



DECISION

Fair Work Act 2009

s.65B - Application for a dispute about requests for flexible work arrangements

Tracey Smith

v

Costco Wholesale Australia Pty Ltd

(C2025/5689)

COMMISSIONER CRAWFORD

SYDNEY, 11 SEPTEMBER 2025

Dispute about request for flexible work arrangements – one circumstance found to exist but no nexus with request – request not valid – application dismissed.

BACKGROUND

[1] Tracey Smith has been employed by Costco Wholesale Australia Pty Ltd (**Costco**) in a full-time Maintenance Assistant role at its Canberra Warehouse since 9 July 2018. Ms Smith and Costco have agreed to a flexible working arrangement since October 2018 whereby Ms Smith works the following shifts each week:

- Monday: 6am to 2:30pm.
- Tuesday: 6am to 2:30pm.
- Wednesday: 6am to 2:30pm.
- Thursday: 6am to 2:30pm.
- Sunday: 6am to 12:30pm.

[2] Ms Smith submitted a request for alternative flexible working arrangements on 21 April 2025. Ms Smith sought to compress her weekly hours into four days per week by starting work two hours earlier each morning. Ms Smith sought the following shifts each week:

- Monday: 4am to 2:30pm.
- Tuesday: 4am to 2:30pm.
- Wednesday: 4am to 2:30pm.
- Sunday: 4am to 12:30pm.

[3] Ms Smith applied for the alternative flexible working arrangements under s.65 of the *Fair Work Act 2009* (**FW Act**) based on the following circumstances:

- Ms Smith is a carer for her partner and her grandchild who is less than a year old.
- Ms Smith is over 55 years of age.

[4] Costco failed to respond to Ms Smith within 21 days as required by s.65A of the FW Act. Costco ultimately refused Ms Smith's request on 19 May 2025. Costco referred to Ms Smith's requested working arrangements creating safety issues due to a lack of supervision at 4am and raised concerns about overtime entitlements being triggered from Monday to Wednesday each week because Ms Smith would work more than 8 hours per shift.¹

[5] Ms Smith's dispute did not resolve during conciliation and a hearing was listed for 8 September 2025 via video. I granted permission for Costco to be represented at the hearing because I was satisfied granting permission would enable the matter to be dealt with more efficiently. Ms Smith did not oppose permission being granted to Costco.

[6] Ms Smith relied on documentary evidence recording her request for flexible working arrangements and information about rosters at the Canberra Warehouse. Ms Smith also provided evidence in reply to material filed by Costco. Ms Smith's daughter, Jessica O'Sullivan, provided a witness statement outlining why she needs assistance from Ms Smith to care for her young child. Ms Smith and Ms O'Sullivan were not required for cross-examination.

[7] Costco relied on a witness statement from Johnny Huynh (Warehouse Manager) dated 8 August 2025 which had four documents attached. Mr Huynh was not required for cross-examination.

CONSIDERATION

[8] While I appreciate it can be challenging for self-represented parties to prepare evidence, there is a significant lack of evidence about some key issues in relation to Ms Smith's application. Ms Smith was on notice that Costco was relying on this lack of evidence from when Costco filed evidence and submissions on 8 August 2025. Ms Smith had an opportunity to file evidence and submissions in response on 15 August 2025 but did not provide any medical or other documentary evidence.

[9] I consider it was necessary for Ms Smith to provide medical evidence to establish that she is a carer for her partner within the meaning of the *Carer Recognition Act 2010*. Ms Smith referred in closing submissions to her partner suffering a serious injury at work which has ongoing implications for his capacity. That may well be the case, but medical evidence will generally be required before the Commission can be satisfied that the circumstance identified in s.65(1A)(a) of the FW Act existed at the time the request was made by Ms Smith.

[10] I also consider there is a lack of evidence to establish that Ms Smith's request was made "because of" caring obligations for her partner. Ms Smith has not provided any medical evidence to substantiate what support her partner requires and at what times of the week. Ms Smith referred in closing submissions to taking her partner to physiotherapy appointments on Saturdays. However, no evidence has been provided to establish how often Ms Smith's partner is required to attend physiotherapy appointments and why these would need to occur on a Saturday.

[11] In relation to Ms Smith's grandson, it does not appear that Ms Smith has responsibility for the care of a "child" within the meaning of s.65(1A)(a) and s.17 of the FW Act. Ms O'Sullivan's son is clearly a member of Ms Smith's "immediate family" within the meaning of

s.12 of the FW Act. However, the circumstance in s.65(1A)(a) of the FW Act is not directed at having responsibility for the care of a child who is within the employee's immediate family.

[12] It also does not appear that Ms Smith is a carer for her grandson within the meaning of the *Carer Recognition Act 2010*, which means the circumstance in s.65(1A)(b) cannot be relied upon.

[13] There is no dispute that Ms Smith meets the circumstance in s.65(1A)(d) in that she is 55 years of age or older. However, there is insufficient evidence to establish that Ms Smith's desire for changed working circumstances is "because of" her age and that there is a "nexus" between her requested flexible arrangements and her age. The case advanced by Ms Smith indicates she requested flexible working arrangements so she can provide care for her partner and grandson. Those reasons are completely understandable, but they are not reasons that are directly linked to Ms Smith's age.

[14] The Full Bench in *Jordan Quirke v BSR Australia Ltd*² identified five discernible requirements in s.65 that must be satisfied for a request under s.65(1) to have been "validly made."

[15] The first requirement is that one of the circumstances identified in s.65(1A) must "apply" to the employee. For the reasons identified above, I have found that the only circumstance that "applied" to Ms Smith when she made the request for flexible working arrangements on 21 April 2025 was that she was 55 years of age or older.

[16] The second requirement is that the employee's desire for changed working arrangements must be "because" of the relevant circumstances in s.65(1A) and the request must "relate to" the relevant circumstances. For the reasons identified above, I am not satisfied that Ms Smith's request was made in relation to her circumstance of being 55 years of age or older. I consider the request was made so that Ms Smith could provide care to her partner and grandson.

[17] For the reasons identified above, Ms Smith did not make a valid request for flexible working arrangements under s.65(1) of the FW Act. That means there is not a dispute that is capable of being arbitrated by the Commission.

[18] Costco has confirmed during these proceedings that it is willing to meet with Ms Smith to discuss alternative working arrangements that will meet the needs of both parties. I encourage Ms Smith to take up that offer and to have further discussions with Costco. Costco has accommodated flexible working arrangements for Ms Smith since 2018. Costco is clearly open to trying to accommodate working arrangements that allow Ms Smith to balance her work and family responsibilities. If Ms Smith's circumstances mean that she is no longer able to work on Thursdays, it appears Costco would be willing to accommodate a change to her working arrangements. However, it may not be realistic for Ms Smith to expect that she can work one less day per week without losing any income or substantially increasing her income.

[19] I also note that Ms O'Sullivan may be able to make her own request for flexible working arrangements to care for her child and that this could potentially include requesting certainty to be able to care for her son for one day per week.

[20] Ms Smith's application is dismissed.



COMMISSIONER

Appearances:

Ms T Smith representing herself.

Ms K Sullivan from Maddocks representing Costco.

Hearing details:

2025.

Sydney (via video).

8 September.

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¹ Clause 6.6.2 of the *Costco Wholesale Australia Pty Ltd Enterprise Agreement 2023 – 2027*.

² [\[2023\] FWCFB 209](#) at [22] to [25].