65]

⁶¹ Applicant's Statement at [18].

⁶² Attachment EN 8 to the application.

⁶³ *Fair Work Act 2009* (Cth), s.739(4).

⁶⁴ Respondent's Submissions at [6].

⁶⁵ Respondent's Submissions at [4].

⁶⁶ Applicant's Reply Submissions at [4].

⁶⁷ Applicant's Reply Submissions at [5].

⁶⁸ Applicant's Reply Submissions at [7] with reference to *Linfox Australia Pty Ltd v Transport Workers Union of Australia* [2013] FCA 659, [31]; *Hodgkinson v Fernie*[3 CB(NS) 189 at 202; *Goode v Bechtel* [1904] HCA 27; (1904) 2 CLR 121, 126

as cited with approval in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 295 ALR 596, 619.

⁶⁹ Applicant's Reply Submissions at [8].

⁷⁰ Applicant's Reply Submissions at [29].

⁷¹ [\[2023\] FWC 49](#).

⁷² [\[2023\] FWC 49](#) at [80].

⁷³ [\[2023\] FWCFB 104](#).

⁷⁴ [\[2023\] FWCFB 104](#) at [64].

⁷⁵ [\[2023\] FWCFB 104](#) at [64].

⁷⁶ [\[2023\] FWCFB 104](#) at [68].

⁷⁷ [\[2023\] FWCFB 104](#) at [70].

⁷⁸ [\[2023\] FWCFB 104](#) at [71].

⁷⁹ [\[2023\] FWCFB 104](#) at [74].

⁸⁰ [\[2023\] FWCFB 104](#) at [81].

⁸¹ [\[2023\] FWCFB 104](#) at [89].

⁸² [\[2023\] FWCFB 104](#).

⁸³ [\[2023\] FWCA 1780](#) at [5].

⁸⁴ [\[2023\] FWCFB 104](#).

⁸⁵ [\[2023\] FWCFB 104](#).

⁸⁶ Cooper Statement, Annexure SKC-3.

⁸⁷ Cooper Statement, Annexure SKC-3.

⁸⁸ *Fair Work Act 2009* (Cth), s.65A(1).

⁸⁹ *Fair Work Act 2009* (Cth), s.65A(3)(a)(i).

⁹⁰ Applicant's Reply Submissions at [33].

⁹¹ Applicant's Reply Submissions at [34].

⁹² Applicant's Reply Submissions at [37].

⁹³ Applicant's Submissions at [25].

⁹⁴ *Fair Work Act 2009* (Cth), S.65A(3)(a)(ii).

⁹⁵ Applicant's Statement at [37].

⁹⁶ Applicant's Statement at [4] – [5].

⁹⁷ Applicant's Submissions at [86].

⁹⁸ Applicant's Submissions at [25].

⁹⁹ Paxton Statement at [9].

¹⁰⁰ Paxton Statement at [10].

¹⁰¹ Paxton Statement at [12].

¹⁰² Pezzuto Statement at [1].

¹⁰³ See also Vescio Statement at [4].

¹⁰⁴ Pezzuto Statement at [2] – [3], [9].

¹⁰⁵ Pezzuto Statement at [5].

¹⁰⁶ Pezzuto Statement at [2] – [3].

¹⁰⁷ Vescio Statement at [5].

¹⁰⁸ Cooper Statement at [6] and Annexure SKC-1; Bruce Statement at [5] and Annexure MB-1.

¹⁰⁹ Cooper Statement at [6].

¹¹⁰ Cooper Statement at [6].

¹¹¹ Cooper Statement at [6].

- ¹¹² Cooper Statement at [44].
- ¹¹³ Bruce Statement at [6].
- ¹¹⁴ Bruce Statement at [7].
- ¹¹⁵ Bruce Statement at [8].
- ¹¹⁶ Bruce Statement at [10].
- ¹¹⁷ Bruce Statement at [11].
- ¹¹⁸ Bruce Statement at [12].
- ¹¹⁹ Bruce Statement at [13].
- ¹²⁰ Bruce Statement at [14] - [15].
- ¹²¹ Bruce Statement at [17].
- ¹²² Bruce Statement at [19].
- ¹²³ Cooper Statement at [4].
- ¹²⁴ Applicant's Statement at [13].
- ¹²⁵ Applicant's Statement at 13.
- ¹²⁶ Applicant's Statement at [9].
- ¹²⁷ Applicant's Statement at [10].
- ¹²⁸ Paxton Statement at [12].
- ¹²⁹ Paxton Statement at [13].
- ¹³⁰ Paxton Statement at [13].
- ¹³¹ Cooper Statement, Annexure SKC-3.
- ¹³² Paxton Statement at [13].
- ¹³³ Respondent's Submissions at [18].
- ¹³⁴ Cooper Statement at [18].
- ¹³⁵ Cooper Statement at [19].
- ¹³⁶ Cooper Statement at [20].
- ¹³⁷ Cooper statement at [21] – [28b].
- ¹³⁸ Paxton Statement at [6].
- ¹³⁹ Respondent's Submissions at [19].
- ¹⁴⁰ Paxton Statement at [23].
- ¹⁴¹ Cooper Statement, Annexure E.
- ¹⁴² Cooper Statement at [38].
- ¹⁴³ Cooper Statement at [39] – [45].
- ¹⁴⁴ Cooper Statement at [46] – [48].
- ¹⁴⁵ Cooper Statement at [49].
- ¹⁴⁶ Cooper Statement at [50] – [52].
- ¹⁴⁷ Paxton Statement at [7].
- ¹⁴⁸ Respondent's Submissions at [27].
- ¹⁴⁹ Applicant's Submission at [31].
- ¹⁵⁰ Applicant's Reply Submissions at [41].
- ¹⁵¹ Applicant's Reply Submissions at [45].
- ¹⁵² Applicant's Reply Submissions at [47].
- ¹⁵³ Applicant's Reply Submissions at [49].
- ¹⁵⁴ Applicant's Submissions at [50].
- ¹⁵⁵ Applicant's Submissions at [51].

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- ¹⁵⁶ Applicant's Submissions at [52] with reference to *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council* [\[2013\] FWC 5](#), [15].
- ¹⁵⁷ Applicant's Submission at [59].
- ¹⁵⁸ Applicant's Submission at [62].
- ¹⁵⁹ Applicant's Submission at [65].
- ¹⁶⁰ Respondent's Submissions at [22].
- ¹⁶¹ Paxton Statement at [3].
- ¹⁶² Paxton Statement at [4].
- ¹⁶³ Cooper Statement at [40].
- ¹⁶⁴ Applicant's Statement at [23].
- ¹⁶⁵ Respondent's Submissions at [21].
- ¹⁶⁶ Paxton Statement at [24].
- ¹⁶⁷ Cooper Statement at [44].
- ¹⁶⁸ Cooper Statement at [44].
- ¹⁶⁹ Cooper Statement at [44].
- ¹⁷⁰ Cooper Statement at [44].
- ¹⁷¹ Cooper Statement at [44].
- ¹⁷² Applicant's Statement at [31].
- ¹⁷³ Applicant's Statement at [32].
- ¹⁷⁴ Applicant's statement at [32].
- ¹⁷⁵ Applicant's statement at [34].
- ¹⁷⁶ Applicant's statement at [33].
- ¹⁷⁷ Applicant's Statement at [31].
- ¹⁷⁸ Applicant's Statement at [29].
- ¹⁷⁹ Applicant's statement at [35].
- ¹⁸⁰ Vescio Statement at [7].
- ¹⁸¹ Vescio Statement at [3].
- ¹⁸² Cooper Statement at [40]
- ¹⁸³ Cooper Statement at [40].
- ¹⁸⁴ Cooper Statement at [41]/
- ¹⁸⁵ Applicant's Statement at [20] – [21].
- ¹⁸⁶ Applicant's Statement at [22].
- ¹⁸⁷ Applicant's Statement at [23].
- ¹⁸⁸ Applicant's Statement at [6].
- ¹⁸⁹ Paxton Statement at [21].
- ¹⁹⁰ Paxton Statement at [21].
- ¹⁹¹ Paxton Statement at [21].
- ¹⁹² Cooper Statement at [41].
- ¹⁹³ Pezzuto Statement at [13].
- ¹⁹⁴ Applicant's Statement at [24].
- ¹⁹⁵ Cooper Statement at [47].
- ¹⁹⁶ Cooper Statement at [47].
- ¹⁹⁷ Cooper Statement at [47].
- ¹⁹⁸ Paxton statement at [25].

¹⁹⁹ Applicant's Statement at [25].

²⁰⁰ Paxton Statement at [22].

²⁰¹ Applicant's Statement at [35].

²⁰² Applicant's Statement at [35].

²⁰³ Pezzuto Statement at [7].

²⁰⁴ Applicant's Statement at [26].

²⁰⁵ Applicant's Statement at [27].

²⁰⁶ Cooper Statement at [50].

²⁰⁷ Cooper Statement at [51].

²⁰⁸ Cooper Statement at [50].

²⁰⁹ Paxton Statement at [5].

²¹⁰ Respondent's Submissions at [20].

²¹¹ Respondent's Submissions at [24].

²¹² Respondent's Submissions at [20].

²¹³ Applicant's Statement at [27].

²¹⁴ Paxton Statement at [23].

²¹⁵ Paxton Statement at [23].

²¹⁶ Fitzgibbon Statement at [10].

²¹⁷ Fitzgibbon Statement at [11].

²¹⁸ Cooper Statement at [35].

²¹⁹ Cooper Statement at [4].

²²⁰ Cooper Statement at [44].

²²¹ Cooper Statement at [47].

²²² Cooper Statement at [47].

²²³ Paxton Statement at [23].

²²⁴ Pezzuto Statement at [7].

²²⁵ See also Vescio Statement at [4].

²²⁶ Pezzuto Statement at [2] – [3], [9].

²²⁷ Pezzuto Statement at [5].

²²⁸ Transcript of Proceeding, PN1775.

²²⁹ *Fair Work Act 2009* (Cth), s. 65C.

²³⁰ Applicant's Statement at [37].

²³¹ Applicant's Submissions at [86].