

Ruth Cully v Commonwealth of Australia
(represented by the Australian National Audit Office) [2022] FWC 495 (7 April 2022)

Is it reasonable to expect all employees to follow lawful employer instructions to return to the office? The Fair Work Commission (FWC) decision of *Ruth Cully v Commonwealth of Australia* (represented by the Australian National Audit Office) [2022] FWC 495 (7 April 2022) (*Ruth Cully*) confirms that it depends on the employee's circumstances. This case provides a practical reminder of the importance of employer instructions being both lawful and reasonable in the context of each employee.

Background

Ruth Cully concerned the dismissal of Ms. Cully, a 64-year-old part-time auditor, by the Australian National Audit Office (ANAO). Ms. Cully had been employed by the ANAO for over 20 years and employed as a Commonwealth public servant for 33 years.

Ms. Cully was at an increased risk of complications from COVID-19, which was supported by a medical certificate. Accordingly, Ms. Cully sought approval to work from home (WFH) for a number of periods starting 16 March 2020 and ending with a request for further approval to WFH for a six-month period from 30 July 2020 to 30 January 2021, due to her own health risks and her role as a carer for her elderly uncle in Woolgoolga in regional New South Wales.

Based on alleged performance and attendance issues, the ANAO revoked Ms. Cully's WFH arrangement on 15 September 2020 and stated that Ms. Cully was expected to be back to work in the ANAO's office in Canberra on 29 September 2020.

Ms. Cully's subsequent applications for personal leave and access to long service leave to care for her uncle were denied on the basis that Ms. Cully was not caring for an "immediate family member" and that Woolgoolga was not Ms. Cully's principal place of residence. After failing to return to the office in February 2021 as directed, the ANAO conducted an investigation and found Ms. Cully in breach of the Code of Conduct.

Termination of Employment

Ms. Cully's employment with the ANAO was terminated on 2 June 2021 due to non-performance of duties, despite the fact that by that date she had returned to the office for a period of six weeks.

The ANAO argued its reasons for termination were two-fold:

- Ms. Cully took two periods of unauthorised leave between 18 November 2020 to 17 March 2021 and 6 to 21 April 2021 and failed to provide a reasonable explanation for the absences
- Ms. Cully refused to follow lawful and reasonable directions to return to work in the Canberra office in February 2021

FWC Decision

Ms. Cully made an unfair dismissal application to the FWC and on 7 April 2022, Deputy President Dean found in favour of Ms. Cully on the basis that there was no valid reason for her dismissal.

While Deputy President Dean found the ANAO's directions to return to work in the office were lawful, he found that the ANAO's instructions to return to the office in Ms. Cully's context were unreasonable.

Deputy President Dean found:

- Ms. Cully satisfied the definition of a carer under the Fair Work Act 2009 (Cth) (FW Act) since there was evidence she was residing in Woolgoolga with her uncle at the relevant time and that she advised the ANAO of this. The fact that Ms. Cully resided at two residences throughout this period was immaterial.
- The ANAO was provided with medical certificates confirming Ms. Cully's medical advice to WFH, entitling Ms. Cully to request and be granted flexible working arrangements to WFH.
- The ANAO never raised formal complaints regarding Ms. Cully's performance issues with Ms. Cully. Ms. Cully had an unblemished working record in 30 years of working as a public servant. There was also a lack of evidence to suggest an irreparable breakdown of the employer-employee relationship.

Deputy President Dean further noted that even if the directions to return to the office were reasonable, the dismissal of Ms. Cully would remain unfair given that Ms. Cully returned to the office to perform her duties for six weeks prior to the dismissal.

The FWC ordered the reinstatement of Ms. Cully and compensation for lost pay.

Key Reminders and Tips for Employers

The decision of the FWC acts as a clear reminder to employers to consider whether their instructions are both lawful and reasonable in the context of the specific circumstances unique to each employee.

As a result of *Ruth Cully*, employers are strongly encouraged to:

- Consider each individual employee's circumstances when withdrawing or adjusting WFH arrangements
- Avoid introducing inflexible directions or policies that do not account for individual circumstances
- Seek legal advice before terminating an employee's employment for failure to return to the office

Should you require any further advice regarding an adjustment of WFH policies or directions to employees, please get in touch with our Labour & Employment team.

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