DECISION

Fair Work Act 2009
s.604—Appeal of decision

Elizabeth Naden
v
Catholic Schools Broken Bay Limited as Trustee for the Catholic Schools Broken Bay Trust
(C2025/1113)

VICE PRESIDENT ASBURY
VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SLEVIN BRISBANE, 22 APRIL 2025

Appeal against decision [2025] FWC 317 of Commissioner Matheson at Sydney on 4 February 2025 in Matter No. C2024/9205 – Dispute under Catholic Schools Broken Bay Enterprise Agreement 2023 – Agreement incorporates s 65A of the Fair Work Act 2009 (Cth) – Request for flexible work arrangement by teacher upon returning from parental leave – Request refused –Failure to consider consequences of refusal for employee – Employer not entitled to refuse request under s 65A(3) of the Act – Permission to appeal granted and appeal allowed – Dispute determined.

Introduction

[1] Elizabeth Naden is a teacher at the Sacred Heart Primary School Pymble. She has been a teacher at the school since 2016. In 2023, Ms Naden was promoted to an executive role as Religious Education Coordinator (**REC role**). In 2024, Ms Naden had time off on parental leave associated with the birth of her child. She was due to return from parental leave in 2025. In preparation for her return to work, Ms Naden requested to work part time to assist in balancing her work commitments with her parental responsibilities and to accommodate the childcare arrangements she had organised. The school refused the request for Ms Naden to return to work part time unless she agreed to return only as a classroom teacher and did not return to her REC role until she returned to full-time work. Ms Naden challenged the refusal. Her union raised a dispute over the refusal which made its way to the Commission. The dispute was heard by Commissioner Matheson who decided that the refusal should stand.

[2] Ms Naden seeks permission to appeal and to appeal under s 604(1) of the *Fair Work Act 2009* (Cth) (the **Act**) against the decision of Commissioner Matheson in [2025] FWC 317 (the **Decision**). The Decision concerned the application made by Ms Naden to deal with the dispute under the dispute settlement provision in *Catholic Schools Broken Bay Enterprise Agreement 2023* (the **Agreement**) about the refusal to permit Ms Naden to return to work in accordance with a flexible work arrangement.

[3] Ms Naden's employer, Catholic Schools Broken Bay Limited as Trustee for the Catholic Schools Broken Bay Trust (the **respondent**) refused the request for a flexible work

arrangement. The request was for Ms Naden to return to work on a part time basis in term 1 of 2025 and continue in term 2. The Commissioner heard the matter on an urgent basis in late January in the days leading up to the commencement of term 1 2025. Ms Naden was not successful at first instance and sought expedition on appeal hoping to have the flexible arrangements she seeks in place for term 2.

[4] For the reasons that follow, permission to appeal is granted, the appeal allowed, and the decision of the Commissioner is quashed. We have redetermined the matter and find that the respondent was not entitled to refuse Ms Naden's request under s 65A of the Act. We resolve the dispute by determining that the respondent was not entitled to refuse Ms Naden's request and is required to implement a flexible working arrangement in accordance with Ms Naden's request for term 2 of 2025.

Background and decision under appeal

[5] The dispute was over a matter arising under the Agreement or, alternatively, the National Employment Standards (the **NES**) set out in Part 2-2 of the Act. The dispute came before the Commission as a dispute concerning compliance with clause 10 of the Agreement. It was referred to the Commission under clause 41 of the Agreement.

[6] Clause 10 of the Agreement provides:

> **10. RIGHT TO REQUEST FLEXIBLE WORKING ARRANGEMENTS**
>
> 1. The provisions dealing with requests for flexible working arrangements will apply in accordance with the NES.
> 2. Disputes about the application of the provisions of the NES will be dealt with in accordance with Clause 41 Dispute Resolution Procedure.

[7] Clause 41 of the Agreement relevantly provides:

> **41. DISPUTE RESOLUTION PROCEDURES**
>
> 41.1 In the event of a dispute about:
> (a) a matter arising under this Agreement; and/or
> (b) a matter pertaining to the relationship between an Employee and/or the Union and an Employer arising under a Work Practices Agreement as defined in clause 4 - Definitions of this Agreement ("WPA Dispute"); and/or
> (c) a matter arising under the NES;
>
> the following procedure shall be followed.
>
> STEP 1
>
> 41.2 In the first instance the parties should attempt to resolve the matter at the workplace by discussions between the Employee or Employees concerned and the relevant supervisor, where appropriate. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner through discussions between the Employee or Employees concerned and senior management (which may include senior CEO/CSO staff) as appropriate.

41.3 In addition to subclause 41.2, if the dispute is or includes a WPA Dispute, the parties should attempt to resolve the dispute through a collaborative discussion during which both parties should consider the following factors in attempting to resolve the dispute:

(a) maximising learning outcomes for students, including students with additional needs;

(b) the pastoral, safety and wellbeing needs of students and staff; and

the impact of any resolution on other Employees.

STEP 2

41.4 If a dispute is unable to be resolved at the workplace, and all appropriate steps under subclause 41.2 and, if applicable, subclause 41.3, have been taken, a party to the dispute may refer the dispute to the FWC.

41.5 The FWC may deal with the dispute in two stages:

(a) The FWC will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) If the FWC is unable to resolve the dispute at the first stage, the FWC may then, on application of either party:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

(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.)

41.6 An Employer or Employee may appoint another person, organisation or association to accompany and/or represent them for the purpose of this clause. Where the Employee appoints the Union, the Union shall be a party to the dispute.

41.7 While the dispute resolution procedure is being conducted, work must continue in accordance with this Agreement and the Act. Subject to applicable work health and safety legislation, an Employee must not unreasonably fail to comply with a direction by the Employer to perform work, whether at the same or another workplace that is safe and appropriate for the Employee to perform.

[8] The dispute is capable of being characterised in two ways. The dispute could be characterised as a dispute as described in clause 41.1(c) being a matter arising under the NES. At first instance, however, the matter was characterised as a dispute as described in clause 41.1(a), being a dispute arising under clause 10 of the Agreement. Clause 10 has the effect of incorporating the provisions of the NES dealing with flexible working arrangements as terms of the Agreement.[1] Given the manner in which the dispute was resolved, nothing turns on this distinction.

[1] As contemplated by s 55(5) of the *Fair Work Act 2009* (Cth).

[9] The relevant term of the NES conferring a right to request flexible working arrangements is found in s 65 of the Act. It reads:

> **65 Requests for flexible working arrangements**
>
> *Employee may request change in working arrangements*
>
> (1) If:
>
> (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
>
> (b) the employee would like to change his or her working arrangements because of those circumstances;
>
> then the employee may request the employer for a change in working arrangements relating to those circumstances.
>
> Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.
>
> (1A) The following are the circumstances:
>
> (aa) the employee is pregnant;
>
> (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
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> (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
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> (c) the employee has a disability;
>
> (d) the employee is 55 or older;
>
> (e) the employee is experiencing family and domestic violence;
>
> (f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing family and domestic violence.
>
> (1B) To avoid doubt, and without limiting subsection (1), an employee who:
>
> (a) is a parent, or has responsibility for the care, of a child; and
>
> (b) is returning to work after taking leave in relation to the birth or adoption of the child;
>
> may request to work part-time to assist the employee to care for the child.
>
> (2) The employee is not entitled to make the request unless:
>
> (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
>
> (b) for a casual employee—the employee:
>
> (i) is, immediately before making the request, a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and
>
> (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.
>
> (2A) For the purposes of applying paragraph (2)(a) in relation to an employee who has had their employment changed under Division 4A of Part 2-2, any period for which the employee was a regular casual employee of the employer is taken to be continuous service for the purposes of that paragraph.
>
> *Formal requirements*
>
> (3) The request must:
>
> (a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

[10] Section 65A of the Act deals with responding to requests made under s. 65. It reads:

65A Responding to requests for flexible working arrangements

Responding to the request

(1) If, under subsection 65(1), an employee requests an employer for a change in working arrangements relating to circumstances that apply to the employee, the employer must give the employee a written response to the request within 21 days.

(2) The response must:
(a) state that the employer grants the request; or
(b) if, following discussion between the employer and the employee, the employer and the employee agree to a change to the employee's working arrangements that differs from that set out in the request—set out the agreed change; or
(c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).

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

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

(4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to a change to the employee's working arrangements if the employer would have reasonable business grounds for refusing a request for the change.

Reasonable business grounds for refusing requests

(5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:
(a) that the new working arrangements requested would be too costly for the employer;
(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;
(d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
(e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

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

Employer must explain grounds for refusal

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

Genuinely trying to reach an agreement

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

[11] Put briefly, under s 65 of the Act an employee can request changes to working arrangements if they meet specified criteria, such as being pregnant, a parent or carer, having a disability, being 55 or older, experiencing family/domestic violence, or providing care to someone experiencing family/domestic violence. A request must be in writing and set out details of the change sought and the reasons for it. Under s 65A(1) and (2), the employer must respond to the request in writing within 21 days, either granting the request, proposing an alternative arrangement, or refusing the request. Under s 65A(3), the request may only be refused if the employer has discussed the request with the employee and genuinely tried to reach agreement accommodating the circumstances which gave rise to the request, there has been no agreement, the employer has had regard to the consequences of the refusal on the employee, and the refusal is on reasonable business grounds.

[12] Section 65B deals with disputes about flexible working arrangements. It applies to disputes where a request has been refused, or the employer has failed to provide a written response within 21 days of it being made. Such disputes can be referred to the Commission for resolution. The Commission must initially deal with disputes through non-arbitration methods (e.g., conciliation or mediation) unless exceptional circumstances exist. Arbitration may be used if necessary. Section 65C deals with arbitration. It provides

65C Arbitration

(1) For the purposes of paragraph 65B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:
  (a) if the employer has not given the employee a written response to the request under section 65A—an order that the employer be taken to have refused the request;
  (b) if the employer refused the request:

(i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or

(ii) an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds;

(e) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request under section 65A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 65A;

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

(i) an order that the employer grant the request; or

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

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

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

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

(a) a provision of this Act; or

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

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

(4) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.

(5) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:

(a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or

(b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

Contravening an order under subsection (1)

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

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

[13] As the dispute came to the Commission in this matter under clause 41 of the Agreement, the Commissioner was not conducting an arbitration under s 65C of the Act. Rather, the Commissioner was arbitrating a dispute referred to the Commission under clause 41.4 of the Agreement and exercising the power conferred by s 41.5(b).

[14] The dispute notification sought a determination in relation to whether the respondent complied with its obligations under the Agreement and the NES. The Commissioner set out the questions that Ms Naden sought be determined at paragraph [18] of the Decision as follows:

- "Pursuant to clause 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?"

[15] We note that the question in the first dot point related to the respondent's consultation obligations. Reference is made to clause 10 of the Agreement. Clause 10 of the Agreement creates an obligation to deal with requests for flexible working arrangements in accordance with the NES. The questions posed in the second dot point go to compliance with the NES obligations on an employer when responding to a request for flexible working arrangements, including the obligations under s 65A(1), s 65A(3)(a)(i) and (ii) and s 65A(3)(c). The question in the third dot point again refers to clause 10. Clause 10 does not in terms refer to reasonable business grounds. It incorporates the requirements of the NES including that an employer is only entitled to refuse a request for flexible working arrangements in the circumstances set out in s 65A(3). As such, the question of reasonable business grounds where an employer refuses a request for flexible working arrangements is dealt with in s 65A(3)(d). Subsections 65A(4) and s 65A(5) of the Act also deal with reasonable business grounds.

[16] Following attempts to resolve the dispute by conciliation, an arbitration was held on 28 and 29 January 2025. The arbitration was conducted on an urgent basis as Ms Naden was due to return to work in term 1 of 2025 which commenced on 31 January 2025. The parties provided witness statements prior to the arbitration. The respondent provided witness statements for four witnesses. Ms Naden provided witness statements for six witnesses, including an expert witness statement of Professor Sara Charlesworth. Professor Charlesworth's statement was filed in reply. Professor Charlesworth's statement was not received into evidence at the hearing following objections as to its relevance, it being filed late in the proceedings as evidence in reply, and it not being reply evidence[2].

[17] The Decision records the background to the dispute[3]. Put briefly, Ms Naden had been employed since 2016 as a teacher at the Sacred Heart Primary School. She commenced a period of parental leave on 31 May 2024. At the time she commenced parental leave she also held the REC role which involved a number of responsibilities in addition to her teaching role. Ms Naden was appointed to the REC role in 2023. It was regarded as an executive role within the school and carried with it additional remuneration. Ms Naden was due to return to work from parental leave at the beginning of 2025. In an email dated 21 September 2024, Ms Naden made the request for a flexible working arrangement. The request was to return to work part-time for terms 1 and 2 of the 2025 school year. Ms Naden asked to work three days per week on Wednesday, Thursday, and Friday. The request was made due to her childcare responsibilities. She proposed to return to full-time work starting in term 3 of 2025. The Decision records the Commissioner was satisfied, for the purposes of s 65, that Ms Naden was able to make the request as she is a parent of a child school age or younger (s 65(1A)(a)), had more than 12 months continuous service with the respondent (s 65(2)(a)), and the request was in writing (s 65(3)(a)). The Commissioner was thus satisfied that the request was validly made[4].

[2] At [11] and [12]
[3] At [15] to [63].
[4] At [27] – [36].

[18] The respondent had a concern about the request as it preferred not to have a teacher who had executive responsibilities working part-time. The respondent engaged with Ms Naden on a number of occasions in the latter part of 2024 over the request. The respondent proposed options for returning to work that departed from the request. No agreement had been reached. Allowing for the request having been made on Saturday 21 September, and applying s 36(2) of the *Acts Interpretation Act 1901* (Cth), a written response to the request, as required by s 65A(1), should have been provided by 14 October 2024. The Decision sets out the evidence of conversations and email correspondence between Ms Naden and the respondent about her request between 21 September 2024 and 6 December 2024. Those communications focussed on the changes the respondent was willing to make to Ms Naden's working arrangements upon her return. Essentially, the respondent was willing to allow her to return to a part-time teaching role but was not willing to allow her to also fill her executive role as the REC on a part-time basis.

[19] By December there had been no written response from the respondent meeting the requirements in s 65A(1) and (2). On 6 December 2024, the IEUA, raised a dispute with the respondent on Ms Naden's behalf under clause 41 of the Agreement alleging failures in the consultation process and the absence of reasonable business grounds for refusing the request. A meeting on 12 December 2024 failed to resolve the matter. Further correspondence resulted in a lengthy written response refusing the request on 12 December 2024. The dispute was not resolved and was referred to the Commission on 19 December 2024.

[20] After setting out the background, the Commissioner considered the approach to determining the dispute.[5] The Decision records that Ms Naden sought a determination that the respondent had failed to fulfil its obligations under s 65A in relation to her request for a flexible work arrangement. At paragraph [65], the Decision describes those obligations. The first obligation falling under s 65A(1) is that the employer must respond to a request in writing and within 21 days. The Commissioner then describes the balance of the obligations as falling into three categories either form, process or substance. At paragraph [66] the obligations are described in this way:

> "[**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)); and 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

[5] At [64] – [97].

- 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)).”

[21] The Decision then records an apparent difference between the parties as to the matter that was in dispute and the scope of the Commission's power under clause 41 of the Agreement to resolve it.[6] That difference was described as raising a question as to whether the Commission's arbitral power under the Agreement extended to what the Commissioner had described as the form and process requirements in s 65A. The IEUA's submission was that clause 41 placed no restriction on the Commission's ability to arbitrate the dispute. The respondent contended that the Commission's powers were limited by the powers set out in the Act and that the arbitration was to deal with the substance of the refusal being whether there were reasonable business reasons.

[22] Consistent with the contention that the Commission has broad powers to determine whether the respondent complied with all the obligations in s 65A of the Act, the IEUA submitted that the respondent's failures were fourfold. First, the respondent had failed to provide its written response to the request within 21 days of it being made. Second, the respondent had not genuinely consulted, as it failed to engage in meaningful discussions or explore alternatives that accommodated the request. Third, the respondent did not consider the financial and career impacts which were consequences of the refusal. Fourth, the respondent's refusal was not based on reasonable business grounds. The respondent contended that the Commission's arbitral power was limited to the powers provided in s 65C of the Act, but submitted that it had, in any event, fulfilled its “form and process” obligations and had reasonable business grounds for the refusal.

[23] The Decision makes a number of findings about the matters raised by the IEAU. The Commissioner found that it was evident the respondent had not provided its written reasons for refusing the request until 12 December 2024 which was not within the 21-day requirement in s 65A(1)[7]. The Commissioner found that during the discussions about the request the respondent put three alternative options to Ms Naden and so the respondent had met the requirements in s 65A(3)(a)[8] to discuss and genuinely try to reach agreement about making changes to Ms Naden's working arrangements to accommodate the circumstances in the request. The Commissioner noted that the refusal of the request had consequences for Ms Naden as follows:

> [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. 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. The Applicant submits that there is a risk that she would be at a distinct disadvantage for future career advancement.

[6] At [67].
[7] At [83].
[8] At [88].

[24] Significantly, the Commissioner noted that there was limited evidence that those consequences were discussed with Ms Naden, and that Ms Naden asserted that this established a failure by the respondent to comply with s 65A(3)(c).[9]

[25] The Commissioner then considered in detail the nature of the REC role and the grounds for the respondent's refusal, being the adverse impact on students, significant cost increase, adverse workload on other staff, and reduced leadership at the school[10]. The Decision records, at paragraph [191], the Commissioner's finding that the grounds on which the respondent refused the request constituted reasonable business grounds. The Commissioner also recorded, at paragraph [192], that she considered it appropriate, if Ms Naden did not wish to return to her teaching and REC role on a full-time basis in terms 1 and 2, that she be permitted to return in a teaching capacity working Wednesday to Friday for terms 1 and 2 and to return to the REC Role on a full time basis in terms 3 and 4 of the 2025 school year.

[26] We note that the Commissioner also issued a separate Order[11], intended to give effect to the Decision. No reference was made to the Order in the appeal proceedings. We note that the Order includes an error. For completeness we have considered the Order as if the word "not" did not appear in order 1 which is consistent with the obvious intent of the Decision and the way it has been treated by the parties. We will also take the appeal as also being an appeal against the Order.

Grounds of Appeal

[27] The notice of appeal contains three grounds. The first alleges that the Commissioner erred in refusing to admit the expert report of Professor Charlesworth. The second alleges that the Commissioner erred by failing to resolve the dispute concerning the respondent's failure to consult. The third alleges that the Commissioner erred by mistaking the facts and failing to take into account relevant considerations in concluding that the respondent had reasonable business grounds to refuse the request. Ms Naden contends that her appeal raises public interest considerations as it concerns a question of general application, being the correct approach in determining disputes about flexible work arrangement requests, and that the decision is affected by error.

[28] The respondent contends, in its appeal submissions, that the dispute before the Commissioner was a narrow dispute going to the question of whether it had reasonable business grounds to refuse Ms Naden's request. It submits that permission to appeal should not be granted as the public interest is not enlivened for three reasons. First, the public interest is not enlivened because the appeal will be of little utility in circumstances where the practical circumstances of the dispute are confined as term 1 has ended and term 2 will end on 27 July 2025. Second, requests for flexible working arrangements are by their nature specific to individual circumstances and the business reasons to refuse such requests will be specific to individual cases and so will not give rise to matters of general application. Third, and, in any event, the Commissioner's decision was not affected by error.

[9] At [90].
[10] At [98] to [166].
[11] PR783995.

Permission to Appeal

[29] The note at the end of clause 41.5 of the Agreement states that a decision of the Commission when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5-1 of the Act and an appeal may be made against the decision. That is so because the Commission's appeal power is found in s 604 of the Act which is within Division 3 of Part 5-1. What follows is that an appeal of a decision under clause 41 of the Agreement may, in accordance with s. 604(1), only be made with the permission of the Commission. Pursuant to s 604(2) permission must be granted if it is in the public interest to do so and may be granted by discretion in other circumstances.

[30] The task of assessing whether the public interest is met is a discretionary one involving a broad value judgment.[12] The public interest is not satisfied simply by the identification of error or a preference for a different result.[13] Considerations that may attract the public interest include that the matter raises issues of importance and general application, that the decision manifests an injustice or that the result is counterintuitive.[14]

[31] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of an appealable error.[15] However, the fact that the member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[16] Permission to appeal will rarely be granted in order to allow an appellant to argue a case on appeal which it did not raise at first instance.[17] An application for permission to appeal is not a preliminary hearing of the appeal. In determining whether to grant permission to appeal, it is unnecessary and inappropriate to conduct a detailed examination of the appeal grounds.[18] However, it is necessary to engage with the grounds to consider whether they raise an arguable case of appealable error.

[32] We do not consider that the first ground dealing with the refusal to admit the statement of Professor Charlesworth warrants permission to appeal. The Commissioner's reasons for refusing to receive the statement into evidence were that it was filed late in the proceedings and was not sufficiently directed to the particular circumstances of the dispute to be relevant. There was no error in the approach taken by the Commissioner especially in relation to the timing of the filing of the material. The proceedings had been called on quickly to address Ms Naden's

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[12] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216-217 per Mason CJ, Brennan, Dawson and Gaudron JJ: applied in *Hogan v Hinch* (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46].

[13] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343; 197 IR 266 at [24]-[27]; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/ Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review; *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 178; *NSW Bar Association v Brett McAuliffe*; *Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663; 241 IR 177 at [28].

[14] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24]-[27].

[15] *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [30].

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

[17] *Nilsen (SA) Pty Ltd v CEPU* [2016] FWCFB 3119 at [13]- [15]; *Romic v Blacktown City Council* [2020] FWCFB 6098 at [16].

[18] *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [82].

imminent return to work. The statement was filed two days before the hearing and, given its nature, had the potential to cause prejudice to the respondent. The respondent also contended that the statement was not properly reply material. The decision to receive evidence is a discretionary decision. The often-recited principles in *House v The King* apply.[19] It is not sufficient that an appeal bench disagree with the decision at first instance, error in the reasoning process must be established. We see no arguable error in the Commissioner's reasoning process in relation to the first ground and so permission is refused to pursue that ground.

[33] The third ground of appeal is directed at the Commissioner's finding concerning reasonable business grounds. This ground is advanced on three bases, that the Commissioner mistook certain facts, otherwise failed to take relevant considerations into account, and acted on a wrong principle.

[34] As to the first two bases in ground 3, that the Commissioner mistook certain facts and otherwise failed to take relevant considerations into account, the Decision carefully considers the business reasons given by the respondent in refusing the request. The evidence is set out in some detail. The submissions in support of this ground took us to the evidence and encourages us to make findings contrary to those of the Commissioner. Having closely considered those submissions, we do not consider that the Commissioner mistook the facts, took into account irrelevant material or failed to take into account relevant material. We do not believe the errors alleged in grounds 3a and 3b have been substantiated and refuse permission to appeal with respect to those grounds.

[35] We granted Ms Naden leave to amend her appeal to include a third basis in support of ground 3. The amendment asserted that the Commissioner acted on a wrong principle by applying the wrong test to the assessment of the matters raised by s 65A(5). The correct test was said to include a consideration of the object in the Act which includes promoting gender equality and the Commissioner failed to do so, and that the Commissioner found there were reasonable business grounds notwithstanding that she was unable to conclude that the feared impacts of the flexible work arrangement were either "likely" to occur or would be "significant". The respondent submits that this was not raised at first instance. Ms Naden raised the objects of the Act at first instance by submitting generally that they should be given appropriate weight. It was not put that the object in s 3 altered the test to be applied in s 65A(5) in the manner advanced on appeal or that reasonable business grounds could only be established by consequences that were both "likely" to arise and "significant". We agree that the argument raised on appeal was not put to the Commissioner and do not propose to grant permission to allow it to be argued on appeal.

[36] Counsel for Ms Naden submitted, in oral submissions on the appeal, that the question of whether there were reasonable business grounds justifying the respondent's refusal of the request was a question to which the correctness standard applies such that the appeal could be allowed if the Full Bench reached a different conclusion in relation to that question. The notice of appeal was not framed in that manner and, rather, alleged that the Commissioner was exercising a discretion which had miscarried. The respondent submitted that determination of whether reasonable business grounds existed involved the exercise of a discretion. Given the conclusion we have reached with respect to ground 2 and the manner in which ground 3 is framed in the notice of appeal, it is unnecessary for the Full Bench to determine that question.

[19] (1936) 55 CLR 499.

[37] We do grant permission to appeal in relation to the second ground of appeal. The second ground is that the Commissioner erred by failing to resolve the dispute over the Respondent's failure to consult under s 65A(3), including that it failed to take into account the consequences of its refusal for Ms Naden. For the reasons below, we are of the view that the Decision in relation to s 65A(3) is affected by error, the error was material, and it warrants correction on appeal.

Consideration

[38] The dispute before the Commissioner was a dispute pursuant to the dispute settlement procedure in the Agreement. It arose from clause 10 of the Agreement which required that requests for flexible work arrangements be dealt with in accordance with the NES.

[39] The obligation to consult over requests for flexible working arrangements is found in s 65A(3) of the Act. The subsection provides that the employer may refuse the request only if the four requirements described in paragraphs (a) to (d) of s 65A(3) are met. That is, an employer is prohibited from refusing a request unless each of those requirements is satisfied. The requirements are that the employer has held discussions with the employee and genuinely tried to reach agreement about the request for flexible working arrangements, those discussions have not resulted in agreement, the employer has had regard to the consequences of the refusal for the employee, and the refusal is on reasonable business grounds. The section commences with the words and punctuation "The employer may refuse the request only if:". This clearly indicates that all four requirements must be met. If they are not, the employer is not permitted to refuse the request.

[40] Ms Naden brought her dispute on the basis that not all of the requirements in s 65A(3) were met. In the arbitration, Ms Naden proposed that the Commissioner address a series of questions. Those questions included a general question as to whether the consultative obligations had been met. They also directed specific attention to whether the requirement in s 65A(3)(a), that discussions towards agreement occur, was met and whether the requirement in s 65A(3)(c), that the respondent has had regard to the consequences of the refusal for the employee, was met. The question of whether there were reasonable business grounds for the refusal, which is the requirement in s 65A(3)(d), was also raised[20].

[41] At paragraph [66] of the Decision, the Commissioner described the requirements in s 65A(3)(a) to (c) as *process* requirements and the requirement in s 65A(3)(d) as a *substance* requirement. Having made this distinction, the Commissioner stated at paragraph [94]:

> "[**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."

[42] It is clear that the Commissioner, faced with an urgent dispute, was seeking to get to the heart of the matter. Much of the material filed in the case was directed at the question of whether

[20] Decision at [18].

the respondent had reasonable business grounds to refuse the request. The focus of the evidence was on that issue. However, we accept Ms Naden's submission that, in simply determining the dispute over reasonable business grounds the Commissioner did not resolve important questions raised in her dispute about the failure of the respondent to meet the other requirements in s 65A(3). We consider this to be an error because a failure to meet any of the requirements in s 65A(3)(a) to (d) meant the respondent could not refuse Ms Naden's request. This point should have been addressed, and it was not.

[43] We note that the Commissioner made findings relevant to s 65A(3)(a) and (b) in any event. A finding was made that there were discussions about the request and that the respondent put options to Ms Naden in attempts to reach agreement and so the respondent had met the requirement in s 65A(3)(a)[21]. While there was no express finding in relation to s 65A(b), it is apparent that there was no agreement arising from those discussions. Consequently, the Commissioner effectively decided that on the evidence, those two requirements were met. The Commissioner's conclusion on those matters was available on the evidence and we have not reached a different view. The requirement in s 65A(3)(c), however, falls into a different category. As set out above, the Commissioner noted that the refusal of the request had adverse consequences for Ms Naden and Ms Naden's submission that the respondent had not provided her with the opportunity to put forward her concerns and so had not complied with s. 65A(3)(c). In relation to this submission, the Commissioner concluded that there was limited evidence that those consequences were discussed with Ms Naden and that the evidence given by those involved in the refusal of the request did not point to consideration of the consequences for Ms Naden of the refusal.[22]

[44] While the Commissioner noted that there was limited evidence that Ms Naden disclosed other consequences of the refusal, it was also noted that there was evidence that Ms Naden raised the financial consequences for her of the refusal and her desire to maintain the REC position. The fact that Ms Naden did not fulsomely describe the consequences of a refusal is not an answer to the requirement in s 65A(3)(c) or the prohibition on the employer refusing a request unless this requirement was met. The requirement to consider the consequences of the refusal for an employee is placed on the employer. In the present case, the employer was sufficiently aware of the consequences for Ms Naden of a refusal. In our view, the evidence establishes that the discussions which were held were about alternatives offered by the employer based on its business needs and did not include any consideration of the consequences of refusing the arrangement on Ms Naden. The Commissioner's conclusions in relation to the lack of evidence of discussions about the consequences of refusal, were in effect a finding that the requirement in s 65A(3)(c) had not been met. We consider that the Commissioner failed to appreciate the significance of that finding and failed to take it into account in resolving the dispute.

[45] Section 65A(3)(c) places a positive obligation on the employer to consider the consequences of a refusal on the employee. It is to be expected that any such consideration will be discussed in the consultations over a request and be included in the written reasons for refusal required by s 65A(1) to be given to the employee within 21 days. The written reasons for refusal in the current matter, dated 12 December 2024, some 82 days after the request was made, make no mention of the consequences for Ms Naden, and as we have indicated earlier, the evidence

[21] At [88].
[22] At [90].

recorded by the Commissioner, given by the individuals involved in the refusal of the request, did not indicate that regard was had to the consequences for Ms Naden.

[46] The respondent submitted that, during the cross examination at first instance, evidence was led that was capable of establishing that the employer did take into account the consequences of the refusal for Ms Naden. The evidence was elicited during the cross examination of a senior manager. We have reviewed that evidence and do not consider that it does. The responses were general in nature, speculative, and did not address the question of whether the consequences for Ms Naden were considered at the time the decision to refuse the request was made.

[47] The respondent, in refusing the request, was required to have regard to the consequences of a refusal for Ms Naden. Section 65A(3) operated such that the respondent was not entitled to refuse the request unless that requirement was met. The evidence did not establish that respondent had regard to those consequences when it refused the request.

[48] Further, s65A(2)(c) states that where the request for flexible working arrangements is refused, the written response must, subject to subsection (3), state that the employer refuses the request and include the matters required by subsection (6). Subsection (6)(a) requires that the written response must include the details of the reasons for the refusal. This requirement underpins the significance of the obligation placed on the employer by s 65A(3) including in subsection (c). Put simply, not only is a written response to a request required to be given within 21 days, but it is also subject to the requirement that where the request is refused, the employer must provide details of the reasons for refusal. We consider that this includes not only that it has had regard to the consequences of the refusal for the employee but how it has had regard to those matters. In the context of the significance of the right to request flexible working arrangements, the circumstances in which it can be exercised, the focus of the procedural requirements relating to genuinely trying to reach agreement, and the specification of the matters that must be taken into account, the importance of the written response required by s 65A(1) cannot be understated.

[49] In this case the written response provides no reference to the consequences of the refusal for Ms Naden or any details of how regard was had to the consequences for Ms Naden in the respondent deciding to refuse the request. We find that no detail was given because the respondent did not have regard to the consequences for Ms Naden. Consequently, the requirement in s 65A(3)(c) to consider the consequences of the refusal was not met.

[50] The significance of the finding that the requirement in s 65A(3)(c) was not met is that the respondent could not refuse the request. The Commissioner was, with respect, wrong to regard the question of whether the refusal was based on reasonable business grounds as the only matter of *substance* in the resolution of the dispute. Each of the matters in s 65A(3) must be satisfied before an employer is entitled to refuse a request for flexible work arrangements. It follows that the resolution of the dispute should be a determination that the respondent was not entitled to refuse Ms Naden's request and Ms Naden is entitled to return to work in accordance with her request for a flexible working arrangement.

[51] We were informed that Ms Naden has made a further request for a flexible working arrangement to apply in term 3 of 2025. The respondent indicated that the request had not yet been considered. We do not propose to express a view in relation to that request. The Agreement requires that the request be treated in accordance with the NES and any dispute arising from

the process may be progressed through the disputes procedure. We note that the respondent's failure to meet the statutory requirements to respond within 21 days of the 21 September 2024 request resulted in the need for an urgent hearing at first instance and an expedited hearing on appeal. We trust that the respondent will not repeat its tardiness in relation to Ms Naden's further request.

[52] Given the error we have identified, the Decision and Order should be quashed and, for the reasons set out above, resolve the dispute by determining that as the respondent did not meet all of the requirements of s 65A(3) it was not entitled to refuse Ms Naden's 21 September 2024 request for a flexible working arrangement and should not have done so. The respondent should permit Ms Naden to work in term 2 of 2025, in accordance with the flexible working arrangement requested on 21 September 2024. In quashing the decision, we note that the Commissioner heard and determined a complex dispute involving evidence from numerous witnesses and issued a considered and comprehensive decision in a very short space of time. We also note that much of the focus of the proceedings at first instance was directed to the question of whether there were reasonable business grounds for the refusal of the request, rather than to the point that has been successfully advanced in the appeal. However, Ms Naden did raise that the respondent had failed to comply with the obligations imposed by s 65A(3)(c) and that her application should be successful on that ground. She was correct to do so.

[53] We make the following orders:

1. Permission to appeal is granted;
2. The appeal is allowed;
3. The Decision and Order made on 4 February 2025 in Matter No. C2024/9205 are quashed; and
4. The Commission determines that the respondent was not entitled to refuse Ms Naden's request for a flexible working arrangement and is required to implement the flexible working arrangement for term 2 of 2025, in accordance with Ms Naden's request made on 21 September 2024.

VICE PRESIDENT

Appearances:

L Saunders, of counsel, instructed by the Independent Education Union of Australia for the appellant.
V Bulut, of counsel, instructed by Corrs Chambers Westgarth for the respondent.

Hearing details:

7 April 2025.
Sydney (in person).

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<PR786288>