Flexible Working Arrangements

This document has been created to provide Clubs with a summary of flexible working arrangements. Please note that this is not an exhaustive list of everything that may apply to flexible working arrangements.

What are flexible working arrangements?

A flexible working arrangement is where an agreement is made between an employer and an employee to change standard working arrangements in order to accommodate an employee's special circumstances.

Examples of flexible working arrangements can include:

- Changing hours of work e.g. change of start and finish times
- Changing patterns of work e.g. working split shifts instead of a continuous shift
- Changing the place of work e.g. being able to work from home

A flexible working arrangement can be ongoing or it can be a one-off instance.

Who can make a request?

A permanent employee who has been working for the same employer for at least 12 months can make a request for flexible working arrangements. In addition they must meet one of the following circumstances as set out section 65 of the *Fair Work Act* (Cth) (**the Act**):

- the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
- the employee is a carer (with carer given the definition under the *Carer's Recognition Act 2010* which can be found here);
- the employee has a disability;
- the employee is 55 or older;
- employees who are pregnant;
- the employee or a member of their immediate family or household is experiencing family and domestic violence; or
- 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 violence from the member's family.

Casual employees not only have to fall into one of the above categories but must also have been working on a regular and systematic basis with their employer for at least 12 months and have a reasonable expectation of continuing work on this basis.

Making a request

If an employee wishes to make a request for flexible working arrangements then the Act requires them to do so in writing.

If an employee verbally makes a request for flexible working arrangements then a Club should send them something in writing acknowledging their request, but ask that they specify it in writing. An employer should also check whether the employee falls into a category entitling them to make a request.

The request from the employee must specify what changes they are seeking and the reasons for the requested changes.

Responding to a request

Once a request for flexible working arrangements has been received, an employer has 21 days in which they must respond in writing.

Before responding in writing however, under the *Fair Work Act 2009* (Cth) & the *Registered and Licensed Clubs Award 2020* (**Clubs Award**) clause 6.2, an employer must discus the request with the employee and genuinely try to reach an agreement on a change in working arrangements that will reasonably accommodate their circumstances (including considering alternative arrangements to what was requested by the employee).

When looking to accommodate their circumstances an employer needs to have regard to:

- the needs of the employee arising from their circumstances;
- the consequences for the employee if changes in working arrangements are not made; and
- any reasonable business grounds for refusing the request (discussed further in the refusing a request section).

Accepting a request

If after discussions the employer agrees to the employees request then they need to put something in writing to the employee stating that the agreement has been accepted and how long this will be for. Clubs who agree to a request may wish to have a trial period in order to assess if it is indeed workable (e.g. a few months) and then if it is it can be extended to a longer period. Any trial period should be reasonable and of a length where the workability of the arrangement can be assessed.

If after the trial period the arrangement is working with little or no detriment to the Club then it should be extended unless there is genuinely something that will change in the future that will make it unworkable.

Clubs can also consider including a review or review dates in which both parties can come together to generally discuss how they are finding the arrangement.

During the duration of the flexible working arrangement, an employer should keep note of how the employee is faring and if there has been an unreasonable drop in performance as a result of this change then take any performance management required.

Refusing a request

An employer can only refuse a request where there are reasonable business grounds to do so. In terms of what constitutes reasonable business grounds, section 65(5A) of the Act provides the following examples:

- the requested arrangements are too costly;
- there is no capacity to change other employees working arrangements to accommodate the flexible arrangements requested;
- it's impractical to change other employees' working arrangements or hire new employees to accommodate the request made;
- the request would result in a significant loss of productivity; and
- the request would have a significant negative impact on customer service.

Should the employer refuse a request then as well as meeting the consultation requirements discussed earlier they must also communicate this refusal in writing within 21 days and the refusal must include:

- an explanation of the reasons for the refusal, including on what grounds;
- how the ground or grounds for refusal apply to the request;
- any other changes the employer is willing to make to accommodate their request or if there aren't any that can be offered; and
- that they have the right to refer a dispute on flexible working arrangements to the Fair Work Commission (FWC).

Different change in working arrangements agreed to

If both parties meet and agree to make changes to the employee's working arrangements that are different to what was initially requested then this needs to be detailed in writing within 21 days of the initial request being made. The specifics of what the alternate agreement is should be specified and both parties should sign this to acknowledge that this is a true reflection of what was discussed and agreed to.

Ending flexible working arrangements

When either party is looking to end a flexible working arrangement the primary way this can be done is by both parties mutually agreeing to its end in writing.

Where an employer wants to end an arrangement but an employee does not mutually agree to this or the specified end date has not been reached, it may still be possible to end an arrangement but caution must be exercised. Any decision to end the arrangement must be done reasonably and with sufficient business grounds and not be done in a manner that will be harsh, unjust or unreasonable.

An example of a case where an employer was found to be justified in ending a long standing flexible working arrangement was *CFEMU (New South Wales Branch) v South Western Sydney Local Health District* [2016]. In this case the arrangement was one that had been in place for 8 years and allowed two painters to start and end work an hour earlier in order to collect their primary school aged children. The employer however, advised the two that they would be ending the arrangement and would revert back to normal hours. Initially

they were given 4 weeks' notice but this was extended to 12 months so that they could organise alternate arrangements.

The employee's union representatives argued it was unreasonable for the arrangement to be ended due to its longstanding nature and that it should have at least run until their children were no longer at primary school. The court however, ruled that it was valid to end the arrangement, on the basis of legitimate business grounds. The employer had put them back to regular working hours to improve efficiency, increase organisation and as the Hospital was one of the busiest in NSW. The fact they were given initially 4 weeks, consulted with and then had this extended to 12 months also led to the Court holding it was reasonable as a lengthy period of time was given for them to make other arrangements.

Where an employer is seeking to end a flexible working arrangement without the employees agreement it must only be done where sufficient grounds exist for this, it will not result in something that is unfair, unjust or harsh. As much notice as possible should also be provided so that the employee can adequately prepare for the change. The stronger the legitimate business ground and the more notice that is given the more likely any termination of flexible working arrangements will be viewed as valid.

Where a flexible arrangement has a set time and is not renewed then this could also result in its end, however, the same principles above should be followed, that is it should only end and not be renewed if there are legitimate business reasons for doing so. An employer should also notify the employee ASAP that the arrangement won't be being extended beyond its specified end date so that sufficient notice is given.

Dealing with Disputes

Where a dispute arises in relation to a request the matter should firstly be dealt with under the relevant modern awards dispute resolution clause, which for the Clubs Award is clause 34.

The matter should firstly be discussed with the employee/s and their relevant supervisor and should that not be successful then with more senior management with both discussions occurring in a timely manner.

Should internal means fail then the FWC has the power to deal with disputes over flexible working arrangements. Initially any dispute brought to the FWC will need to be conciliated or mediated where with the assistance of the FWC the parties will see if they can reach a satisfactory agreement.

If no agreement can be reached during conciliation or mediation then the FWC will be able to arbitrate the dispute which will result in a binding decision being reached.