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Jalan Srijaya Negara, Palembang, South Sumatra 30139, Indonesia.
Phone: +62711-580063Fax: +62711-581179
Email: sriwijayalawreview@unsri.ac.id| sriwijayalawreview@gmail.com
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Regulating Work from Home to Promote Work-Life Balance: A Comparative Legal Review of Malaysia, the UK and Australia

Ruzita Azmi[a*], Zurina Adnan[a], Rosmawani Che Hashim[b], Siti Nur Samawati Ahmad[c]

[a*] *Universiti Utara Malaysia Kuala Lumpur Campus, Kuala Lumpur/Associate Fellow, Legal and Justice Research Centre, School of Law, Universiti Utara Malaysia, Malaysia. Corresponding author Ruzita Azmi. E-mail: zita@uum.edu.my; rina@uum.edu.my*

[b] *Faculty of Business and Economics, Department of Management and Marketing, University Malaya Kuala Lumpur, Malaysia. E-mail: wanie285@um.edu.my*

[c] *Kolej Profesional MARA Beranang, Selangor, Malaysia. E-mail: samawati.ahmad@mara.gov.my*

Article

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Abstract

The traditional office-based model of employment has undergone a significant transformation as flexible working arrangements (FWAs) and remote work have become increasingly prevalent. This development has been influenced by technological progress and evolving societal expectations regarding work-life balance (WLB). In many Commonwealth countries, such as Malaysia, the COVID-19 pandemic catalysed the widespread adoption of flexible and remote work arrangements. As lockdowns and social distancing measures forced businesses to adapt, many organisations discovered the viability and effectiveness of remote work, particularly working from home (WFH). This paper aims to examine the legal framework and policies or best practices in Malaysia that promote WLB and facilitate WFH options, and to compare these policies or best practices and legal frameworks with those in developed commonwealth countries such as the UK and Australia. This paper applies doctrinal research and comparative methods. The doctrinal or library research comes from textbooks, reports and articles from law and non-law journals and reviews. Doctrinal research aims to understand the principles of law and policies dealing with FWA and WFH options. A comparative study will be employed to examine similarities and differences across situations within the same commonwealth legal system. The paper concludes that, to promote WLB and facilitate the WFH option through FWA, a comprehensive legal framework and effective policies are required, especially in Malaysia.

INTRODUCTION

Flexible working arrangements, or FWAs, give employees some flexibility in where, when, and how they work. FWAs have long been implemented in developed countries, and their use is

growing in developing countries as they adopt more flexible work practices.[1] Numerous benefits are associated with FWAs, such as increased worker productivity, maintaining the talent pool through effective hiring and retention, and improving workers' well-being by encouraging work-life balance (WLB).[2] Because FWAs can improve employees' well-being, productivity, and WLB, traditional work arrangements in the modern workplace are slowly being replaced for a variety of reasons.[3] It is important to note that the outbreak of coronavirus disease 2019 (COVID-19) at the end of 2019 has generally focused attention on WLB, which frequently involves the use of FWAs. The forms of FWAs can be categorised into five categories, namely flexitime saving account (flexi-time arrangements, and time-saving account arrangements), workload flexibility (part time job, job sharing, and contingent work), flexibility of place (work from home, tele-homeworking, and virtual working) as well as alternative work schedule (staggered work hours arrangement, and compressed workweek arrangement).[4] Although FWAs take multiple forms, this paper focuses specifically on working from home (WFH) as a sub-category of FWAs because it raises distinct legal and regulatory issues. Unlike other forms of flexibility, such as flexitime or compressed workweeks, WFH directly affects the workplace and alters traditional assumptions about supervision, occupational health and safety, data protection, and employer control. These features have generated increased legal disputes and policy responses, particularly in the post-pandemic context. For this reason, WFH warrants separate legal examination within the broader FWA framework.

In practice, FWA enables employees in an organisation to adjust their working patterns and schedule according to their level of flexibility. Meanwhile, the use of remote working or tele-homeworking, especially WFH, where employees work outside their organisations, is one of the flexibility practices.[5] . Furthermore, one cannot deny that technological advancements have enabled workers to continue working from the comfort of their homes or other locations. It has been pointed out that WFH gives workers the flexibility to complete tasks in their own homes, maintain a WLB and help organisations accomplish their goals while lowering the risk of a

1 Amirul, S.R and Shaari, S.C, "An Overview: Twenty Years of Flexible Working Arrangements," *Advances in Business Research International Journal* 7, no.2 (2021): 27-41.

2 Ibid.

3 Harlida Abdul Wahab, Hanis Wahed, and Siti Suraya Abdul Razak, "Flexible Work Arrangements and the Legal Considerations in Malaysia," *Atlantis Highlights in Social Sciences, Education and Humanities* 15 (2023): 401-409, https://doi.org/10.2991/978-94-6463-352-8_31 (accessed March 1, 2024).

4 Nurulbahiah Awang and Nazruzila Razniza Mohd Nadzri, "The Implementation of Flexible Work Arrangements (FWAS) and Its Impact for Work-Life Balance of Women's Workforce," *I-IECONS E-Proceedings* 10, no. 1 (2023): 438–449, https://doi.org/10.33102/iiecons.v10i1.15 (accessed March 12, 2024). Sharija binti Che Shaari and Sharifah Rahama binti Amirul,. "Regulating Flexible Working Arrangements (FWAS) in Malaysian Private Sector: Are We There Yet?" International Journal of Business, Economics and Law, Vol. 21, Issue no. 4 (2020) (April) ISSN 2289-1552.

5 Harlida Abdul Wahab, Siti Suraya Abd Razak, and Nik Ahmad Kamal Nik Mahmod, "Legal Issues in Working from Home amid COVID-19 Pandemic in Malaysia," *UUM Journal of Legal Studies* 13, no. 2 (2022): 163-186, https://doi.org/10.32890/uumjls2022.13.2.7 (accessed March 31, 2024).

disease such as a COVID-19 outbreak.[6] Recently, Forbes[7] has reported that many employees feel the return-to-office trend diminishes their flexibility, which they require for a better WLB. Flexibility, which is always associated with FWAs, has become one of the most sought-after values in a company.

Interestingly, in Malaysia, the concept of WFH has undergone a significant transformation over the years. Initially met with scepticism and concerns about reduced productivity, a survey conducted during the preliminary WFH application in Malaysia revealed that it did contribute to lower productivity. The survey, organised by Klynveld Peat Marwick and Goerdeler (KPMG) in 2020, found that 69% of the 3,022 respondents believed WFH should continue as part of the new normal. However, the survey also found that reduced productivity was due to several factors, including 64% of respondents facing challenges with WFH, such as network issues, communication barriers, and a lack of technology readiness.[8] Nevertheless, remote work has slowly but steadily emerged as a preferred choice for many, eventually contributing to a healthier WLB. This shift reflects a changing perspective on the traditional office-centric work model. It is important to note that a recent survey titled 'The Global Survey of Working Arrangements 2023' indicated that the number of employees who desired full workdays at home in several Commonwealth countries, including Malaysia, Singapore, and the United Kingdom, is among the highest.[9] Meanwhile, in another survey conducted by Human Resource Development Corporation (HRDF), it was uncovered that 85% of employees in Malaysia strongly agree or agree that it is important to have an FWA in their organisation, and 94% of employees and 52% of employers believe that there should be a formalised national FWA Policy. Further, it is submitted that affiliating employees with FWA benefits both the employer and the employees, as it is considered one of the flexible mechanisms for achieving WLB.[10]

It should be noted that in some Commonwealth countries, such as the UK and Australia, the FWA is not new. Indeed, the implementation of FWAs whereby WFH is included as one of its practices and options can be found in several statutes, namely the Employment Rights Act 1996 (ERA 1996) and Employment Relations (Flexible Working) Act 2023 in the UK, as well as the Fair Work Act 2009 (FWA 2009) for Australia.

Meanwhile, as mentioned earlier for a developing Commonwealth country such as Malaysia, the COVID-19 pandemic catalysed a paradigm shift in its approach to work. In response to lockdowns and social distancing measures, businesses had to adapt to remote work quickly to ensure business continuity. The Movement Control Order (MCO) implemented by the Malaysian

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6 Norhasni Zainal Abiddin, Irmohizam Ibrahim and Shahrul Azuwar Abdul Aziz, "A Literature Review of Work From Home Phenomenon during COVID-19 Toward Employees' Performance and Quality of Life in Malaysia and Indonesia," *Sec. Organisational Psychology* 13 (2022), DOI: https://doi.org/10.3389/fpsyg.2022.819860, https://www.frontiersin.org/articles/10.3389/fpsyg.2022.819860/full (accessed March 30, 2024).

7 Bryan Robinson, "New Flexible Jobs Making a 2024 Comeback: What that Means for Your Career," *Forbes,* February 6, 2024, https://www.forbes.com/sites/bryanrobinson/2024/02/06/new-flexible-jobs-making-a-2024-comeback-what-that-means-for-your-career/?sh=1d1ed65e3a39 (accessed April 1, 2024).

8 Ibid., n.6.

9 Cevat Giray Aksoy et al., "Working From Home Around the Globe: 2023 Report," (2023), https://wfhresearch.com/wp-content/uploads/2023/06/GSWA-2023.pdf (accessed April 1, 2024).

10 "Policy Planning For Flexible Work Arrangements (FWA) in Malaysia Year 2021," *Human Resource Development Corporation*, (2023), https://nhrc.com.my/wp-content/uploads/2022/07/Policy-Planning-for-Flexible-Work-Arrangement-Kopi-Chat_Final.pdf (accessed April 3, 2024).

Government in 2020 mandated a large-scale transition to WFH. Post-pandemic, Malaysia continued to embrace FWAs as a fundamental component of the new normal. Many businesses adopted hybrid models, allowing employees to work both from the office and remotely, especially WFH. In response to the growing trend of FWAs, the Malaysian Government introduced amendments to the Employment Act 1955 (EA 1955) via the Employment (Amendment) Act 2022, which has put FWAs on a statutory footing. These amendments, effective since January 1, 2023, extended certain workforce rights to cover a broader scope of employees, including those engaged in remote work. This ensures that individuals who WFH receive the same legal protections and entitlements as traditional office-based employees.[11]

It can be seen that remote working, or tele-homeworking, especially WFH, where employees are physically working outside their organisations and based at home or other locations, is categorised as one of the FWAs options or practices. As an important component of modern labour practices, the idea of FWAs, namely WFH, is increasingly replacing traditional office-centric work patterns. Despite the excitement from employers as well as employees towards a cultural shift from traditional office-centric to WFH, and although, amongst others, it has been proven that there is a correlation between FWAs where WFH is part of it, which has improved productivity and profit generation, there are concerns as WFH involves certain arrangements, it must take legal considerations into account.[12] Therefore, robust and dynamic employment law and policy play important roles in shaping the implementation of WFH arrangements within workplaces to address employees' rights and employers' duties. This paper aims to discuss the legal issues and policies related to WFH in Malaysia, the UK and Australia. First, the law and policy on WFH in Malaysia will be explained, followed by an analysis of the legal frameworks in the UK and Australia, and the discussion will conclude.

RESEARCH METHODS

Three Commonwealth countries, namely Malaysia, the UK and Australia, are selected in this writing to analyse legal frameworks and policies in the above-mentioned jurisdictions. The study will employ doctrinal and qualitative methods, which are commonly found in social, law and humanities research. In this study, the qualitative element refers to document-based qualitative analysis, focusing on interpretive evaluation of policy documents, legislation, government reports and academic literature to assess how legal principles and policy objectives are applied in practice. The doctrinal research provides a systematic investigation of the specific rules and laws that govern a particular legal subject, focusing on analysing the relationship between legal rules, particularly explaining legal areas and predicting future developments in the law. Doctrinal research or library-based study, which means that the material will be largely drawn from secondary sources, will be gathered from libraries, archives and other databases. Secondary data or sources also come from textbooks, reports and articles from law journals and review as well as other social sciences journals. The basic aim of doctrinal research is to discover, explain,

[11] See below for further discussion under 'The Law and Policies.'

[12] Ibid., n.3. Yogarajah., A. (2020). Do your employees work from home? Legal Issues to Consider. Sprintlaw. Available at https://sprintlaw.com.au/working-from-home-legal-issues(accessed March 1, 2024).

examine, analyse and present in a systematic form, facts, principles, provisions, concepts, theories or the working of certain laws and legislation.

This study also employed the comparative method to examine the policy and legal frameworks in developed countries, such as the United Kingdom and Australia, regarding WFH. These two Commonwealth countries are among the top in embracing WFH as the new norm. A comparative approach involves examining the similarities and differences between situations within the same legal system. The approach may also be used to compare views, ideas, concepts, rules, principles, and theories that bear on law and its institutions.[13] Comparative law, according to Lepaulle[14] enables an individual to see the law of his country through the eyes of a stranger, by allowing him "[t]o see things in their true light". Furthermore, it has been pointed out that "the basic methodological principle of all comparative law is that of functionality... the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results."[15] One of the benefits of comparative law analysis is the ability to identify the best rules from various jurisdictions to adapt to one's legal system to solve a particular legal problem. The best-suited rule for adaptation depends on its purpose and whether it can operate justly.[16]

ANALYSIS AND DISCUSSION

The Law and Policies

Malaysia

In Malaysia, businesses and organisations owned and run by private individuals or entities make up the private sector. This sector includes a wide range of industries, including manufacturing, services, finance, technology, and more. On the other hand, the government-owned and controlled agencies, ministries, and other entities make up the public sector. This industry is essential to the delivery of public or civil services such as healthcare, education, and infrastructure development, and the public sector performs a variety of regulatory and economic tasks. Regardless of whether it is the private or public sector, a large percentage of the Malaysian workforce works in both sectors, making a significant economic contribution.

It is important to note that FWAs are beginning to receive attention from the Government as they are incorporated into national strategic plans for socio-economic development, such as the Tenth Malaysia Plan (2010) and the Eleventh Malaysia Plan (2015). In fact, the Government, acting through Malaysian Talent Corporation Malaysia Berhad (TalentCorp),[17] is pleading with companies to implement FWAs to provide greater latitude over length of service, location, and working hours at the workplace, aimed at raising labour productivity, encouraging WLB, and

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[13] Anwarul Yaqin. (2008). Legal Research and Writing Methods. Lexis Nexis Butterworth.

[14] Lepaulle, P. (1922). The Function of Comparative Law with a Critique of Social Jurisprudence Volume 35 1922. Facsimile Publisher.

[15] Zweigert, K. & Kotz, H. (1998). Introduction to Comparative law. Clarendon Press.

[16] Zweigert, K. & Kotz, H.

[17] Talent Corporation Malaysia Berhad (TalentCorp) was established on January 1, 2011. It is an agency under the Ministry of Human Resources (MOHR) that drives Malaysia's talent strategy towards becoming a dynamic talent hub. TalentCorp partners with the public and private sectors to implement initiatives that attract, nurture, and retain the expertise needed to meet today's and future talent demands. https://www.talentcorp.com.my/about/about-us (accessed March 1, 2024).

increasing the number of women joining the workforce. In addition, the Malaysian Budget 2014 established a two-year incentive: in the form of a double tax deduction on qualifying expenses, subject to conditions for organisations that adopt or strengthen FWA policies.[18] It seems right to say that, despite the Government's drive to promote FWAs in the private sector prior to COVID-19, it received little enthusiasm. This can be seen as FWAs being uncommon and not widely practised in the private sector until the COVID-19 pandemic.[19] When Malaysia was badly hit by the COVID-19 pandemic and multiple MCOs were imposed to curb its spread, the public sector eventually necessitated new work methods for the civil service. As a result, WFH in the civil service was implemented. It is worth noting that WFH in the public sector began during the COVID-19 pandemic in early 2020. However, the WFH policy was officially implemented only from January 1, 2021, via Service Circular No. 5 of 2020 (PP 5/2020).[20] In the civil service, the WFH arrangement allows officers to be instructed to carry out official obligations, including core responsibilities, from home during working hours. If Federal Civil Service Officers meet the requirements and guidelines outlined in PP 5/2020, they may be eligible to WFH for full or partial days for a specific period, based on the level of necessity and suitability of their duties. It is important to note that under PP 5/2020, officers may receive instructions from the Government or the head of department (HOD)to WFH for the following purposes: 1) To reduce or avoid loss/ damage/ destruction due to reasons such as environmental pollution, the spread of infectious diseases and/or natural disasters that can threaten safety and public order either in the office/premise or residential areas; 2) To avoid the occurrence of harm, problems or a difficult situation whether for the officer himself or other officers should the said officer be present in the office; or 3) To create a balance between the agency's need for continuity of work for the sake of service and the officer's need to handle personal matters in a situation where the officer is not permitted to take leave.

It can be seen that any officer or group of officers in a certain work category may be instructed by the Government or the (HOD) to WFH for these reasons, provided that the work can be completed at home and does not require physical presence in the workplace. It seems right to say that the implementation of PP 5/2020 on January 1, 2021, marked a significant milestone in Malaysia's approach to remote work, particularly in response to the challenges posed by the COVID-19 pandemic. By promoting WFH arrangements, the Malaysian Government aimed to reduce the risk of virus transmission in workplaces while ensuring business continuity.[21] Most importantly, it provides a formal regulatory framework for government agencies to facilitate and regulate remote work arrangements.

As previously mentioned, the Malaysian Government introduced changes to the EA 1955 that significantly advanced FWA. These modifications sought to bring labour regulations up to date and accommodate changing workplace dynamics—particularly in light of the COVID-19 pandemic, which hastened the shift to flexible and remote employment. A legislative foundation

[18] Sharija binti Che Shaari and Sharifah Rahama binti Amirul, "Regulating Flexible Working Arrangements (FWAS) in Malaysian Private Sector: Are We There Yet?" *International Journal of Business, Economics and Law* 21, no. 4 (2020) ISSN 2289-1552.

[19] Ibid.

[20] See further discussion below regarding the WFH policy.

[21] Ibid.

for FWAs, including telecommuting, flexible scheduling, and reduced workweeks, was established by the EA 1955 changes. This action improved productivity and efficiency while acknowledging the significance of work-life balance and employee well-being. Effective from January 1, 2023, the EA 1955 has incorporated the amendments introduced by the Employment (Amendment) Act 2022. With that, the EA 1955 has now formally recognised the modern concept of FWA in Malaysia, or what some may call WFH.

Sections 60P and 60Q of the EA 1955 contain the most recent FWA provisions, which came into effect on January 1, 2023. Section 60P states the requirements and model of FWA as follows:

> "(1) Subject to Part XII or anything contained in the contract of service, an employee may apply to an employer for a flexible working arrangement to vary the hours of work, days of work or place of work in relation to his employment. 60P. (2) Where there is a collective agreement, any application made by the employee under subsection (1) shall be consistent with the terms and conditions in the collective agreement."

Meanwhile, section 60Q sets out the application process of FWA, which provides that:

> (1) The employee shall make an application for a flexible working arrangement under section 60P in writing and in the form and manner as may be determined by the Director General. (2) Upon the application made under subsection (1), an employer shall, within sixty days from the date such application is received, approve or refuse the application. (3) The employer shall inform the employee in writing of the employer's approval or refusal of the application under subsection (1) and in the case of a refusal, the employer shall state the ground of such refusal."

Under the new laws, Malaysian employees who prefer to work flexibly, which includes WFH, will be able to apply for FWA with their respective organisations. It is important to note that the new section 60P is not all-encompassing and is still subject to the overall terms and conditions of an employment contract. As such, an application is subject to the employer's discretion; it cannot be granted automatically. Furthermore, the application for FWA depends on the collective agreement entered into between the employer and the employee, as provided in section 60P(2) of the EA 1955.

If one examines the wording of section 60P (1) of the EA 1955, it allows an employee to apply for FWA to change the hours, days, or location of his employment. However, under section 60Q(2), the employer must consider the approval or rejection of such an application within 60 days of receiving the employee's written application. Furthermore, upon approval or rejection, the employer must notify the employee in writing of the reasons for the decision. In Malaysia, despite limitations on certain employment rights under the EA 1955 regarding wage amounts, the FWA applies to all employees regardless of their wages. This means that regardless of income level, employees have the right to request and negotiate FWA to suit their needs and circumstances.

It has been pointed out that the language of the aforementioned section 60P cannot be interpreted to grant employees the fundamental right to a FWA or WFH. It is not a legal need; rather, it is a recent tendency. However, if the circumstances truly demand or call for an FWA or WFH, an employee is always free to submit an application under section 60 P for FWA or WFH, provided there are no employment terms that specifically prohibit either option.[22]Also, while applying for FWH or WFH, employees should adhere to the specified procedures, terms, and

[22] Yen Shen Chau, "The New Provisions for Flexible Working Arrangement in the Employment Act 1955," *Linkedin*, March 27, 2023, https://www.linkedin.com/pulse/new-provisions-flexible-working-arrangement-employment-act (accessed March 1, 2024).

conditions if the company policy, employment contract, or both have already established schemes for FWA or WFH.

Since sections 60P and 60Q are new to EA 1955, it seems appropriate to say that Malaysia has not yet seen the application, utility, or impact that these two new parts could have on Malaysia's employment market. It is strongly advised that, before offering flexible options to workers, companies that want to implement FWA or WFH schemes should first lay out explicit guidelines, rules, and/or regulations.[23] An effective FWA or WFH policy should address or cover most of the following key items:[24] 1) Stating the aim, scope, applicability and effect of the policy; 2) Identifying the different or specific type of FWAs; 3) Setting out the application process; 4) Pre conditions or limitations on FWAs; 5) The company's expectations of the employees under the scheme of FWA or WFH; 6) Risk management, confidentiality and data protection; and 7) Manner of supervision or reviewing of work progress and performance.

By virtue of sections 60P and 60Q, employers are required to consider requests for FWA from eligible employees, taking into consideration operational requirements and business needs. By introducing these amendments, the Malaysian Government aimed to create a more inclusive and adaptable labour environment, fostering innovation and productivity while prioritising workers' welfare. It has been pointed out that it will be interesting to see how the courts interpret the two new sections in the context of an employee's complaint against an employer when the section 60P application has been denied for any reason, or for no reasonable reason.[25] Whether or not there will be complaints of this kind, only time will tell.

On the other hand, in terms of FWA policy, the Malaysian Public Service appears to support its implementation, arguing that productivity and efficiency will improve if public servants' lives are well-organised, they have a reasonable cost of living, stable emotions, a pleasant working environment, and a good work-life balance. This amounted to the release of WFH Policy Service Circular Number 5 of Year 2020 (PP 5/2020), which consists of two major principles regarding the requirement to WFH: when instructed by the Government, or when instructed or given by the Head of the Public Service Department (PSD). In relation to its rule of implementation, employees who are permitted to adopt WFH must:[26] a) Always be present at home within designated workplace and working hours; b) Always be reachable within designated workplace and working hours; c) Be ready to work from the office as instructed by the Head of PSD within a reasonable time frame; d) Comply with the rules, regulations and instructions from authorities. Meanwhile, Human Resource Development Corporation (HRDC)[27] has suggested the key themes to be considered in developing FWA policies in an organisation include: people and culture; processes and systems; technology and tools; welfare; and financials. Moreover, it is proposed

[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] "Work from Home Policy," Service Circular Number 5 of Year 2020 (PP 5/2020).
[27] HRDC is under the purview of the Ministry of Human Resources (MOHR) and is responsible for driving Malaysia's talent development aspirations by collecting levies from employers and funding training and development programmes for the Malaysian workforce. "Policy Planning For Flexible Work Arrangements (FWA) in Malaysia Year 2021," *Human Resource Development Corporation*, (2023), https://nhrc.com.my/wp-content/uploads/2022/07/Policy-Planning-for-Flexible-Work-Arrangement-Kopi-Chat_Final.pdf (accessed March 5, 2024).

that for the purpose of effective FWA policy framework, the following strategy must be considered to accommodate FWA: 1) Standard labour legislation need to be drafted in ensuring protection to the employer and employee; 2) FWA guidelines need to be introduced by providing technical assistance on how to develop and implement effective FWA to the organisation; 3) Digitalisation process towards the works which cater all the IT tools and equipment to facilitate the work must be adopted; 4) Provisions towards WFH allowances must be prepared; and 5) Ensuring the health and safety of the employees.

Despite the recent implementation of legal provisions on WFH and the lack of established policies for FWA, good FWA practices have been established in well-known Malaysian organisations, including the Inland Revenue Board of Malaysia (LHDN), the Malaysian Employers Federation (MEF), and Malayan Banking Berhad (Maybank). LHDN has introduced Smart Office Flexible Office (SOFO) under its Management Order No. 3, Year 2022, as part of its commitment towards FWA. Under SOFO, its employees are allowed to adopt three working mechanisms: Work from Office, WFH, and Remote Working, or a combination of the two. However, adoption of SOFO is still subject to the employee's application, the Head of Department's approval, the nature of the work, disciplinary action, and employees on medical leave.[28]

Meanwhile, MEF collaborated with the International Labour Organisation in July 2023 to provide employers with guidance on meeting global standards for FWA. The policy statement on FWA, its goals, definition, scope, and the application of FWA policy, which includes WFH, are all part of this collaboration.[29] Accordingly, a company may allow the application of FWA, which permits employees to have flexibility regarding their place of work, such as WFH. This will apply to all positions identified by the employer, with consultation with the union or employee representatives, unless it is not possible to do so due to overriding business exigencies, in which case the final decision to grant WFH remains with the employer.[30] Further, the application of the WFH arrangement may take place on any of the following arrangements: for a fixed term period of time; on a temporary or as and when required basis; and on a long-term or permanent basis (subject always to the policy of the company)

In this regard, Maybank has developed its own WLB approaches to accommodate employees' lifestyles and career goals, while treating them with empathy and flexibility. The model comprises three strategies: WFH, FWA, and Mobile Work Arrangements (MWA).[31] At Maybank, employees can WFH for extended periods, with a focus on virtual interactions and engagement. MWA's employees are completely "mobile" in their work, which primarily focuses

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[28] "Arahan Pentadbiran Bil. 3 Tahun 2022 Peraturan Bekerja: Smart Office Flexible Office (SOFO)," Jabatan Pengurusan Insan, Lembaga Hasil Dalam Negeri.

[29] "Company Policy Template for Flexible Work Arrangements (Hours Of Work, Days Of Work, and Place Of Work)" Malaysian Employer Federation (MEF), (2023).

[30] Ibid.

[31] Mohamad Danial Abdul Khalil, "Maybank Adopts Hybrid Work Arrangement to Prepare for the Future" https://lifeatwork.my/wp-content/uploads/2023/08/Maybank-Adopts-Hybrid-Work-Arrangement-to-Prepare-for-the-Future.pdf. (accessed March 17, 2024). Daljit Dhesi "Maybank goes Flexi" The Star, July 26, 2021, https://www.thestar.com.my/business/business-news/2021/07/26/maybank-goes-flexi (accessed March 18, 2024).

on output rather than input. Maybank is focusing on flexible hours, "phasing in and out" various leave types, and employee support schemes under FWA.[32]

While the statutory provisions under sections 60P and 60Q of the Employment Act 1955 represent an important development, they also reveal potential gaps in the protection of employees seeking FWA. The law grants employers considerable discretion to approve or refuse such requests, provided they give reasons. However, it does not specify substantive criteria or remedies for employees in cases of unreasonable refusal. This raises questions about the enforceability of employees' rights to request such arrangements and the adequacy of existing protections against arbitrary or discriminatory refusals. Comparative studies have shown that without clear enforcement mechanisms, FWAs can reinforce managerial prerogative rather than genuinely empower workers.[33] From a normative perspective, the introduction of FWAs should be understood not only as a managerial or productivity tool, but as part of a broader legal and social framework aimed at achieving decent work, equality, and WLB.[34] However, the extent to which Malaysian law achieves this equilibrium remains to be tested through judicial interpretation and practical application.[35]

United Kingdom

The UK government is said to be strongly committed to ensuring flexible workplaces, as evidenced by a series of laws related to FWA and WFH. The Employment Rights Act 1996 (ERA 1996) and the Employment Relations (Flexible Working) Act 2023 are among the relevant laws pertaining to the current issues. It is important at the outset to clarify that FWA is a broad statutory concept encompassing a range of working patterns, whereas WFH constitutes only one form of FWA, referring specifically to the place of work. Other recognised forms of FWA under the statutory framework include variations to working hours, times of work, job-sharing, part-time work, compressed hours, and term-time working.[36] However, in practice, much of the contemporary legal discourse and litigation has focused on WFH requests, particularly in the post-pandemic context, thereby obscuring the conceptual distinction between homeworking and the wider framework of flexible working.

Under the ERA 1996, provisions relating to FWA in the UK are governed by section 80F. This provision allows an employee to apply for a contractual variation of their hours of work, times of work, or place of work. The application must specify the proposed change, the date on which it is intended to take effect, and the anticipated effect on the employer's business, together

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[32] Ibid.

[33] International Labour Organization, "Flexible Working Arrangements: Implications for Workers' Protection," (Geneva: ILO, 2020), https://www.ilo.org/global/publications/WCMS_748324/lang--en/index.htm (accessed March 1, 2024); Fair Work Ombudsman, "Flexible Working Arrangements," (Canberra: Australian Government, 2021), https://www.fairwork.gov.au/tools-and-resources/fact-sheets/rights-and-obligations/flexible-working-arrangements (accessed March 1, 2024). See also the discussion under the UK and Australia.

[34] Simon Deakin and Gillian S. Morris, *Labour Law*, 7th ed. (Oxford: Hart Publishing, 2021)

[35] Heejung Chung, *The Flexibility Paradox: Why Flexible Working Leads to (Self-)Exploitation* (Bristol: Policy Press, 2022); International Labour Office and Eurofound, *Working from Home: From Invisibility to Decent Work* (Geneva: ILO, 2021), https://www.ilo.org/global/publications/WCMS_765806/lang--en/index.htm (accessed March 1, 2024)

[36] See discussion below.

with suggestions for mitigating any adverse impact. .[37] Such an application can only be made once a year with the same employer,[38] in which the employees have worked with the employer for at least 26 weeks of continuous service. An employer to whom an application under section 80F is made shall notify the employee of the decision on the application within the decision period of three months beginning with the date on which the application is made, or such longer period as may be agreed by the employer and the employee. [39]

For the employer who receives such an application, section 80G of ERA 1996 provides that any decision to approve or refuse must be dealt with reasonably. However, such a rejection is subject to appeal. Accordingly, an application made can be rejected due to several circumstances provided under section 80G(1)(b) of ERA 1996 as followings: the burden of additional costs, detrimental effect on ability to meet customer demand, inability to re-organise work among existing staff, inability to recruit additional staff, detrimental impact on quality, detrimental impact on performance, insufficiency of work during the periods the employee proposes to work, planned structural changes, and such other grounds as the Secretary of State may specify by regulations.

While the statutory framework adopts an inclusive approach to FWA, organisational policies frequently operate to narrow this concept in practice, often privileging operational rigidity or managerial norms over individual flexibility. FWA in the UK presents a multifaceted landscape, grappling with fundamental questions about its status as a right, the prevalence of application rejections, and concerns about unfair treatment towards specific employee groups. Moreover, instances of employee detriment and unfair dismissal underscore the urgent need for comprehensive policies and practices that uphold equitable treatment and protect employee rights in this evolving work environment. The following discussion will elaborate on the above issues.

1) Rejection of the Application

In *Moore v Ecoscape UK Ltd*,[40] An employee who is suffering from asthma had made an application to work from home during the COVID-19 pandemic due to his condition, in which he felt that the company could not provide a workplace which is "completely risk-free". His application was rejected by the employer due to the effective measures taken by the company, including face masks, antibacterial gel, a prohibition on customers entering the premises, and social distancing. Ms Moore's fears were not workplace-specific, but rather a general fear of leaving the home.

Under section 80F of ERA 1996, employees are required to attend meetings arranged by the employer to discuss the application; failure to attend the meetings is treated as a rejection of the application for FWA.[41]

However, the rejection of the application is subject to complaint to an employment tribunal, where it can be proven that the rejection was made on incorrect facts or without any basis as laid

[37] Section 80F(1) and (2) of ERA 1996.
[38] Section 80F(4) of ERA 1996.
[39] See further below on the changes made under the Employment Relations (Flexible Working) Act 2023 on sections 80G and 80F of the ERA 1996.
[40] Employment Tribunal (2417563/2020).
[41] Doug Pyper, "Flexible Working", *House of Common Library*, (2018). https://researchbriefings.files.parliament.uk/documents/SN01086/SN01086.pdf (accessed March 1, 2024).

down under section 80G of ERA 1996, and this must be made within the time specified.[42] In a case where the complaint received by the Tribunal is successful, several remedies are available to employees under section 80I of ERA 1996, including an order for reconsideration of the application and an award of compensation payable by the employer to the employee.

It is possible that an employer's refusal to grant FWA without proper and reasonable grounds may amount to an unfair dismissal and sex discrimination claim. In the case of *Ms L Hedger v British Deaf Association,*[43] the court has awarded an employee with 36,000 pounds for unfair dismissal and sex discrimination when her application for FWA after having a baby was rejected by her employer (British Deaf Association (BDA)). It was held that BDA's conduct was improper and unreasonable to the extent of losing trust and confidence in the employer-employee relationship. BDA should consider her situation in dealing with childcare issues as compared to male workers.

In *Ms M Glover v Lacoste UK Ltd and Mr R Harmon*,[44] a flexible working was requested by Ms Glover who works as a manager at the global fashion brand Lacoste while on maternity leave, but was rejected by the employer because managerial staff must work full-time and be fully flexible. It was held that such rejection amounted to harm, discriminatory treatment, and a disadvantage to the employee.

The case of *Coleman v Attridge Law*[45] involved a mother who is the primary carer for her disabled son, who was fired by her employer after requesting time off to care for her son, and was accused of attempting to manipulate her working conditions. She has also been denied flexible working hours and discriminated against because of her son's disability. It was determined that, while she was not disabled herself, she could not be treated less favourably because of her association with a disabled person. As a result, such protection was not limited to people with disabilities.

The introduction of the Employment Relations (Flexible Working) Act 2023, which came into effect on 6 April 2024, has given UK employees additional rights to request FWA. Accordingly, employees will have the right to request flexible working from day one (day one right) of their employment, removing the current requirement of 26 weeks of continuous service, the application can be made twice in any 12-month period as compared to one application only under ERA 1996, and workers in all types of employment will be entitled to make such application as compared to restricted employment types under ERA 1996.[46] Now, from the very outset of their employment journey, employees can express their desire for flexibility. If the timeframe for replying to the employee's flexible working request was 3 months, it has now been reduced to 2 months. Employers will also have to explain the reasons for denying any request, and employees no longer have to explain the impact of their request. However, the list of reasons

[42] Section 80H of ERA 1996.
[43] Employment Tribunal (3318925/2019).
[44] Employment Tribunal 2202054/2021: [2023] EAT 4.
[45] [2008] IRLR 722.
[46] Caroline Dohorty, "Understanding the Employment Relations (Flexible Working) Act 2023: What It Means for Employers and Employees," (2023), https://www.linkedin.com/pulse/understanding-employment-relations-flexible-working-act-doherty (accessed March 19, 2024).

employers can use to deny requests remains the same, including factors such as the cost to the business or the impact on quality, performance, or the ability to meet customer demand.

2) Unfair Treatment of Specific Categories of Employee

The fairness of FWA laws and policies is being questioned regarding FWA rights among solo living managers and professionals without children. It is submitted that the primary focus is given only to those with children and/or other caring responsibilities, which is in contrast to the government policy about equality.[47] Eventually, it had caused inequity for employees without children, who are reported to be facing increased workloads, longer working hours, requirements to travel, and holiday restrictions to cover co-workers who are absent or have been granted FWA.[48]

Aside from adhering to the EU Directive (prior to Brexit whereby the UK withdrawal from the European Union on 31 January 2020), the UK introduced two major policies to promote a healthy work-life balance: The Family Friendly Policy and the Good Work Plan: Proposals to Support Families. These policies include several benefits, including maternity, paternity, and adoption requirements; FWA; bereavement leave; compassionate leave; and childcare provisions.[49] Indeed in the UK such friendly policy can be traced back to 2010 for example when Ford Motor Company in order to attract more female workers, launched its Ford Parents Network to raise awareness about the challenges of working parents, the keys aspects of maternity policy covers up to 52 weeks of maternity leave for all employees regardless of length of strength and 100% maternity pay for the entire 52-week period.[50]

3) Employee's Detriment or Unfair Dismissal

It should be noted that the ERA 1996 protects employees from retaliation or dismissal by their employer because they left or refused to return to their workplace or to any dangerous part of it, or because they took appropriate steps to protect themselves or others. Section 100 of the ERA 1996 states that an employee is protected from dismissal if they have a reasonable belief that returning to their workplace poses a serious or imminent threat to them or others.

In *Gibson v Lothian Leisure*,[51] the employee who works as a chef refused to come to the workplace due to the serious and imminent danger of COVID-19, since the company offered a lack of secure measures or personal protective equipment (PPE), since he lived with his father, who was clinically extremely vulnerable. Due to the refusal, he was then summarily dismissed by a text message on the grounds of redundancy. The court held that the potential harm that could be inflicted on his father met the test of serious and imminent danger, and that the refusal to

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47 Krystal Wilkinson, Jennifer Tomlinson and Jean Gardiner, "The Perceived Fairness Of Work–Life Balance Policies: A UK Case Study Of Solo-Living Managers And Professionals Without Children," *Human Resource Management Journal*, (2018), https://doi.org/10.1111/1748-8583.12181 (accessed March 21, 2024).

48 Ibid.

49 HM Government, *Good Work Plan: Proposals to Support Families*, (2019), https://assets.publishing.service.gov.uk/media/5d31c17fed915d2fefd0bde7/good-work-family-support-consultation.pdf (accessed March 11, 2024).

50 David Woods, "Top Employers for Working Families: Ford of Britain," *HR Magazine*, November 9, 2010, https://www.hrmagazine.co.uk/content/news/top-employers-for-working-families-ford-of-britain/ (accessed March 1, 2024).

51 ET/4105009/2020.

attend work was an appropriate step to protect his father from that danger rendered the dismissal automatically unfair.

In *Rodgers v Leeds Laser Cutting*,[52] an employee informed his manager that he would not return to work until after lockdown because he was afraid of infecting his clinically vulnerable children with COVID-19. On the facts, the Tribunal determined that the employee did not have a reasonable belief in serious and imminent workplace danger. The employer had taken the precautions recommended by government advice at the time, and the employee had not expressed any concerns about the workplace measures or taken any steps to avoid danger before leaving.

In *Bryan v Landmarc Support Services Ltd*,[53] asthma prevented Ms Bryan from returning to work, and there was proof that she was actually "terrified" of contracting COVID-19, despite having arranged for other employees to cover her week on the rotation. Ms Bryan filed a complaint about being required to attend work, even though the Government advised that vulnerable people should be able to work from home. The Tribunal conducted a forensic examination of the specific duties that required Ms Bryan to be in the office and concluded that they made up only a small portion of her role. The Tribunal found that Landmarc violated the implied term to take reasonable steps to protect her safety by "unnecessarily ordering" her to attend the office before conducting an individual risk assessment of the risk to her specifically.

Australia

FWA and WFH are also becoming the norm and the foundation in many employment settings in Australia, and every employee is required to comply with the National Employment Standards (NES). Accordingly, section 61 of the Fair Work Act 2009 (FWA 2009) is subject to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022. It sets minimum standards for the employment of employees that any agreement cannot supersede. The minimum standards apply to requests for flexible working arrangements, which are described further under section 65 of the FWA 2009.

Section 65 of the FWA 2009 provides the procedures for requesting flexible working arrangements. Employees may request, in writing, a change in working arrangements by setting out the details of the change sought and the reasons for it. However, they must ensure they fall under the categories of:[54] the employee is pregnant; 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 (within the meaning of the Carer Recognition Act 2010); the employee has a disability; the employee is 55 or older; the employee is experiencing violence from a member of the employee's family; 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.

[52] [2022] EAT 69.
[53] ET 2502158/2020.
[54] Section 65(1A) of FWA 2009.

Further, the categories are extended to the persons who may request to work part-time to assist the employee to care for the child if he is a parent, or has responsibility for the care, of a child; and is returning to work after taking leave in relation to the birth or adoption of the child.[55]

The application under this provision may only be made if the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or for a casual employee, the employee is a long-term casual employee of the employer immediately before making the request; and has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.[56]

In responding to employee requests, section 65A of FWA 2009 puts an obligation to the employer to response to the request within 21 days with the followings categories of responses: state that the employer grants the request; or 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 state that the employer refuses the request and include the matters required by subsection (6).

The refusal of the employer to comply with the FWA requested by the employee is subject to the following legal provisions:[57] a) the employer has discussed the request with the employee, and 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); b) the employer and the employee have not reached such an agreement; c) the employer has had regard to the consequences of the refusal for the employee; and d) the refusal is on reasonable business grounds.

Section 65A (5) of FWA 2009 states that the reasonable business grounds include: 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; d) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

Further, in refusing the request, the employer must, in writing, explain the grounds for his refusal, since such refusal might constitute discrimination, which allows employees to file a claim under anti-discrimination laws. Such grounds of refusal must include the followings requirements: a) details of the reasons for the refusal; b) without limiting paragraph (a) of this subsection, namely set out the employer's particular business grounds for refusing the request and explain how those grounds apply to the request; and b) 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 or state that there are no such changes.

[55] Section 65(1B) of FWA 2009.
[56] Section 65(2) of FWA 2009.
[57] Section 65(3) of FWA 2009.

Against this statutory backdrop, it is critical to distinguish between substantive employment rights, procedural entitlements, and policy-based flexibility. Sections 65 and 65A of the Fair Work Act 2009 do not confer a standalone right to flexible working or WFH; rather, they establish a procedural right to request FWA and to receive a response that complies with statutory requirements. The ultimate decision remains subject to employer discretion, constrained only by the obligation to engage genuinely with the request and to refuse it solely on reasonable business grounds. As such, flexible working in Australia occupies an intermediate legal position, stronger than a purely discretionary benefit, yet falling short of a substantive employment right.

This procedural and conceptual framework generates practical and normative challenges. In particular, it raises questions about whether WFH should be considered a core employment entitlement or a discretionary benefit, and how employers should balance operational efficiency with employee needs. In Australia, FWA encounter similar challenges to those in the UK. There is an ongoing debate regarding whether WFH should be considered a standard aspect of employment or a discretionary benefit. This ambiguity raises questions about employees' rights to request and maintain FWA. Additionally, employers in Australia are increasingly challenged by employees seeking flexible working options. As the demand for flexibility grows, employers must navigate the balance between accommodating employee needs and maintaining operational efficiency. In Australia, FWA has sparked debate on two critical issues. Firstly, there is the question of whether WFH arrangements, as a substantive employment right, fall within employment entitlements. Secondly, employees may challenge employers who refuse WFH requests, highlighting the delicate balance between employers' prerogatives and employees' interests within the FWA framework. The following discussion will elaborate on these issues.

1) WFH as a Substantive Employment Right in Australia?

Australian case law demonstrates that FWA, including WFH, do not constitute a substantive employment right but instead operates within a framework of procedural entitlement subject to employer discretion. This position is consistently illustrated in judicial and Tribunal decisions, which emphasise the centrality of reasonable business grounds and operational requirements in assessing WFH requests.

The approach was affirmed in *Holmes v Australian Carers Pty Ltd,*[58] where the employee alleged discrimination, bullying, and harassment following her refusal to work from home, she further argued that the approval of WFH arrangements for other employees created entitlement in her favour. The court rejected this argument, holding that WFH is not a general right of employees and that differential treatment alone does not establish entitlement. This decision underscores the principle that the Fair Work Act 2009 does not guarantee WFH access, even where similar arrangements exist within the organisation.

A similar emphasis on employer operational needs is evident in *Hair v State of Queensland (Queensland Health)*,[59] . In this case, the employee, who worked as a Human Resource Advisor and Acting Workplace Relations Advisor, sought flexible working arrangements that would significantly limit her physical presence in the workplace. The employer refused the request on

[58] (No 2) [2023] FedCFamC2G 714.
[59] [2021] QIRC 422.

the basis that the role required timely in-person support, frequent face-to-face engagement, and attendance at short-notice meetings. The court upheld the refusal, finding that the employer had relied on reasonable business grounds, including productivity concerns and the potential negative impact on team functioning. This case highlights that the nature of the role itself may justify limiting WFH access, even where flexible working is generally encouraged.

Beyond statutory rights and judicial interpretation, flexible working in Australia is also shaped by organisational and governmental policy frameworks that operate alongside, but do not displace, employer discretion under the Fair Work Act 2009. In addition to legal protection, Australia has developed the Workplace Flexibility Diagnostic Tool, which can be used by employers and employees as guidance and support in understanding and developing flexible workplace arrangements policy.[60] As a result, good policies have key features such as a statement, purpose, guidelines, procedures, references, and resources. The Workplace Gender Equality Policy is one of the applicable FWA policies in Australia, embedded within six standardised Gender Equality Indicators (GEIs). GEI 4 describes the availability of employment terms, conditions, and practices relating to flexible working arrangements for employees and working arrangements supporting employees with family or caring responsibilities, where flexible working arrangements are a prerequisite for Employer of Choice for Gender Equality (EOCGE) citation (criterion 4), and an essential underpinning for meeting other equality criteria.

In relation to the Australian Public Service (APS), it is submitted that the offer for FWA is sufficient to contribute to WLB as compared to the four-day work week. As a result, the Government published the APS, a set of flexible working principles, in an effort to make the public sector "a model employer" and to "redefine the future of work" in Government[61] which aims to embed FWA in the culture of APS. The working principles consist of the following:[62] a) Flexibility according to different roles that include when and where an employee works; b) Flexibility that must be mutually agreed and benefited to all which should be reviewed regularly; c) Flexibility with clear explanation about employer's expectation and benchmark in line with the oraganisation's goals; d) Flexible work arrangements that value meaningful and regular face-to-face contact by considering the interest of a team member on the requirement of face to face working; e) Flexibility with continous supervision in ensuring their effective performance and career development.

The boundaries of employer discretion were further examined in *Municipal Administrative Clerical & Service U v Com Taxation*,[63] where employees challenged the Australian Taxation Office's (ATO) decision to require staff to return to office-based work following an extended period of pandemic-related WFH. The applicants argued that the ATO had failed to consult

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60 Workplace Gender Equality Agency, *Flexible Work*, (Australian Government) https://www.wgea.gov.au/ (accessed March 27, 2024).

61 Nathan Schmidt, "Public Service Staff Secure Unlimited Work-From-Home Days," *news.com.au*, July 12, 2023, https://www.news.com.au/finance/work/at-work/public-service-staff-secure-unlimited-workfromhome-days/news-story/a517f1547947324a24b95eec0087891c (accessed March 1, 2024).

62 Australian Government, *All Roles Flexible: Principles of Flexible Work in the APS*, (2023), https://www.apsc.gov.au/sites/default/files/2023-04/Secretaries%20Board%20Principles%20of%20Flexible%20Work%20in%20the%20APS.pdf (accessed March 1, 2024).

63 [2022] FCA 1225.

adequately and had relied on misleading representations regarding WFH arrangements. The Tribunal held that the COVID-19 pandemic constituted an exceptional circumstance and accepted that the ATO, as an essential service, had acted in good faith to ensure continuity of operations while managing health risks. This decision confirms that temporary or emergency-based WFH arrangements do not crystallise into permanent rights and may be withdrawn where justified by operational imperatives.

Taken together, these cases illustrate a coherent doctrinal position: while employees in Australia possess a statutory right to request FWA under sections 65 and 65A of the Fair Work Act 2009, they do not enjoy a substantive right to WFH. Employer discretion remains central, provided that requests are genuinely considered, refusals are grounded in reasonable business considerations, and procedural obligations, such as consultation and written explanation, are fulfilled. Normatively, this framework reflects a deliberate legislative balance between promoting workplace flexibility and preserving managerial prerogatives, positioning WFH as a conditional, context-dependent accommodation rather than an enforceable employment entitlement.

2) Challenge by Employees

Employers may face claims under the FWA 2009 or anti-discrimination legislation if they refuse an employee's request to WFH based on age, disability, or parental and carer responsibilities, which may include a claim under unfair dismissal. However, it is legal and reasonable to refuse the request if it is made to balance the reasonable business requirements with the needs of the employee arising from family or carer responsibilities or disability.

In *Lubiejewski v Australian Federal Police*,[64] it was held that it is lawful and reasonable for an employer to call an employee who suffers from anxiety, depression, and autism spectrum disorder to return to work after the lockdown has ended, after some discussion about his work capacity, in order to provide him with special employment support. Following numerous additional instructions, the employer eventually terminated his employment on the grounds that he had failed to comply with lawful and reasonable directions. The claim for unfair dismissal was dismissed because the employer had taken necessary steps to ensure the workers' safety, such as seating arrangements consistent with the employee's psychologist's advice, and had stated that they were open to facilitate some work from home, but not on a full-time basis. However, in *Marriott v Baptcare Ltd*,[65] the dismissal of an employee before the employer required him to return to work was unjust, even though the direction for the employee to get vaccinated in order to return to work, which was later refused, was deemed reasonable.

In *Ruth Cully v Australian National Audit Office*,[66] Ms Cully was approved for WFH with a medical certificate indicating that she is "at increased risk of complications from COVID-19" and to care for her ailing uncle. Despite medical advice to the contrary, she was later directed to return to work after such a term because she lacks work. She kept working in the office. Ms Cully's uncle died on April 7, 2021, and she was fired on June 2, 2021. It was held that Ms Cully's dismissal was unjust, even though the directive to return to work was lawful but unreasonable

64 [2022] FWC 15.
65 [2022] FWC 300.
66 [2022] FWC 495.

given the immediate circumstances, including her high risk of COVID-19 and her caring responsibilities for a family member. The court determined that Ms. Cully's case involves failure to perform duties rather than poor performance.

Procedurally, consideration to grant FWA that also covers the practice of WFH should be based on the specific categories of workers. For instance, older and solo employees, or those who are disabled, may be considered not to work at particular times or places, or to reduce working time or work from home due to personal care and transportation problems. Therefore, the WFH's request should be considered on a case-by-case basis, with all factors, particularly the nature of the work and the customer's needs, carefully weighed. In this regard, the employer can choose from several available models, including the discretionary model, which is based on the nature of the business and employees' willingness to WFH; the entitlement model, which is included in the employment contract; and the requirement model, which is based on the employer's requirements.[67]

As noted, COVID-19 pandemic acted as a catalyst for a paradigm shift in Malaysia's approach to work. In response to lockdowns and social distancing measures, businesses had to swiftly adapt to remote work to ensure business continuity. The MCO implemented by the Government in 2020 mandated a large-scale transition to WFH. Many companies realised the benefits of remote work, including cost savings, increased productivity, and improved employee satisfaction. Meanwhile, the Government played a role by issuing Service Circular No. 5 of 2020 (PP 5/2020) to facilitate a smooth transition to remote work. Post-pandemic, Malaysia continued to embrace FWAs as a fundamental component of the new normal. Companies and businesses have started adopting hybrid models, allowing employees to work both in the office and remotely, including WFH. The experience gained during this period has shaped a new normal in which remote work, including WFH, is no longer just a temporary measure but an integral part of the country's work culture. The legal framework surrounding FWAs and remote work in Malaysia has evolved to meet the changing needs of the modern workforce. Key policies and regulations have been established to provide a structured and supportive environment for both employers and employees engaging in flexible work practices.

Currently in Malaysia, FWAs have been increasingly recognised, and, as far as the legal framework is concerned, amendments to the EA 1955 were introduced in 2022 to accommodate modern work dynamics, including WFH. Sections 60P and 60Q of the EA 1955 outline the application process for FWAs, empowering employees to request changes in their working hours, times or place of work. However, there are challenges and limitations to implementing FWAs in Malaysia, including the need for clear employer policies and guidelines. The experiences of some Malaysian organisations, such as the LHDN, MEF, and Maybank, in adopting FWAs, including WFH to promote WLB and employee well-being, have highlighted the need for clear policies that consider employee rights and business needs in shaping future work arrangements.

In the UK, the ERA 1996 governs FWAs, allowing employees to request changes in their working hours, times, or place of work. Employers must handle such requests reasonably, with

[67] Claire Harrison, "Big HR & Employment Law Issues of 2022/23," https://hhr.com.au/big-hr-employment-law-issues-of-2022-23/ (accessed March 21, 2024).

refusal subject to appeal. However, rejection can occur for various reasons, including additional costs, performance impacts, and planned structural changes. Court cases in the UK illustrate instances of rejection and unfair treatment, emphasising the need for clear policies and equitable treatment. The introduction of the Employment Relations (Flexible Working) Act 2023 in the UK enhances employee rights by allowing requests for FWAs from day one of employment and enabling two applications per year. This reflects a broader trend towards promoting WLB and gender equality in the workplace.

In Australia, the FWA 2009 establishes minimum employment standards, including provisions for FWAs. Employees can request changes to their working arrangements for specific reasons, such as caregiving responsibilities or disability. Employers must respond to requests within 21 days and may refuse only for reasonable business grounds. Legal cases in Australia illustrate the complexities of balancing employee rights with business needs. While WFH is not considered an inherent right, employers must consider individual circumstances and potential discrimination claims when handling requests. It can be seen that the government initiatives and workplace policies aimed at promoting flexibility and WLB, such as the Workplace Flexibility Diagnostic Tool and Workplace Gender Equality Policy. Challenges faced by employers include claims of unfair dismissal and breaches of anti-discrimination legislation, highlighting the importance of clear communication and fair treatment. Court cases in Australia demonstrate the legal considerations surrounding WFH arrangements during the COVID-19 pandemic and the need for employers to balance employee needs with operational efficiency.

In these three jurisdictions, governments' proactive efforts to foster WLB through the introduction of relevant laws and policies should also be actively implemented by employers. Even though FWA and WFH are not general employment rights for employees, the employer may consider their application, provided it does not affect the stability of the organisation's operations. Furthermore, to ensure the effective implementation of FWA, it is agreed that the organisation's regulations and policies must be clearly communicated to employees to avoid disputes arising from unfairness or discrimination. Aside from that, issues such as code of conduct, health and safety, and data protection must be clearly defined.[68] It can be seen that in Malaysia, the UK, and Australia, the use of remote working, or tele-homeworking, especially WFH, where employees work outside their organisations, is one of the flexibility practices. The concept of FWAs, particularly WFH, has gained prominence in Malaysia, the UK, and Australia, and there are indeed benefits of WFH in terms of productivity, talent retention, and WLB. The significance of WLB is a crucial issue to be considered in awarding employees' happiness in performing their work. The global perspective on FWAs, particularly in the UK and Australia, has been integrated into labour laws and organisational practices for some time. Also, these two countries have legislated FWAs, such as the UK's ERA 1996 and Australia's Fair Work Act 2009, and businesses in both countries have embraced them to enhance productivity and employee satisfaction. FWAs, including WFH, are significant in modern workplaces, and there is a need

[68] Talent Corp, "Making Flexible Work, Work: Towards Better and More Inclusive Work-Life Practices," (2018), https://www.talentcorp.com.my/clients/TalentCorp_2016_7A6571AE-D9D0-4175-B35D-99EC514F2D24/contentms/img/Documents/TC-UNDP_FWAs_Making-Flexible-Work-Work_2021.pdf (accessed March 1, 2024).

for effective policies and regulations to support their implementation. FWAs, which include remote working or WFH, have pointed out the importance of considering employee rights, business needs, and technological advancements in shaping the future of work arrangements

CONCLUSION

This paper has examined WFH within the broader framework of FWAs in Malaysia, the UK, and Australia. The comparative analysis demonstrates a shared doctrinal position across all three jurisdictions: while employees are increasingly empowered to request flexible working, WFH has not attained the status of a substantive employment right. Instead, the prevailing legal model is procedural, granting employees a right to request flexibility while preserving employer discretion, subject to statutory duties of reasonableness, consultation, and justification. Despite this shared approach, notable differences exist between the jurisdictions. In the UK, recent legislative reforms have enhanced the enforceability of flexible working requests, indicating a stronger legal commitment to WLB and inclusive employment practices. Australia, while similarly recognising a statutory right to request flexible working, places greater emphasis on reasonable business grounds and operational requirements, thereby reinforcing managerial prerogative. Malaysia, by contrast, has only recently placed FWAs on a statutory footing, and its framework remains comparatively underdeveloped and highly dependent on organisational policy and employer goodwill. Normatively, the findings suggest that procedural rights alone may be insufficient in addressing the structural implications of WFH, particularly as it continues to reshape traditional assumptions about workplace location, supervision, and employee autonomy. As WFH becomes an enduring feature of contemporary work, greater doctrinal clarity and regulatory coherence are required to ensure fairness, consistency, and legal certainty. While all three jurisdictions adopt a predominantly procedural approach to FWAs, significant differences remain in the enforceability and remedies available. In the UK and Australia, employer discretion is more tightly constrained by statutory duties, judicial oversight, and access to remedies, particularly in cases involving discrimination or unfair dismissal. By contrast, Malaysia's framework under sections 60P and 60Q of the Employment Act 1955 offers limited guidance on unreasonable refusals and provides no clear remedial pathway for employees. This comparative gap highlights the need for Malaysia to move beyond policy-led flexibility towards clearer procedural safeguards that promote fairness and legal certainty, even where WFH is not recognised as a substantive employment right.

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