[2024] FWC 717

The attached document replaces the document previously issued with the above code on 15 April 2024.

Paragraph [40] has been amended to remove the word ‘not’ from the last sentence.

Associate to Commissioner Platt
18 April 2024

[2024] FWC 717

DECISION

Fair Work Act 2009
s.65B - Application for a dispute about requests for flexible work arrangements

Shane Gration

v

Bendigo Bank
(C2023/6392)

COMMISSIONER PLATT ADELAIDE, 15 APRIL 2024

Application to deal with a dispute about the right to request for flexible working arrangements – jurisdiction - reasonable business grounds – application dismissed

[1] On 9 October 2023, Mr Shane Gration (the Applicant) lodged an application for the Commission to deal with a dispute under s 65B of the *Fair Work Act 2009* (the Act) concerning a request for a flexible work arrangement with his employer, Bendigo Bank (the Respondent or the Employer).

[2] On 30 October 2023, a conciliation conference was conducted but the matter was unable to be resolved. Subsequent discussion between the parties have similarly been unsuccessful in resolving the matter.

[3] Directions were issued requiring each party to submit an outline of their submissions, witness statements and material to be relied upon. This material was compiled into two digital hearing books and distributed to the parties prior to the hearing.

[4] The Hearing was conducted in person, in Adelaide, on 21 March 2024.

[5] The Applicant was self-represented, the Respondent was represented by Ms Kirsty Stewart of Counsel, permission granted pursuant to s.596.

[6] Two digital court books were received into evidence. The first contained material provided in accordance with the Directions, the second was material received after the production of the first digital court book.

[7] Mr Gration gave evidence on his own behalf and, Mr Graeme White (General Manager) and Ms Tamara Lee Capogreco (Senior Manager) gave evidence on behalf of the Respondent.

Background

[8] The original application in this matter related to a request for a flexible working arrangement made by the Applicant on 9 October 2023. The Respondent declined the request. The Applicant filed a s.65B application and I conducted a Conference. At the Conference the parties agreed a without prejudice interim arrangement whereby Mr Gration attended the workplace one day a fortnight until the matter was determined.

[9] A report back was provided in January 2024. The dispute had not resolved and it became apparent that the basis for the Applicant's request changed over the period of time since the first request was made. At the Directions Conference on 10 January 2024, it was agreed that the Applicant would file a revised flexible workplace arrangement request by 7 February 2024 and that the Respondent would respond to that request no later than 28 February 2024. The request was made and the respondent declined the request (contending there were reasonable business grounds to do so) on 22 February 2024.

[10] For the sake of clarity, it is only the February 2024 request and refusal that is being reviewed by the Commission. In so far as it is necessary, I have allowed the Applicant to amend his original application to refer to the request made on 7 February 2024 and its subsequent rejection, pursuant to s.586 of the Act.

[11] On 18 March 2024, I granted the Respondent permission to be represented pursuant to s.596 on the basis of complexity and efficiency. In order to mitigate the impact of that decision on the Applicant, the Hearing was conducted in the form of a Determinative Conference.

LEGISLATION

Legislative framework

[12] Division 4 of Part 2-2 of the Act, *The National Employment Standards* is concerned with 'Requests for flexible working arrangements'. Division 4 has been substantially amended a number of times since the enactment of the Act in 2009, most recently by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act).

[13] Section 65 of the Act in its current form sets out the circumstances in which an employee may request for a change in working arrangements. It provides:

> **65 Requests for flexible working arrangements**
>
> *Employee may request change in working arrangements*
>
> (1) If:
>
> (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
> (b) the employee would like to change his or her working arrangements because of those circumstances;
>
> then the employee may request the employer for a change in working arrangements relating to those circumstances.

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

(1A) The following are the circumstances:

(aa) the employee is pregnant;
(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
(b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
(c) the employee has a disability;
(d) the employee is 55 or older;
(e) the employee is experiencing family and domestic violence;
(f) 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 family and domestic violence.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and
(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
(b) for a casual employee—the employee:

(i) is, immediately before making the request, a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and
(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

(2A) For the purposes of applying paragraph (2)(a) in relation to an employee who has had their employment converted under Division 4A of Part 2-2, any period for which the employee was a regular casual employee of the employer is taken to be continuous service for the purposes of that paragraph.

Formal requirements

(3) The request must:

(a) be in writing; and
(b) set out details of the change sought and of the reasons for the change.

[14] In its original form upon the enactment of the Act in 2009, s 65(1) provided for the right to make a request for flexible working arrangements only where the employee was a parent of or had the responsibility for the care of a child who was under school age or was under 18 and

had a disability. Sections 65(1), (1A) and (1B) were introduced by the *Fair Work Amendment Act 2013* (Cth) in substantially their current form (except for s 65(1A)(aa))[1]. The Statement of Compatibility with Human Rights in the Explanatory Memorandum for the *Fair Work Amendment Bill 2013* (2013 EM) stated that:

> Part 3 of Schedule 1 to the Bill extends the right to request a change in working arrangements to a broader category of persons, including to employees with caring responsibilities, parents with children that are school age or younger, employees with a disability, those who are mature age, as well as to employees who are experiencing violence from a family member or are providing care and support to a member of their immediate family or a member of their household as a result of family violence.
> . . .
> Extending the right to request a change in working conditions to this additional range of employees recognises the interests of these particular groups and further enhances the assistance provided to them.
> …
> These amendments reinforce existing protections against discrimination contained in the FW Act.

[15] In relation to s 65(1), the 2013 EM said (at [27]-[28]):

> New subsection 65(1) provides that if an employee would like to change his or her working arrangements because of any of the circumstances specified in new subsection 65(1A), then the employee is entitled to request a change in his or her working arrangements. The terms of new subsection 65(1) make clear that the reason the employee would like to change their working arrangement is because of the particular circumstances of the employee. That is, there must be a nexus between the request and the employee's particular circumstances.
>
> These provisions are not intended to limit the timing or nature of discussions about flexible working arrangements generally. For example, where an employee can foresee that he or she may need to assume caring responsibilities in the short to medium term, it is anticipated that the employee could commence discussions ahead of assuming those responsibilities to 'flag' that a request in accordance with these provisions may be coming, and to give the parties an opportunity to explore suitable alternative arrangements that accommodate the needs of both parties. Consistent with the current operation of the right to request provisions and the intent of these provisions to promote discussion between employers and employees about flexible working arrangements, there is no evidence requirement attaching to the request. It would be expected that documentation relating to the particular circumstances of an employee would be addressed in discussions between employers and employees.
>
> (underlining added)

[16] Specifically in respect of the inclusion of 'the employee has a disability' in s 65(1A)(c), the 2013 EM stated (at [35]):

> 'Disability' in new paragraph 65(1A)(c) is not defined and has its ordinary meaning.

[17] I note that the Oxford Dictionary describes a disability as a 'physical or mental condition that limits a person's movements, senses, or activities; (as a mass noun) the fact or state of having such a condition'.[i]

[1] The drafting of s 65(1A)(e) and (f) was the subject of minor modification by the SJBP Act.

[18] Section 65A, which was added to the Act by the SJBP Act, concerns the obligations of an employer which arise when an employee makes a request under s 65(1). Section 65A provides:

> **65A Responding to requests for flexible working arrangements**
>
> *Responding to the request*
>
> (1) If, under subsection 65(1), an employee requests an employer for a change in working arrangements relating to circumstances that apply to the employee, the employer must give the employee a written response to the request within 21 days.
>
> (2) The response must:
>
> (a) state that the employer grants the request; or
> (b) 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
> (c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).
>
> (3) The employer may refuse the request only if:
>
> (a) the employer has:
>
> (i) discussed the request with the employee; and
> (ii) 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); and
>
> (b) the employer and the employee have not reached such an agreement; and
> (c) the employer has had regard to the consequences of the refusal for the employee; and
> (d) the refusal is on reasonable business grounds.
>
> Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances: see subsection 65C(5).
>
> (4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to a change to the employee's working arrangements if the employer would have reasonable business grounds for refusing a request for the change.
>
> *Reasonable business grounds for refusing requests*
>
> (5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:
>
> (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;
(e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

Note: specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

Employer must explain grounds for refusal

(6) If the employer refuses the request, the written response under subsection (1) must:

(a) include details of the reasons for the refusal; and
(b) without limiting paragraph (a) of this subsection:

(i) set out the employer's particular business grounds for refusing the request; and
(ii) explain how those grounds apply to the request; and

(c) either:

(i) 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
(ii) state that there are no such changes; and

(d) set out the effect of sections 65B and 65C.

Genuinely trying to reach an agreement

(7) This section does not affect, and is not affected by, the meaning of the expression 'genuinely trying to reach an agreement', or any variant of the expression, as used elsewhere in this Act.

[19] Sections 65B and 65C of the Act, also introduced by the SJBP Act, empower the Commission to deal with disputes arising from an employer's refusal of, or failure to reply within 21 days to, an employee's request made under s 65(1):

65B Disputes about the operation of this Division

Application of this section

(1) This section applies to a dispute between an employer and an employee about the operation of this Division if:

(a) the dispute relates to a request by the employee to the employer under subsection 65(1) for a change in working arrangements relating to circumstances that apply to the employee; and
(b) either:

(i) the employer has refused the request; or
(ii) 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 65A.

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

Resolving disputes

(2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

FWC may deal with disputes

(3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.

(4) If a dispute is referred under subsection (3):

(a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
(b) the FWC may deal with the dispute by arbitration in accordance with section 65C.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate. The FWC commonly deals with disputes by conciliation. The FWC may also deal with the dispute by mediation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

(5) The employer or employee may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:

(a) resolving the dispute; or
(b) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

65C Arbitration

(1) For the purposes of paragraph 65B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:

(a) if the employer has not given the employee a written response to the request under section 65A—an order that the employer be taken to have refused the request;
(b) if the employer refused the request:

(i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or
(ii) an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds;

(e) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request under section 65A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 65A;

(f) subject to subsection (3) of this section:

(i) an order that the employer grant the request; or
(ii) an order that the employer make specified changes (other than the requested changes) in the employee's working arrangements to accommodate, to any extent, the circumstances mentioned in paragraph 65B(1)(a).

Note: An order by the FWC under paragraph (e) could, for example, require the employer to give a response, or further response, to the employee's request, and could set out matters that must be included in the response or further response.

(2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.

(2A) The FWC must not make an order under paragraph (1)(e) or (f) that would be inconsistent with:

(a) a provision of this Act; or
(b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.

(3) The FWC may make an order under paragraph (1)(f) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.

(4) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.

(5) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:

(a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or
(b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

Contravening an order under subsection (1)

(6) A person must not contravene a term of an order made under subsection (1).

Note: This subsection is a civil remedy provision (see Part 4-1).

[20] Schedule 1 to the Act sets out transitional provisions applying to amendments to the FW Act. Item 64 of Schedule 1 provides that the amendments in, relevantly, Division 3 of Part 11 of Schedule 1 to the SJBP Act (which added ss 65A, 65B and 65C to the FW Act) 'apply in relation to a request made under subsection 65(1) of [the FW Act] on or after the commencement of that Part'. Item 17 of s 2(1) of the SJBP Act provides that the Part 11 amendments commenced on 6 June 2023.

Jurisdictional prerequisites for arbitration

[21] In *Jordan Quirke v BSR Australia Ltd*[ii] a Full Bench of the Commission set out the jurisdictional pre-requisites for an application of this type. The Full Bench stated:

> "Section 65B(1) relevantly provides that s 65B applies to a dispute between an employer and an employee if, first, the dispute relates to 'a request by the employee to the employer under subsection 65(1) for a change in working arrangements relating to circumstances that apply to the employee' and, second, the employer has either refused the request or has not given the employee a written response under s 65A within 21 days. Thus, to the extent that s 65B(3) permits a dispute to be referred to the Commission and s 65B(4) empowers the Commission to deal with the dispute (including, if necessary, by arbitration under s 65C), the dispute must be of the type referred to in s 65B(1). Absent the existence of such a dispute, the Commission lacks jurisdiction under s 65B(4) and cannot engage in arbitration under ss 65B(4)(b) and 65C. Because, as explained, the first predicate for such a dispute is that it must relate to a request by the employee under s 65A(1), then the Commission's jurisdiction is dependent on a request of that nature having been made.
>
> There are five discernible requirements in s 65 that must be satisfied in order for a request under s 65(1) to have been validly made. The first two requirements are contained in s 65(1) itself. *First*, s 65(1)(a) requires that 'any' — that is, at least one — of the circumstances in s 65(1A) must *apply* to the employee. The use of 'apply' in the present tense connotes that the relevant circumstance must, as a matter of fact, exist (rather than being anticipated or the subject of anticipatory discussions) in respect of the employee at the time the request is made. It follows that, where the Commission is asked to arbitrate pursuant to s 65B(4)(b), it must be able to be satisfied that one of the circumstances in s 65(1A) applied to the relevant employee at the time of the employee's request for flexible working arrangements.

Second, the employee's desire for changed working arrangements must be 'because of' the relevant circumstance in s 65(1A) (s 65(1)(b)), and the request for a change in working arrangements must 'relat[e] to' the relevant circumstance. This embodies the requirement for a 'nexus' between the request and the relevant circumstance referred to in the 2013 EM.

The *third* requirement is that contained in s 65(2), namely that the employee has a minimum period of service which, in the case of a non-casual employee, is 12 months of continuous service immediately before making the request.

The final two requirements are the 'formal requirements' in s 65(3). The *fourth* requirement, in s 65(3)(a), is that the request must be in writing. The *fifth* requirement, in s 65(3)(b) is that the request must set out the details of the change sought and the reasons for the change. The requirement to set out the 'reasons for the change' is to be understood as connected with the requirements for a valid request in s 65(1), such that the required reasons would need to identify the relevant circumstance in s 65(1A) and explain how the proposed changed working arrangements relates to that circumstance."

There is a further requirement (*sixth* requirement) that the request has to have been made on or after 6 June 2023.

[22] I adopt the guidance provided by the Full Bench.

Evidence

[23] Mr Gration submitted a statement (containing a number of attachments) and gave evidence.

[24] The relevant evidence from Mr Gration is summarised as follows:

- Mr Gration's written contract of Employment dated July 2021[iii] specified that his place of work was the Adelaide Head Office.

- Mr Gration's position description[iv] contemplates him assisting staff and partners with bank policies and loans scenarios; demonstrating a 'can do' approach with customers, partners, colleagues; providing regular feedback and training to staff; being available to assist other staff.

- Mr Gration's wife sustained a serious injury to her foot prior to his employment with the Respondent.

- A letter from Dr Quang Tran dated 28 July 21, states that Mrs Melanie Gration had a fall and fractured her left calcaneus (the large bone forming the heel) in 2020 and that a bone graft was required. Dr Tran advised that Mrs Gration required rehabilitation.

- I have been provided with an x-ray of Mrs Gration's ankle which shows a number of metal objects have been inserted into her ankle region.

- I have also been provided with a medical certificate from Dr P Ashley Mauviel dated 2 February 2024, which states 'Mrs Gration has a serious foot injury that requires additional assistance from Shane' [the Applicant]' The certificate does not advise the basis for Dr Ashley's assessment.

- Mr Gration gave evidence that his wife's foot injury results in muscle cramps/spasms, stiffness in the joint, frequent instability of the ankle, swelling, discoloration and general soreness. Mr Gration states his wife is in constant pain with her foot injury and the best rehabilitation for her injury is to be essentially off her feet. Mr Gration gave evidence that his wife currently works as a Yoga instructor and runs 15 x 1-hour high intensity workouts per week[v]. This workload is such that Mrs Gration needs to recuperate after these classes and Mr Gration needs to be at home to assist his wife.

- Mr Gration said that at his initial employment interview with the Respondent he raised his wife's foot injury and stated the rehabilitation could continue for many years. At the time, the Respondent had work from home arrangements due to the pandemic but Mr Gration was advised that work from home arrangements will be "fully flexible and negotiable" and no-one will be forced back into the office post pandemic.

- In July 2023, Mr Gration was advised by his Manager that everyone was required to work back in the office 2 days a week.

- Since the interim arrangements were agreed in proceedings before the Commission in October 2023, Mr Gration has attended the Grenfell Street office fortnightly and noted that no other team Members have been present. Mr Gration has not attended any team meetings/training seminars/milestone moments in the last 4 months.

- As to his work performance, Mr Gration asserts he currently sits 30% above target and is one of the highest performers in the division. He is constantly praised by both internal and external stakeholders for his service to the bank's clients. Mr Gration loves his job and has a passion for credit assessment.

- Mr Gration advised that his daughter has recently been diagnosed with ADHA which requires uniformity in her day to day routine. In addition, she suffers from chronic asthma.

- Mr Gration advises that he is recognised as a carer under the *Carers Recognition Act 2010*[vi] which together with the document titled Carer's Certificate[vii] is sufficient to establish jurisdiction under s.65(1A)(b).

- Mr Gration also expressed that he is not a big fan of going into the office, that he did not feel comfortable and prefers working from home rather than being in the office.

[25] The Respondent submitted statements from Mr Graham White[viii], General Manager Operations, Processing and Servicing and Ms Tamara Capogreco, Senior Manager. Both witnesses gave evidence.

[26] Mr Whites' relevant evidence is summarised as follows:

- In the early stages of the COVID-19 pandemic, including during the brief lockdowns in South Australia in late-2020 and mid-2021, the Respondent took an enterprise wide approach to office attendance that staff members were to avoid attending the office unless it was absolutely critical to do so.

- Over the course of 2021 and 2022, as vaccination became available and the risks and controls associated with COVID-19 began to evolve, the Respondent began to gradually encourage staff members to return to working in the office.

- In January 2022, the Respondent commenced discussions with team members about adopting a hybrid work model whereby staff members would work a combination of days from the office and from home, with days and regularity to be determined on a team-by-team basis, guided by the team's 'moments that matter'.

- 'Moments that matter' is a term used within the Respondent's business to describe activities that have the most impact and create the best outcomes when they take place face-to-face, and permit employees to connect and collaborate. Each team has their own unique 'moments that matter', but examples include team planning days, milestone celebrations, onboarding, inductions, welcoming new team members, training, development conversations and obtaining technical support.

- In March 2022, 'The Way We Work: Office-based Employee Guide' (WWW Guide) published on the Respondent' intranet page. The WWW Guide provided information and guidance to staff members around the hybrid working model that was to be adopted within the business and explained the importance of a combination of working in the office and working from home to balance the needs of the business, role requirements, opportunities for meaningful team connection, individual personal circumstances, and employee wellbeing.

- In or around mid-2023, formal discussions commenced around mandating a partial return to work in the office, in accordance with the Respondent's hybrid working model.

- On 4 July 2023 Mr White sent an email to OPS staff members that required staff to attend the office at least two days per week, effective 1 September 2023.

- The Respondent held the view that there were a number of benefits to the business and employees returning to work in the office, including:

    - establishing and re-establishing relationships, connections and networks within the team and the business more broadly, particularly for new employees;

- enhanced collaboration both within and across teams, particularly as a result of informal 'bump' interactions and ad hoc conversations which would often lead to further discussions, actions and solutions being explored;

- increased effectiveness of learning and coaching through closer and direct interactions between team members and increased informal learning opportunities;

- increased face-to-face communication and interaction opportunities; and

- enhanced wellbeing from greater social interactions and work/life separation.

[27] Ms Capogreco's relevant evidence is summarised as follows:

- Mr Gration is part of a team of 14 people, 7 of whom are based in the Adelaide Office. Five of Mr Gration's team members are based in Ipswich and are required to attend the Respondent's Ipswich office in accordance with the 2 days return to office requirement unless they have been granted an exemption. Mr Gration's Adelaide-based team members have Thursdays as their office 'anchor day'. There is at least one other member of Mr Gration's immediate team who attends the office on Wednesdays, in addition to a minimum of seven of Mr Gration's colleagues in the broader Assessment team, as well as staff members from the Credit Support and Credit Decisions teams.

- The Adelaide Office operates on a 'hot desk' arrangement.

- Team members have 'bump' interactions (informal face to face conversations) with other members of their Team, members of the broader assessment teams and members of the Credit Support and Credit Decisions teams.

- These arrangements result in collaboration, trouble shooting, workshopping and coaching which does not occur in an online environment. These interactions promote teamwork, people engagement, relationship building and networking within the Respondent's organisation.

- The Respondent facilitates 'moments that matter' which are information interactions (some face to face with opportunity for online participation for those not in the office on the day) for events such as International Womens Day, Harmony Day, Town Halls and attendances by key personnel.

- Other than Ms Capogroco's evidence regarding 'moments that matter', her evidence was not in dispute.

Submissions

[28] Mr Gration contends that the Commission's jurisdiction is enlivened as a result of him being responsible for the care of a school aged child and that he is a recognised carer of a person

with a chronic illness. Mr Gration contends there would be no negative impact if his request was granted and there is no business reason for his request to be refused.

[29] The Respondent provided written submissions. The Respondent submits that there are six discernible requirements for a s.65(1) request to be made. The Respondent contends that Mr Gration's application does not meet three of those requirements. Firstly the circumstances required in s.65(1A) have not been met, secondly that Mr Gration's desire for the changed working requirements must be because of the relevant circumstances in s.65(1A) and the request for change must relate to the relevant circumstance, and finally the request must set out the details of the changes sought and reasons for the change, the required reasons must identify the s,65(1A) criteria and explain how the proposed working arrangements relates to that circumstance. In the alternative, the Respondent contends that the request has been rejected on reasonable business grounds.

[30] There is no dispute that the service requirements in s.65(2) have been met.

Witness Credit

[31] I have had the opportunity to observe Mr Gration give evidence. I found his evidence to be inconsistent, largely uncorroborated and overall unconvincing. I gained the impression that Mr Gration's primary focus was seeking to avoid a return to the workplace on the basis that it was possible to satisfactorily complete his work remotely. Mr Gration appeared oblivious to the employer's desire to obtain the benefits of face to face contact.

[32] I am alert to the possibility that Mr Gration could be exaggerating his wife's needs so as to support his desire not to return to working at the workplace.

[33] Mr White and/or Ms Capogroco's gave their evidence in an objective, considered manner and made concessions where appropriate. Where Mr Gration's evidence differs with that of Mr White and/or Ms Capogroco's, I have preferred their evidence over Mr Gration's.

Consideration

[34] I note that the default working option in his contract of employment is to attend the Adelaide office. I note that Respondent's current policy only seeks that Mr Gration attend the office on 2 days per week (subject to absences due to leave including personal and carers leave).

[35] I have given Mr Gration some latitude in the manner in which his case has been presented as result of him not being conversant with the Commission's processes and/or procedures.

[36] After a review of the material submitted by Mr Gration prior to the Hearing, it was suggested to him that his case may be assisted by the provision of medical evidence concerning his wife's condition and its impact on her, and a statement from his wife which attested to the level of support required and the assistance provided by Mr Gration. This invitation was not taken up by the Applicant, nor was any satisfactory reason given for the failure to call his wife to give evidence, other than the contention that she was unavailable. The Respondent has invited me to make a *Jones v Dunkell* inference, that is, that the evidence of Mr Gration's wife would

not have assisted his case. Mr Gration's evidence was largely self-serving and largely uncorroborated, and in my view, it is appropriate to draw the inference.

[37] No analysis of Mrs Gration's medical condition has been proffered and I have little information as to the impact Mrs Gration's foot injury has on her mobility or needs, or any information as to her current physical activity or any future prognosis. I have no information on the level of support reasonably required by Mrs Gration or any assistance that could be provided by other persons. Mr Gration does not appear to have considered any option other than working from home.

[38] Dr Mauvil's certificate of 2 February 2024 simply states "[Mr Gration] would appreciate flexibility in regard to his capacity to work from home as he has been doing to allow him the opportunity to look after her and assist with activities of daily living and her general health care." I do not know what led that statement to be made or the information upon which it was based.

[39] Mr Gration's evidence of Mrs Gration's capacity to undertake Yoga training sessions appeared at odds with his contention that he needed to be constantly home to assist her. The option of Mrs Gration moderating her Yoga sessions such to mitigate the level of support required by Mr Gration does not appear to have been considered.

[40] I accept that Mr Gration is the parent, or has responsibility for the care, of a child who is of school age or younger, this evidence is not in dispute and this this limb of s.65(1A) is satisfied. The Respondent has undertaken that in so far as there is a need for Mr Gration to provide care and support for his daughter on any given day, he will have access to carers leave and/or be permitted to work from home. In my view that is an appropriate response, I am satisfied that there is no need for Mr Gration to permanently work from home to deal with his caring responsibilities and the employers refusal to agree to that portion of the request has been made on reasonable business grounds.

[41] I do not propose to further deal with this limb of the application.

[42] I turn now to the second limb, s.65(1A)(c).

[43] Section 5 of the Carer Recognition Act 2010 provides the definition of the term 'Carer':

> **5 Meaning of *carer***
>
> (1) For the purpose of this Act, a ***carer*** is an individual who provides personal care, support and assistance to another individual who needs it because that other individual:
>
> (a) has a disability; or
>
> (b) has a medical condition (including a terminal or chronic illness); or
>
> (c) has a mental illness; or
>
> (d) is frail and aged.
>
> (2) An individual is not a ***carer*** in respect of care, support and assistance he or she provides:
>
> (a) under a contract of service or a contract for the provision of services; or
>
> (b) in the course of doing voluntary work for a charitable, welfare or community organisation; or

(c) as part of the requirements of a course of education or training.

(3) To avoid doubt, an individual is not a ***carer*** merely because he or she:
(a) is the spouse, de facto partner, parent, child or other relative of an individual, or is the guardian of an individual; or
(b) lives with an individual who requires care.

[44] I observe the Applicant's registration as a Carer with Carer SA is not of itself determinative. As can be seen above, Section 5 includes other requirements including the provision 'personal care, support and assistance to another individual who needs it because the factors described in s.5(1)(a)-(d). Factors 5(1)(c) and (d) do not appear to have application in this case.

[45] There is insufficient evidence to establish that Mrs Gration has a disability.

[46] Whilst I accept that Mrs Gration had at some time a medical condition (based on the limited medical evidence provided), there is insufficient evidence before me as to her current medical condition and/or needs.

[47] The lack of evidence does not permit me to determine that Mrs Gration has the need for personal care, support and assistance. This is predominantly because of the lack of information concerning Mrs Gration's medical condition and its impact on her, the lack of evidence in respect of Mrs Gration's support needs and also the evidence as to her capacity to teach and participate in 15 high intensity Yoga classes per week which appears inconsistent with Mr Gration's contention that his wife requires his support.

[48] Finally, I note that Mr Gration is not a carer merely because he is Mrs Gration's spouse and/or that they reside at the same location.

[49] On this basis, I am unable to conclude that Mr Gration is a carer (within the meaning of the *Carer Recognition Act 2010*), and that this limb of Mr Gration's application must therefore fail, and I have no jurisdiction to consider that portion of the application further.

[50] In the event that I am wrong about the lack of jurisdiction, I make the following observations:

- The contentions in support of the Applicant's request to work from home have changed over the period of time since the original request was made. The initial request was made based on Mr Gration's daughters' medical needs, and his financial position (which appeared to relate his wife's reduced earning capacity since her accident in 2020). Whilst I accept it could be argued that Mr Gration has sought to modify his arguments so as to give him the greatest prospects of success, I as detailed in the introduction , I have only considered his most recent request and have given him some latitude owing to his limited industrial relations knowledge.

- On the evidence, I accept that there are benefits to the Respondent, the Applicant and his work colleagues from face to face interactions. Mr Gration's retort that he is able to meet his workload requirements remotely may be correct, but ignores the

benefits of face to face interactions and employee collaboration, and also Mr Gratian's obligations under his contract of employment which requires him to attend the Adelaide office.

- The process of an employer reviewing s.65 applications necessarily involves the balancing of each parties needs. I observe that the Respondent has been very accommodating with respect to Mr Gration's needs for an extended period. The Respondent seeks that Mr Gration attend the workplace in order to;
    - further deeper connections and spontaneous collaboration;
    - engage in nuanced policy discussions, brainstorming and consensus building;
    - mentor and develop skills of other employees; and
    - attend moments that matter milestones.
- I accept the benefits described accrue from face to face interaction and are desirable in the workplace. The Respondent's reasonableness is further evidenced by it agreeing to provide further flexibility (by way of carers leave and/or additional work from home) where Mr Gration is unable to attend the workplace as a result of the need to care for his daughter. Unfortunately, Mr Gration's approach has not been so accommodating. Mr Gration appears to be only concerned about himself. The employment relationship is a two-way street. In my view the Respondent's rejection of Mr Gration's request is soundly based on reasonable business grounds.

Conclusion

[51] At the Hearing I advised Mr Gration that I would not grant his application. At that time, I had not reached a concluded view as to the jurisdictional issues, but that I was of the view that if those requirements were met, then pursuant to s.65C(1)(b)(i) of the *Fair Work Act 2009,* that the grounds on which the Respondent refused the request were reasonable business grounds. An order to this effect was published on 27 March 2024.[ix]

[52] In respect of the second limb of Mr Gration's application I have found that he does not satisfy the jurisdictional requirements. The outcome remains in that I have declined to interfere in the Respondent's decision to reject the request. I have detailed the approach that I would have taken if I found the jurisdiction requirements had been met, and that I would have found that the Respondent refused the request on reasonable business grounds.

[53] The consequence of this Decision and my Order, is that from the week commencing 15 April 2024 (to give both parties the opportunity to determine and/or modify their current arrangements), Mr Gration will be required to attend the office of the employer 2 days per week, with the days to be agreed between the parties or in the absence of agreement, as directed by the employer.

COMMISSIONER

Appearances:

Mr S Gration as the Applicant.
Ms K Stewart of Counsel, for the Respondent.

Hearing details:

2024
Adelaide
20 March

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[i] Oxford English Dictionary (online at 14 November 2023) 'disability' (def 1).

[ii] [2023] FWCFB 209.

[iii] DCB1 page 82.

[iv] DCB1 page 84.

[v] Exhibit R3.

[vi] DCB Page 29.

[vii] DCB Page 20.

[viii] Exhibit R5.

[ix] PR772808.