



Summary of Decision

26 March 2018

4 yearly review of modern awards — Family Friendly Working Arrangements

AM2015/2

[2018] FWCFB 1692

Introduction

[1] Flexible working arrangements have been the subject of increasing attention in Australia and many other countries in recent years. A number of countries, including Australia, have introduced statutory rights for employees to request flexibility at work in an effort to assist employees to better accommodate their work and parenting/caring responsibilities. Flexibility in this context refers to ‘arrangements in which employees have some say or influence over where work is conducted (for example, telecommuting) and/or when it is conducted (for example, flexi-time) and for how long (for example, working reduced hours or part-time).’¹

[2] This decision² (the Decision) deals with a claim by the ACTU relating to ‘Family Friendly Working Hours for Parents and Carers’. The Claim is set out at [10] of the Decision.

[3] If granted, the Claim would create a new set of employee entitlements. In particular:

- an employee with parenting or caring responsibilities would have a *right to access* ‘Family Friendly Working Hours’ upon giving their employer ‘reasonable notice’; and
- an employee with parenting responsibilities who is on Family Friendly Working Hours would have a *right to revert* to their former working hours up until their child is school aged (or later by agreement); and
- an employee with caring responsibilities who is on Family Friendly Working Hours would have a *right to revert* to their former working hours for a period of two years from the date they commence their Family Friendly Working Hours (or later by agreement).

[4] ‘Family Friendly Working Hours’ is defined in the ACTU’s proposed model term to mean an employee’s existing position:

- (a) on a part-time basis if the employee’s existing position is full-time; or
- (b) on a reduced hours basis, if the employee’s existing position is part-time or casual.

[5] In the proceedings, the desirability of employers and employees reaching agreement on flexible working arrangements was generally accepted, although the framework within which such matters are discussed was contested. At the heart of this contest was the question of how much ‘say or influence’ employees should have in the determination of their working arrangements.

[6] The parties confirmed their general agreement on a range of contextual matters which informed the Full Bench’s findings. A copy of the agreed matters is set out at Attachment F to the Decision.

Submissions

[7] ACCI and Ai Group submitted that the Claim cannot be included in a modern award as it excludes part of the National Employment Standards (NES), contrary to s.55(1) of the *Fair Work Act 2009* (Cth) (the Act). ACCI and Ai Group also opposed the ACTU’s contention that the Claim is a term that supplements the NES within the meaning of s.55(4)(b). The jurisdictional objection is dealt with in Chapter 3 of the Decision. The Full Bench decided that it was not necessary to reach a concluded view on the question of jurisdiction given that it had decided to reject the Claim on its merits.

[8] The merit submissions for and against the Claim are set out in Chapter 4 of the Decision. In essence, the ACTU contended that the existing regulation of family friendly working arrangements is inadequate and is failing to assist employees to balance their work and family responsibilities. It submitted that access to flexible working arrangements that meet the needs of employees will improve the nature and quality of labour force participation for parents and carers.

[9] As to the existing regulatory arrangements, the ACTU submitted that there is a ‘gap’ in the safety net regarding flexible working arrangements because the ‘right to request’ in s.65 of the Act does not provide employees with an enforceable right. An employer’s decision to refuse a s.65 request is not subject to review or appeal.

[10] The Employer parties³ opposed the Claim and contended that s.65 provides a suitable framework for dealing with requests for flexible working arrangements. They submitted that the Claim is fundamentally unfair and unworkable in that it does not provide employers with a capacity to refuse a request for flexible working hours. As ACCI put it, to grant the Claim would be to fundamentally alter the paradigm under which an employer operates a business.

The Evidence

[11] The evidence advanced by the respective parties is canvassed in Chapter 5 of the Decision. Chapter 5.1 focuses on evidence about trends in the labour market - particularly in relation to female labour force participation, including comparing the outcomes for those with and without children. The Full Bench draws the following general propositions from the data in Chapter 5.1:

1. Female labour force participation is generally lower than males and this is the case across the working age population.
2. The data show a clear increase in the share of employment working part-time hours over the last few decades. This has also occurred across the working age population. Part-time employment is more common among females, however, growth in part-time employment has been stronger among males since at least the beginning of the century.

3. Caring for children is the most common reason for working part-time, together with studying and a preference for part-time work. Caring for children is the most common reason for females aged 25 to 44 years, in contrast to studying for younger people (15 to 24 years) and part-time hours being preferred for people aged 45 years and above.
4. The HILDA Survey shows that employment rates and the average number of hours worked are higher among females without dependent children, but the differences between the average hours worked by females with and without dependent children has narrowed over time.
5. New mothers are more likely to remain out of paid work than all women and are more likely to move from full-time work to either part-time work or out of paid work. Part-time employment becomes more common among women once their children become older, however, so does staying out of employment. In contrast, men are more likely to remain employed full-time whether or not they have children.
6. Women who transition from full-time to part-time work are also more likely to move to an occupation with a lower skill level than a higher skill level, particularly if they change employers. However, it is most common to have no change in occupational skill status.
7. Casual employment has remained relatively stable since the beginning of the century but is more common among part-time workers, particularly male part-time workers. Females who moved from full-time to part-time work were more likely to change from permanent to casual employment, however, it was most common to stay permanent for those who remained with the same employer and to stay casual for those who changed employers.
8. The data also showed that females, on average, tend to have lower lifetime earnings, with some of the above general propositions likely to contribute to this outcome.

[12] The survey evidence is dealt with in Chapter 5.2 and the witness evidence is dealt with in Chapter 5.3. A list of the witnesses in the proceeding is at Attachment D to the Decision.

[13] In Chapter 5.4 the Full Bench sets out further findings based on the evidence and material before it:

1. The accommodation of work and family responsibilities through the provision of flexible working arrangements can provide benefits to both employees and their employers.
2. Access to flexible working arrangements enhances employee well-being and work-life balance, as well as positively assisting in reducing labour turnover and absenteeism.
3. Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable child care.
4. Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation.
5. The most common reason for requesting flexible working arrangements is to care for a child or children; another significant group seek flexible working arrangements to care for disabled family members or elders.
6. The majority of employees who request flexible working arrangements seek a reduction in working hours. Parents (predominantly women) seek part-time work to manage parenting and caring responsibilities. The next most common type of flexibility sought is a change in start/finish times and a change in days worked.
7. There are strong gendered patterns around the rate of requesting and the kinds of alterations sought. Women make most of the requests for flexible work. Women do most

of the unpaid care work and seek to adapt their paid work primarily by working part-time.

8. About one in five Australian workers requests flexible working arrangements each year. Only a small proportion of all such requests are made pursuant to s.65 of the Act (about 3 to 4 percent of employees have made a s.65 request).
9. There has been an increase in awareness of the s.65 right to request over time, from 30 per cent in 2012 to over 40 per cent in 2014, with a similar rate of awareness between men and women. Despite this, there has been little change in the proportion of employees who request flexible working arrangements since the introduction of s.65.
10. The utilisation of individual flexibility arrangements (IFAs) for family-friendly work arrangements is very low. Only about 2 per cent of employees report having an IFA with their employer. About 60 per cent of employees who have initiated an IFA did so in order to seek flexibility to better manage non-work commitments.
11. The vast majority of requests for flexible working arrangements (both informal and those made pursuant to s.65) are approved in full, some requests are approved with amendments and small a proportion (about 10 per cent) are rejected outright.
12. Workplace culture and norms can play an important role in the treatment of requests for flexible working arrangements. Individual supervisor attitudes can be powerful barriers and enablers of flexibility.
13. Some employees change jobs or exit the labour force because they are unable to obtain suitable flexibility in their working arrangements.
14. A significant proportion of employees are not happy with their working arrangements but do not make a request for change (a group referred to as 'discontented non-requestors'), for various reasons including that their work environment is openly hostile to flexibility. Men are more likely to be 'discontented non-requestors' than women.
15. A lack of access to working arrangements that meet employees' needs is associated with substantially higher work-life interference (as measured by the AWALI work-life index). This is so whether a request is made and refused, or whether the employee is a discontented non-requestor.
16. The fact that a significant proportion of employees are discontented non-requestors suggests that there is a significant *unmet* employee need for flexible working arrangements.
17. The granting (in whole or in part) or refusal of employee requests for flexible working arrangements largely depends on the context in which the request is made, including the nature and size of the business and the role of the employee.
18. The main reasons given for refusing an employee's flexibility request are operational grounds, including the difficulty of finding another person to take up the time vacated by an employee moving to part-time work.
19. Employee requests for flexible working arrangements, specifically those seeking a reduction in hours, may require substitution of that employee. Depending on the nature of the business and the employee's role, the accommodation of flexible working requests which require the substitution of an employee may be difficult or impractical for a variety of reasons.
20. A modern award term which provides employees with parenting or caring responsibilities with the right to work on a part-time or reduced hours basis without their employer having the right to refuse or modify the employee's decision, would be likely to have adverse consequences for a significant proportion of businesses.

[14] As mentioned earlier, if granted, the Claim would create a new set of employee entitlements. The Full Bench noted that:

'[398] In short, the Claim would provide an employee, with parenting or caring responsibilities the right to work on a part-time or reduced hours basis, subject only to

giving their employer ‘reasonable notice’. Importantly, unlike the right to request under s.65 of the Act, an employer would not be able to refuse an employee’s proposed FFWH [Family Friendly Working Hours] on reasonable business grounds (or indeed on any grounds at all).’

[15] The Full Bench observed that there was considerable merit in the respective positions put by the ACTU and the Employer parties.

[16] The Full Bench accepted, as the ACTU contended, that s.65 lacks an effective enforcement or appeal mechanism, noting that the right to request in s.65 has been characterised as a ‘soft’ regulatory approach, insofar as the employee is denied any effective means of challenging the employer’s refusal to grant their request.

[17] The Full Bench also observed that there was considerable merit in the Employer parties’ submissions in opposition to the Claim, noting that, if granted, the Claim would ‘fundamentally alter the employment relationship. In effectively removing the ability of businesses to determine how to roster labour, the Claim plainly has the potential to have a substantial adverse impact on businesses.’ The Full Bench said:

‘[410] The Joint Employer Survey responses and the Employer parties’ lay witness evidence speak to the potential adverse impact on businesses were the Claim to be granted. For example, if employees were able to determine when and for how long they worked, how would an employer efficiently manage a dairy farm – such as that operated by Ms Platt – where the demand for labour is determined by when the cows have to be milked?’

[18] The Full Bench decided to reject the Claim and in doing so agreed with ACCI’s submission that:

‘No coherent understanding of a fair and relevant minimum safety net could confer on an employee a unilateral right to determine their hours, regardless of the operational considerations of the employer.’⁴

[19] However, the Full Bench went on to state that the rejection of the ACTU’s Claim did not conclude the matter. The Claim was made in the context of the 4 yearly review of modern awards. The review is conducted on the Commission’s own motion, is not dependent upon an application by an interested party, and the Commission is not constrained by the terms of a particular application.⁵

[20] The Full Bench noted that there is general acknowledgment of the benefits to the Australian economy of increased labour force participation by parents and carers (predominately women) and that one way of increasing labour force participation is to facilitate family friendly working arrangements. The Full Bench said:

‘[418] . . . Supporting and enabling women to increase their employment participation is a significant public policy issue in Australia, given the aging of our population.’

[21] The Full Bench reached the *provisional* view that the modern award minimum safety net should be varied to incorporate a model term to facilitate flexible working arrangements for parents and carers.

[22] The *provisional* model term proposed by the Full Bench is set out at **Attachment 1** to this Summary.

[23] The *provisional* model term would supplement the NES in the following ways:

- The group of employees eligible to request a change in working arrangements relating to parental or caring responsibilities, will be expanded to include ongoing and casual employees with at least six months' service but less than 12 months' service.
- Before refusing an employee's request, the employer will be required to seek to confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances.
- If the employer refuses the request, the employer's written response to the request will be required to include a more comprehensive explanation of the reasons for the refusal. The written response will also be required to include the details of any change in working arrangements that was agreed when the employer and employee conferred, or, if no change was agreed, the details of any changes in working arrangements that the employer can offer to the employee.
- A note will draw attention to the Commission's (limited) capacity to deal with disputes.

[24] The Full Bench expressed the *provisional* view that the provisional model term is a term about 'the facilitation of flexible work arrangements, particularly for employees with family responsibilities' and does not contravene s.55, so that it is a term permitted under s.136.

[25] The Full Bench proposes to provide interested parties with an opportunity to make submissions on the following issues:

- (i) The terms of the provisional model term.
- (ii) Whether such a model term is permitted under s.136, and in particular, whether it contravenes s.55.
- (iii) Whether the inclusion of the provisional model term in modern awards will result in modern awards that only include terms to the extent necessary to achieve the modern awards objective.

Next Steps

[26] This matter will be listed for mention at **10:00am on Tuesday 1 May 2018 in Sydney**. The purpose of the mention is to provide interested parties with an opportunity to make submissions about the directions to be made for the filing of further submissions, and the further hearing, of this matter.

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

- ENDS -

¹ Skinner N, Cathcart A & Pocock B (2016), 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters', *Labour and Industry*, Vol. 26, No. 2, p.103

² [2018] FWCFB 1692

³ Australian Chamber of Commerce and Industry, Australian Industry Group, National Retail Association, Private Hospital Industry Employer Associations, Coal Mining Industry Employer Group and National Farmers' Federation

⁴ [ACCI final submissions](#), 19 December 2017 at [1.11]

⁵ *4 Yearly Review of Modern Awards – Annual Leave* [2016] FWCFB 3177 at [135] - [140]

Provisional Model Term

X Requests for flexible working arrangements

NOTE: Clause X provides for certain employees to request a change in working arrangements because of their circumstances as parents or carers. Clause X is additional to the provision to request a change in working arrangements in section 65 of the Act.

Employee may request change in working arrangements

- X.1** An employee may request the employer for a change in working arrangements relating to the employee's circumstances as a parent or carer if:
- (a) any of the circumstances referred to in clause X.2 apply to the employee; and
 - (b) the employee would like to change their working arrangements because of those circumstances; and
 - (c) the employee has completed the minimum employment period referred to in clause X.3.

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

- X.2** For the purposes of clause X.1 the circumstances are:
- (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger; or
 - (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*).
- X.3** For the purposes of clause X.1 the minimum employment period is:
- (a) for an employee other than a casual employee—the employee has completed at least 6 months of continuous service with the employer immediately before making the request; or
 - (b) for a casual employee—the employee:
 - (i) has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months immediately before making the request; and
 - (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.
- X.4** To avoid doubt, and without limiting clause X.1, an employee may request to work part-time to assist the employee to care for a child if the employee:
- (a) is a parent, or has responsibility for the care, of the child; and
 - (b) is returning to work after taking leave in relation to the birth or adoption of the child.

Formal requirements for the request

- X.5** The request must:
- (a) be in writing; and
 - (b) state that the request is made under this award; and
 - (c) set out details of the change sought and of the reasons for the change.

Responding to the request

- X.6** The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.
- X.7** The employer may refuse the request only on reasonable business grounds.
- X.8** Without limiting what are reasonable business grounds for the purposes of clause X.7, reasonable business grounds include the following:
- (a) that the new working arrangements requested by the employee 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 by the employee;
 - (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 by the employee;
 - (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

- (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

X.9 Before refusing a request, the employer must seek to confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:

- (a) the nature of the employee's responsibilities as a parent or carer; and
- (b) the consequences for the employee if changes in working arrangements are not made; and
- (c) any reasonable business grounds for refusing the request.

What the written response must include if the employer refuses the request

X.10 Clause X.10 applies if the employer refuses the request.

- (a) The written response under clause X.6 must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.
- (b) If the employer and employee agreed on a change in working arrangements under clause X.9, the written response under clause X.6 must set out the agreed change in working arrangements.
- (c) If the employer and employee could not agree on a change in working arrangements under clause X.9, the written response under clause X.6 must:
 - (i) state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's responsibilities as a parent or carer; and
 - (ii) if the employer can offer the employee such changes in working arrangements, set out those changes to working arrangements.

Dispute resolution

X.11 The Commission cannot deal with a dispute to the extent that it is about whether the employer had reasonable business grounds to refuse a request under clause X, unless the employer and employee have agreed in writing to the Commission dealing with the matter.

NOTE: Disputes about whether the employer has conferred with the employee and responded to the request in the way required by clause X, can be dealt with under clause Y—Consultation and Dispute Resolution.