

## Article Information

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# Lawful but unreasonable refusal to work from home - A matter of life and death?

***On 7 April 2022, the Fair Work Commission handed down a decision [1] against the Australian National Audit Office ('ANAO') for unfair dismissal. The ANAO revoked permission for a veteran public servant to work from home, despite being at an "increased risk" from COVID-19 and caring for her dying uncle at their second residence, then terminated her employment after she had returned to the office for 6 weeks.***

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### Circumstances of the Case

The Fair Work Commission found that the dismissal of 64-year old public servant at an "increased risk" from COVID-19 and the next of kin designated to care for her terminally-ill uncle, was unfair. Ms Cully, an employee of the ANAO for 22 years, and a Commonwealth public servant for 33 years, was dismissed for non-performance of duties under the Commonwealth Public Service Act.

The ANAO had approved Ms Cully's application to work from home until the end of 2020, after she provided a medical certificate declaring her "at an increased risk of complications from COVID-19," and so she could care for her terminally-ill uncle at their house in Woolgoolga - 850 kilometres away from the office based in Canberra. ANAO approved the arrangement so long as performance was maintained, and that she attend in person for fieldwork and meetings as required, and participate in a monthly review.

In September 2020, the ANAO unilaterally revoked approval, based on "continued applications for leave and resulting lack of work output," and stating that it had no "audit work available that would be appropriate [at her level] that can be completed entirely remotely."

The ANAO told Ms Cully that she had exhausted all other forms of leave, and that the extended periods of leave had inhibited her from fulfilling the requirements of her role to the appropriate standard.

Ms Cully was directed to return to work in Canberra in October 2020, notwithstanding her own medical advice suggesting otherwise.

Her uncle was referred to in-home palliative care in November 2020. She told ANAO he was catheterised, unable to walk, and confined to a bed. Ms Cully again applied for leave, but ANAO rejected it claiming that he was not an immediate family member within the meaning of the Fair Work Act provisions relating to personal/carer's leave. She did not attend work, and ultimately ANAO issued a direction, which they argued was lawful and reasonable, for Ms Cully to return to the Canberra offices.

Ms Cully provided a medical certificate specifying she take leave until 28 February 2021. She then requested work be allocated to her that she would complete remotely to continue caring for her uncle. ANAO issued a second direction that she return to the office, before issuing a Notice of Intention to terminate her employment due to non-performance of duties.

Ms Cully returned to the office on 27 March 2021. She applied for long service leave which was rejected. She continued to work at the office. Ms Cully's uncle passed away on 7 April 2021, and her employment was terminated on 2 June 2021.

### Decision and reasoning

Deputy President Dean found that there was no valid reason for Ms Cully's dismissal. ANAO was clear that their reason for dismissal was the non-performance of her duties rather than unsatisfactory performance.

The Commission concluded that the directions for Ms Cully to return to the office were lawful, but unreasonable, due to the unique circumstances.

ANAO's disregard for Ms Cully's situation, including her elevated risk from COVID and caring responsibilities for a member of her household who had been sent home in her care, were highlighted during cross-examination of ANAO management. Ms Cully, who represented herself, asked the director if a direction could ever be lawful and reasonable "if there is a material risk that it results in death - in the suffering and/or death of a human being?" The director responded "potentially, yes," and that it could be a consequence "because life isn't fair and sometimes bad things happen."

ANAO's view that Ms Cully was not a carer because her uncle was not a member of her household or immediate family was rejected. There was clear evidence that Ms Cully had been residing with her uncle since 2016, and that ANAO had been advised of her residence at the Woolgoolga home since the beginning of 2020. Deputy President Dean observed that there was no evidence an ANAO employee could not have two residences.

Medical certificates provided showed that Ms Cully had responsibility for her uncle's care when he was not in hospital, because she was his next of kin. Deputy President Dean said that ANAO was only able to decline the request for flexible working arrangements on reasonable business grounds, which did not exist in the circumstances.

Further, Deputy President Dean stated that if the directions were in fact reasonable, the dismissal was nonetheless unfair because Ms Cully had returned to the office and had been performing her duties for more than six weeks in the office as directed by ANAO.

Ms Cully was reinstated, and ANAO was ordered to restore any lost pay.

### **Key Takeaways**

This case is quite unique, and provides some useful guidance for employers, particularly that employers must give consideration to the broader circumstances impacting upon individual employees, rather than applying directions entirely inflexibly.

Deputy President Dean noted that ordinarily, a failure to follow an employer's direction to attend the workplace *would* be a valid reason for dismissal, but Ms Cully's circumstances were unique. The unfairness in this case was compounded by the fact that the ANAO appeared to completely disregard the difficult circumstances Ms Cully was facing. Ms Cully was entitled under the *Fair Work Act* to request flexible working arrangements, which could only be declined on reasonable business grounds.

This case serves as a reminder for employers that what is reasonable will depend very much on the individual circumstances. Where the underlying facts differ, and the reason for wishing to continue to work from home not so compelling, the outcome could have been very different.

Making arrangements for staff to start to return to working from the office can be fraught with difficulty, and where issues arise, specific advice is necessary. The Employment Relations team at Piper Alderman can assist your organisation to manage the transition back to a more structured working environment.

[\[1\]](#) *Ruth Cully v Commonwealth of Australia (represented by the Australian National Audit Office)* [2022] FWC 495.