



DECISION

Fair Work Act 2009

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

Ms AB

v

Australian Nursing and Midwifery Federation-New South Wales Branch

(C2024/5098)

COMMISSIONER MATHESON

SYDNEY, 7 FEBRUARY 2025

Application for a dispute about requests for flexible work arrangements

[1] Ms AB (**Applicant**) has lodged a ‘Form F10C – Application to resolve a dispute about flexible working arrangements’ (**Application**) with the Fair Work Commission (**Commission**). The Applicant is employed by the Australian Nursing and Midwifery Federation (**Respondent**).

Hearing and representation

[2] The matter did not resolve with the Commission’s assistance and a hearing took place on 24 October 2024 for the purpose of arbitration.

[3] Both parties sought to be represented by a lawyer. The matter is complex as jurisdictional questions arise including whether there is a request for flexible working arrangements that meets the legislative requirements for such a request in a relatively new jurisdiction in which the case law is continuing to develop.

[4] The factual matrix is also complex and involves sensitive matters involving domestic violence and a school aged child who the Applicant says is impacted by this. I considered that the matter would proceed more efficiently if both parties were represented by a lawyer with requisite knowledge of the legal framework, emerging case law and complexities that arise in that respect, and who have professional obligations to the Commission such that they can assist in focusing on the issues and evidence relevant to the considerations the Commission needs to have regard to in making its determination.

[5] Permission for both parties to be represented by lawyer was granted pursuant to s.596(2)(a) of the *Fair Work Act 2009* (Cth)(**Act**) on the grounds that it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter. As such, during the hearing the Applicant was represented by Ms Morgan-Cocks of Counsel, with Mr Bolwell instructing and the Respondent was represented by Mr Reitano of Counsel with Mr Dawson instructing.

[6] The Applicant filed two witness statements in the proceedings¹ and gave evidence during the hearing. The Applicant also sought to rely on the evidence of Ms Zoe Guinea,² another employee of the Respondent who works as an Organiser.

[7] The Respondent sought to rely on the evidence of Ms Shaye Candish,³ Branch Secretary of the Respondent's New South Wales Branch (**Branch**).

Background

[8] The Applicant is an Organiser began working for the Respondent in 2012 from the Respondent's office (**Office**) and lived near the Office that time.⁴

[9] The Respondent generally allocates organisers to Local Health Districts.⁵

[10] In around April 2021 the Applicant moved to a regional town (**Town**).⁶ At that time the Applicant was organising a Local Health District near the Office.⁷ The Applicant's lease on her home had ended and during the working week she was staying at a location near the Office with a friend.⁸

[11] The Town is over 500km away from the Office via road travel and the most direct method of travel is via air travel.

[12] The Applicant took long service leave in May 2021 and from August 2021 to July 2022, took a career break.⁹ The Applicant returned to work in July 2022.¹⁰

[13] The Applicant gave evidence that:

- in late June or early July 2022, she had a discussion with her lead organiser (**Lead Organiser**) about her return to work;¹¹
- she had told the Lead Organiser that she was living in the Town because they were friends;¹²
- she had initially indicated that she would like to return part time;¹³
- the Lead Organiser asked her if she could organise a particular Local Health Area District located in a regional area (**LHD 1**) and she agreed;¹⁴
- she had expressed some reservations about whether it was possible to organise LHD 1 part time but it was agreed that the Applicant would work full time at that stage and this would be reviewed later.¹⁵

[14] The Applicant evidence was that she told the Lead Organiser that she could not afford the flights to get from the Town to the Office and the Lead Organiser indicated that she should "just put in the forms" and that her manager "knew about it".¹⁶ The Applicant's evidence about when this happened is somewhat confused but during cross examination the Applicant said that at around this time she had a conversation with her then acting manager who told her she'd be on the same arrangements as Ms Guinea and this happened in her first week back from her career break.¹⁷

[15] From July 2022 until March 2023 the Applicant organised LHD 1 from her home in the Town and travelled to the Office about once a fortnight, with the Respondent paying for such travel.¹⁸

[16] The Applicant's evidence was that in February 2023 she asked her current manager, Ms Renata Di Staso, if she could change her organising area to another Local Health District closer to the Town (**LHD 2**) so she could spend more time with her child.¹⁹

[17] There is a complex series of communications and events that occurred after this time and prior to the Application which I deal with below.

[18] On 23 March 2023 the Applicant emailed Ms Di Staso, indicating that:

- there had been conversations between the Applicant and Ms Di Staso the previous day and a few weeks prior;
- she was unable to continue overnight travel at the quantity of nights that she was undertaking at that time;
- her partner's work commitments were such that he needed to commence work by 8.30am, there was no before school care available, and this was leading to an overreliance on help from neighbours who were occasionally away or unable to assist;
- she was still able to travel for a few nights every few weeks as required for meetings in the Office but felt she could not properly represent members on an ongoing basis as they required an organiser who could be on the ground for a number of days every week or fortnight;
- her child was having a hard time at school and needed additional support.²⁰

[19] On 24 March 2023, Ms Di Staso replied to the Applicant's email requesting further clarity about the flexible working arrangements the Applicant was requiring.²¹

[20] On 28 March 2023 the Applicant responded and indicated:

- her child's school opened at 8.40am and when she was at home, she was able to drop her child to school and commence by 9am;
- on days when the Applicant was travelling, she would ask the neighbours to take her child to school;
- she was able to finish work at 5pm as after school care was available; and
- her child was the subject of bullying at school and wanted the Applicant at home more often.²²

[21] On 29 March 2023 Ms Di Staso responded indicating that the Respondent would consider the circumstances outlined by the Applicant in order to put a flexible work arrangement in place, that such an arrangement would be temporary and subject to a 12 month review and a meeting would be coordinated to discuss the outcome.²³

[22] On 5 April 2023 Ms Di Staso met with the Applicant to discuss the request and formalisation of arrangements in relation to working hours due to access to childcare, overnight stays and impact on work allocation.²⁴

[23] In an email to Berice King dated 1 May 2023, in which the Applicant was copied, Ms Di Staso indicated that certain conditions had been agreed as a temporary measure with a review period of 12 months and seeking that the arrangement be formalised.²⁵ The specifics of the arrangement that were agreed are unclear from this correspondence however the Applicant became the Respondent's organiser covering the LHD 2 and Ms Candish, confirmed this to the Respondent's Human Resources Manager, Ms Langler, via letter dated 6 June 2023.²⁶

[24] The Applicant gave evidence that on 21 November 2023 Ms Di Staso notified her that she would require a flexible work arrangement if she wished to remain in the Town.²⁷ In particular, on 21 November 2023 Ms Di Staso wrote to the Applicant and indicated that, as per conversations had that day and the prior Friday:

- there was an arrangement in place, but it sat outside policy and there was no documentation to support it on file;
- if the Applicant wished to request a formal arrangement, she needed to provide written reasons for this and once she did so the Respondent would review the request and respond within 21 days.²⁸

[25] In that email Ms Di Staso suggested that the Applicant had stated the arrangement had been in place before her change to the LHD 2 and Ms Di Staso requested documentation about this.²⁹

[26] On 24 November 2023 the Applicant responded by way of letter (**24 November Letter**).³⁰ In her 24 November Letter the Applicant indicated:

- that prior to her return to work in July 2022, she had a conversation with the Lead Organiser who asked the Applicant if she would be able to organise LHD 1 upon her return;
- the Applicant asked about travel arrangements and the Lead Organiser advised her to put in her travel forms;
- the Applicant became the Organiser for the LHD 1 for around nine months and during that time:
 - the Applicant lived in the Town and that was where her home office was located;
 - the Applicant travelled to and from LHD 1 and the Office;
 - all expenses associated with travel to and from the Applicant's home to LHD 1, other Local Health Districts or to the Office were paid for by the Respondent;
 - expenses to attend events in the location of the Office were paid for by the Respondent;
 - the Applicant received time off in lieu of overtime for time spent traveling to and from a weekend rally in the location of the Office to the Town;
 - there was no discussion or written communication that indicated her working arrangements were temporary;
- in around April 2023 the Applicant requested that her organising area change from LHD 1 to LHD 2 which was approved;
- since becoming the Organiser for LHD 2 the Applicant had the same arrangements in place in relation to travel time and expenses as when she worked in the LHD 1.³¹

[27] In her 24 November Letter the Applicant also indicated:

- she had a child for whom she had full time care, was separated from the child's father and had experienced domestic violence;
- she had made the Respondent aware of the situation, did not wish to rehash those matters but had sought that managers and leads be made aware of the situation;
- she had sought to reduce the number of nights she was away to care for her child;
- in June 2023 she purchased a home in the Town.³²

[28] The 24 November Letter then states, by way of summary:

- the Applicant's Lead Organiser, Al Ball, had informed her that changes were to be made in line with a working from home review but did not provide further details;
- approval had been declined for things that had been standard practice, often at the last minute, without prior discussion;
- in mid-October, days prior to the Applicant's departure to the Office for a face-to-face meeting, the Applicant was directed to travel outside of working hours and this resulted in the need for the Applicant to rapidly adjust her family's arrangements and increased costs by way of more expensive flights and additional accommodation and meal expenses;
- in November she submitted a travel form weeks in advance of her travel, this was rejected one working day before she travelled, the changes resulted in additional cost and as a result the Applicant had to change her child arrangements;
- the Applicant's September expense for car parking at the airport near the Town (**Regional Airport**) during the Respondent's Annual Conference was denied on 17 November;
- no policy existed to address the issue of regional Organisers living and working in regional areas with their home as their work office and the Applicant did not feel the 'Travel accommodation and expenses' policy was the appropriate policy in her circumstances;
- there were no flights to the airport near the Office (**City Airport**) that departed between 6.30am and 10.00am;
- when she had to take the 6.30am flight she needed to leave for the Regional Airport at 5.00am resulting in an exceptionally long day and fatigue risk and in the past (where meeting schedules allowed it) she would take a flight at around lunchtime;
- the flight time to the City Airport was 1 hour and 10 minutes and she would often use this time to read work documents;
- the Applicant regularly worked extended hours outside of standard work hours;
- the Applicant sought to formalise what she said was a long-standing arrangement in which she worked from the Town and the Respondent allowed her to travel during work time with her Regional Airport parking to be considered a travel expense.³³

[29] Ms Di Staso responded on the afternoon of 24 November 2023 seeking confirmation that the 24 November Letter was her formal request for consideration of a flexible working arrangement.³⁴ On 27 November 2023 the Applicant responded stating that she was seeking 'written confirmation of the arrangement that has existed since August 2022'.³⁵ On the afternoon of 27 November 2023, Ms Di Staso requested 'the specifics' of the arrangement that the Applicant wished to have considered³⁶ and on 28 November sent the Applicant a link to information from the Fair Work Ombudsman's website about flexible working arrangements.³⁷

[30] On 28 November 2023 the Applicant emailed Michael Whaites (**Whaites**) of the Respondent (**28 November Email**) indicating that:

- she had told Ms Di Staso that she did not believe a flexible working arrangement was required as she was not seeking a variation of her current arrangement;
- she sought that her normal arrangements continue until a review was completed;
- she had submitted a travel form for travel to the City Airport at 4.45pm on the afternoon of 4 December and a return to the Regional Airport at 9am on 6 December so she could attend a face-to-face meeting in the Office on Tuesday;
- she had chosen the 9am flight to the Regional Airport as it was around \$200 cheaper than earlier flights, she was planning to visit a hospital in LHD 2 at 10.30am and had found that nurses were not ready to speak to her much earlier;
- her flight request had been rejected;
- she wanted Mr Whaites to intervene and return to status quo until the process was complete.³⁸

[31] On 12 March 2024 the Applicant sent a further email to Mr Whaites (**12 March 2024 Email**) stating, by way of summary, that she had been having ongoing issues with her travel arrangements and was seeking his intervention and was seeking clarification on aspects of the travel policy.³⁹

[32] On 28 May 2024 the Applicant's lawyer wrote to Ms Candish (**28 May Letter**).⁴⁰ The 28 May Letter stated, by way of summary:

- in April 2021, the Applicant had, with the knowledge of the Respondent, moved her residential address from a location near the Office to the Town and took a career break;
- upon returning to work from her career break in July 2022 and until October 2023, the Applicant was able to travel from the Town to the Office for work related duties:
 - without difficulty;
 - both in work hours and in her personal time; and
 - using her Respondent provided vehicle to travel to and from the Regional Airport;
- after October 2023 the Applicant experienced 'significant and sustained difficulties in attending work' and 'capricious resistance in organising and gaining approval for' work travel and/or 'at appropriate times that take into account her carer's responsibilities for' her school aged child;
- the change to the Applicant's travel arrangements since October 2023 occurred without warning and consultation and were implemented weeks before the NSWNMA Hybrid Work Arrangements Policy (**Hybrid Work Arrangements Policy**) implementation date of 27 May 2024;
- the Applicant had made the Respondent aware of the dangers she faced from a former partner and one of the reasons she needed to live in the Town was to ensure her and her child's safety;
- because the Applicant lives in the Local Health District in which she works, the Respondent was saving a significant amount in travel expenses;
- the Hybrid Work Arrangements Policy acknowledges that a 'one size fits all approach will not work for all staff' and does not work for the Applicant;

- the Applicant had sought to resolve the difficulties by writing to her manager without a response or success;
- the Applicant was seeking a response to the 24 November Letter;
- the Applicant proposed that she:
 - be automatically approved and authorised to travel between the Town and the Office for work related purposes provided she is mindful of expenditure of the Respondent’s members’ money;
 - be permitted to travel from her home in the Town on the most appropriate flights balancing flight schedules, cost to the Respondent, reasonable hours of work and the Applicant’s carer’s responsibilities;
 - the Applicant continue to organise LHD 2;
- if the Applicant did not receive a satisfactory response to the correspondence by 18 June 2024, she reserved her rights including but not limited to raising a dispute under clause 48(d) of the NSWNMA Enterprise Agreement and/or seeking arbitration pursuant to s.65 of the Act.⁴¹

[33] On 21 June 2024 the Respondent’s lawyer wrote to the Applicant (**21 June Letter**) and, by way of summary said:

- it rejected the assertion that the Respondent knew that the Applicant moved to the Town and took a career break and said that the Applicant did not inform the Respondent of her move until she returned from her career break;
- although the Applicant had been allocated to a particular Local Health District prior to her career break, upon her return she was allocated to the LHD 1 in an attempt to accommodate her move and this occurred during periods of restrictions relating to COVID-19 when staff were still working mostly from home;
- the Applicant had raised personal and family issues which she had claimed made it impossible for her to travel and stay overnight, the Applicant was reallocated to LHD 2 to accommodate those difficulties but there was never an undertaking that the allocation would be permanent;
- once the Applicant was reallocated to LHD 2 she indicated to her manager that staying overnight when travelling to the Office was not a problem;
- organisers are allocated different areas from time to time based on operational needs, re-allocations happen frequently and there are no regionally based organisers apart from one organiser on a pre-existing ‘grand-parented’ arrangement;
- arrangements for staff were somewhat flexible prior to the return to the office and there was never any suggestion that these arrangements were permanent;
- employees were aware there would be a return to the office, consultation was carried out with unions representing staff and it was made clear to the Applicant that she would be expected to return to the office for two to three days per week;
- the Respondent did not dictate where employees live, many employees travel long distances from home to work and their expenses are not met by the Respondent;
- travel from home to the office is undertaken on personal time for all staff and the Applicant was not an exception;
- it did not agree with the Applicant’s claim that living in the Local Health District where an organiser currently works “makes sense” and it had not adopted this model as the organising model;

- it did not agree to proposals put in relation to ‘automatic approval for travel’ at the Respondent’s cost, permission to travel in work time or permanent allocation to LHD 2;
- following receipt of a 24 November document, Ms Di Staso emailed a response later that day asking if the Applicant wanted the document to be considered a flexible work application and in a further response on 27 November asked the Applicant to provide the specifics of the arrangement she wanted to be considered;
- on 28 November Ms Di Staso sent the Applicant a link to guidelines on the Fair Work website to assist her in refining and defining her application however nothing further was received by the Applicant as at the time of sending the 21 June Letter;
- it considered the Applicant could not claim that she did not receive a response to her 24 November document and it rejected the suggestions that it was not aware of or sensitive to the Applicant’s domestic violence history;
- it encouraged her to submit a flexible work arrangement request that could be considered.⁴²

[34] On 26 June 2024 the Applicant’s lawyer wrote to the Respondent’s lawyer (**26 June Letter**) and, by way of summary said:

- while the Applicant did not concede that the Respondent had not already varied the Applicant’s place of work and travel arrangements, the Applicant wanted the 28 May Letter considered as a flexible work request;
- the Applicant was willing to work in any Local Health District to which she was assigned but while her child was still young she would not be able to spend more than three nights away from her (per fortnight) and had stated this in a letter to Ms Di Staso on 23 March 2023;
- the Applicant was a single mother and did not believe that it was an unrealistic expectation to have her overnight trips away capped;
- the Applicant continued to propose that:
 - she be automatically approved and authorised to travel between the Town and Office for work related purposes provided she is mindful of expenditure of the Respondent’s members’ money;
 - be permitted to travel from her home in the Town on the most appropriate flights balancing flight schedules, cost to the Respondent, reasonable hours of work and the Applicant’s carer’s responsibilities;
 - the Applicant continue to organise LHD 2;
- if the Applicant did not receive a satisfactory response by 19 July 2024 she reserved her right to raise a dispute under clause 48(d) of the enterprise agreement and/or seek arbitration of the matter in the Commission pursuant to s.65 of the Act.⁴³

[35] On 12 July 2024 the Respondent’s lawyer wrote to the Applicant’s lawyer (**12 July Letter**) and, by way of summary said:

- it was sympathetic to the Applicant’s issues and remained prepared to have discussions with her as to possible flexible arrangements but would not commit to paying for her travel costs when she was required in the Office;
- the Applicant’s Letter of Appointment clearly stated that her place of employment the Office;

- the Applicant was required to pay for her own travel costs from home to the Office as were other staff;
- other employees were required to travel to the Office in their own time and the Applicant's application that she be permitted to decide when she travelled (including on work time) without prior approval was not something the Respondent could give its unfettered approval;
- the Respondent had no intention of relocating the Applicant to another Local Health District at that point in time but could not give an unending commitment to that allocation;
- the Applicant's application read more like an application to work part-time so she could travel during normal working hours and did not have to spend more than three nights away from home;
- all organisers had recently been required to attend the office for several consecutive days for training and planning activities, the Applicant would need to be available when such activities occurred again to support operational requirements, the Applicant would need to meet the cost of the travel and the Applicant would be required to be in the office at the usual starting time and remain until the conclusion;
- the application could not be approved for reasons of cost, fairness and practicality;
- the Applicant's key duties as an organiser required her to be in workplaces and organisers needed to be available to travel between and stay at locations away from their home;
- it was not possible to organise from a home office and officers needed to be available in person for training and meetings when required in the Office;
- the current policy required regular attendance at the Office;
- it was open to being flexible as to how this might be managed in the short-term for the Applicant but any agreed arrangement would need to include some degree of regular attendance;
- it would try to assist and support the Applicant to attempt to find a workable solution and was more than happy to continue discussions with her once her medical practitioner deemed her fit for such discussions;
- if the Applicant wished to make an application for consideration of part-time work or provide an amended application for flexible work, it would give such application due consideration.⁴⁴

Jurisdictional prerequisites

[36] The Respondent submitted that there is no request of the kind envisaged by s.65(1) and so the condition precedent to arbitration under s.65B(1)(a) is not satisfied.⁴⁵

[37] In this regard, section 65B(1) of the Act provides that s.65B applies to a dispute between an employer and an employee about the operation of Division 4 of Part 2-2 of the National Employment Standards, dealing with requests for flexible working arrangements, if:

- (a) the dispute relates to a request by the employee to the employer under subsection 65(1) for a change in working arrangements relation 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.

[38] As noted by the Full Bench of the Commission in *Jordan Quirke v Bsr Australia Ltd*⁴⁶ the following requirements must be satisfied for a request to have been validly made under s.65(1):

- at least one of the circumstances in s.65(1A) must *apply* to the employee with ‘apply’ connoting that the relevant circumstance must, as a matter of fact, exist (rather than being anticipated or the subject of anticipatory discussion) in respect of the employee at the time the request is made;⁴⁷
- the employee must have a minimum period of service which, in the case of an employee who is not a casual employee, is 12 months of continuous service immediately before making the request;⁴⁸
- the request must be in writing⁴⁹ and in this regard the Full Bench rejected Ms Quirke’s submission that it was only the requested change in working arrangements that needed to be made in writing and found that the request must wholly be in writing;⁵⁰
- the request must set out the details of the change sought;⁵¹
- the request must set out the reasons for the change⁵² and Full Bench said that this requirement 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 circumstances in s.65(1A); and
 - explain how the proposed changed working arrangements relates to that circumstance;⁵³
- the employee’s desire for changed working arrangements must be ‘because of’ the relevant circumstance in s.65(1A)⁵⁴ and the request for a change in working arrangements must ‘relat[e] to’ the relevant circumstance.⁵⁵

Did at least one of the circumstances in s.65(1A) apply to the Applicant at the time of the request?

[39] Section 65(1) of the *Fair Work Act 2009* (Cth) (**Act**) provides that 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 (emphasis added).

[40] The following are the circumstances set out in section 65(1A):

- (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.

[41] The Applicant says:

- she is a parent and has responsibility for her child who attends a primary school near the Town;
- she has experienced significant domestic violence;
- her child has witnessed domestic violence; and
- as recently as April 2024 there have been circumstances relating to this about which her child has sought support.⁵⁶

[42] It is apparent that the Applicant is seeking to rely on the following circumstances in s.65(1A) in making her request:

- the Applicant is the parent, or has responsibility for the care, of a child who is of school age or younger (s.65(1A)(a));
- the employee is experiencing family and domestic violence (s.65(1A)(e));
- 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 (s.65(1A)(f)).⁵⁷

[43] The Respondent submitted that the words 'apply to' in s.65(1A) mean that the circumstances must be in existence *at the time* the request is made.⁵⁸

[44] It is apparent that the employee is the parent of a child who is of school age, that this circumstance existed at the time the Applicant says she made her request and that this is a circumstance that meets s. (s.65(1A)(a)) of the Act. Questions around whether the Applicant was, at the time of the request, experiencing family and domestic violence leave and whether the employee provides care or support to her child who requires care or support because they were experiencing family and domestic violence are more complex. In circumstances where at least one of the circumstances in s.65(1A) applied to the Applicant at the time of the request it is not necessary to answer these questions at this time. I do however return to the matters and evidence raised by the Applicant about this later in this decision.

Had the Applicant served the minimum period of service at the time of making the request?

[45] Section 65(2)(a) provides that in these circumstances an employee is not entitled to make the request unless they have completed at least 12 months of continuous service with the employer immediately before making the request. The Applicant is a long serving employee, and it is not in contention that she has completed at least 12 months of continuous service with the Respondent immediately before the date on which she said she made the request.

Is the request in writing?

[46] Section 65(3) sets out the formal requirements that must be met for a request to constitute a request for flexible working arrangements to be made pursuant to s.65(1).

[47] Section 65(3)(a) requires that the request be in writing.

[48] The Applicant submitted that she made a request for flexible working arrangements on the following days:⁵⁹

- 24 November 2023 (i.e. the 24 November Letter);⁶⁰
- 28 November 2023 (i.e. the 28 November Email);⁶¹
- 12 March 2024 (i.e. the 12 March Email);⁶²
- 28 May 2024 (i.e. the 28 May Letter);⁶³
- 26 June 2024 (i.e. the 26 June Letter).⁶⁴

[49] These communications are all in writing. I deal with the question of whether these written communications meet the balance of the formal requirements in s.65(3) below.

Does the request meet the requirements in s.65(3)?

[50] Section 65(3)(b) requires that the written request set out the details of the change sought and the reasons for the change. In this respect, the matter is complex.

[51] As noted above, there are five documents that the Applicant seeks to rely on as a request for the purposes of s.65 of the Act. The first of these is the 24 November Letter.⁶⁵ The Applicant sets out what she is seeking in the final paragraphs of that letter being formalisation of what she says is a long-standing arrangement in which:

- the Applicant works from the Town;
- the Respondent allows her to travel during work time; and
- her parking is considered a travel expense.

[52] It is apparent from the 24 November Letter that the Applicant is not seeking a ‘change’ but formalisation of what she says are her *existing* arrangements.

[53] The second document that the Applicant seeks to rely on is the 28 November Email.⁶⁶ In the 28 November Email the Applicant indicates that while she did not believe a flexible working arrangement was required as she was not seeking a variation of her current arrangements.

[54] The third document that the Applicant seeks to rely on is the 12 March Email.⁶⁷ The Applicant does not specifically request a change in the 12 March Email but rather indicates that each time she travelled there was an issue or delay, that she was trying to work out what was expected of her when it came to travel, that she was seeking clarity in relation to the travel policy and preservation of the status quo.

[55] The fourth document that the Applicant seeks to rely on is the 28 May Letter.⁶⁸ The 28 May Letter indicates that:

- between July 2022 and October 2023, the Applicant was able to travel from the Town to the Office both in work hours and in her personal time and using her work vehicle to travel to and from the Regional Airport;
- after October 2023 these arrangements had been rejected and the Applicant had experienced ‘capricious resistance’ in organising and gaining approval for travel during work time or at appropriate times that took into account her carer’s responsibilities in respect of child;
- the change since October 2023 happened without warning or consultation and was not agreed to;
- the Applicant was seeking that:
 - she be automatically approved and authorised to travel between the Town and the Office for work related purposes provided she is mindful of expenditure;
 - she be permitted to travel from her home in the Town on ‘the most appropriate flights balancing flight schedules, cost to the [Respondent], reasonable hours of work and [the Applicant’s] carers responsibilities’;
 - she continue to organise LHD 2.

[56] The Respondent submitted that as far as being assigned to LHD 2 there is no ‘change’ proposed and as things stood on 28 May 2024 and as they stood at the time of hearing, the Applicant was assigned to that area.⁶⁹

[57] In this regard I do not consider that the request to continue to organise LHD 2 was a ‘change’ in circumstances where this is what the Applicant was doing, and the Respondent did not have plans to change this.

[58] There is some ambiguity about the impact of the Applicant being permitted to travel from her home in the Town on ‘the most appropriate flights balancing flight schedules, cost to the [Respondent], reasonable hours of work and [the Applicant’s] carers responsibilities’ when there may be varying views about what the ‘most appropriate flights’ are. It is however apparent that there had been a change in the Respondent’s practices that the Applicant did not want and that she sought her own change in response. In particular, at the time of the 28 May Letter the Applicant was no longer being automatically approved and authorised to travel between the Town and the Office for work related purposes as her travel forms had been declined, the Applicant was seeking to be able to use her discretion to choose her own times of travel and flights and that this represented a ‘change’. I consider the nature of this change further below.

[59] The fifth document that the Applicant seeks to rely on is the 26 June Letter.⁷⁰ The 26 June Letter indicates that:

- the Applicant did not concede that the Applicant had not varied the Applicant’s place of work and travel arrangements already;
- the 28 May Letter was intended as a flexible work request;
- the Applicant was willing to work in any Local Health District to which she was assigned but while her child was young was unable to spend more than three nights per fortnight away from her;

- continued to propose that the Applicant:
 - be automatically approved and authorised to travel between the Town and the Office for work related purposes provided she is mindful of expenditure;
 - be permitted to travel from her home in the Town on ‘the most appropriate flights balancing flight schedules, cost to the [Respondent], reasonable hours of work and [the Applicant’s] carers responsibilities’.
 - continue to organise LHD 2.

[60] The 26 June Letter⁷¹ suggests that while the Applicant had some flexibility regarding location and spending nights away, subject to a cap, the change she was requesting was the change she proposed in the 28 May Letter as repeated in the 26 June Letter.

[61] The Respondent submitted that it is important that the 28 May Letter is considered the request for flexible working arrangements that was made as made clear by the letter from the Applicant’s representative on 16 June 2024 and responses in the Applicant’s application.⁷² I accept that the 28 May Letter is the request that should be considered.

[62] Section 65(3)(b) requires that the written request set out the details of the change sought. The ‘change’ referred to in s.65(3) of the Act is clearly a reference to a ‘change in working arrangements’ as contemplated by s.65(1).

[63] Questions arise as to whether the 28 May Letter:

- sets out the ‘details of the change sought’; and
- requests a change in ‘working arrangements’ as contemplated by s.65(1) of the Act.

Does the request set out the details of the change sought?

[64] The Respondent submitted:

- the word ‘details’ is an ordinary English word which, in the context of s.65, should be given its ordinary English meaning: namely, the individual or constituent parts, the particulars, the minutiae or in the colloquial all the bits and pieces;
- in context the words ‘details of the change sought’ should be read as being referable to each constituent part of the proposed changed arrangement: using the example in the note to s.65(1) that would mean;
 - any new proposed starting or finishing (or lunching) times by reference to identified times;
 - as far as location is concerned, the time that work would commence and finish at a particular identified location; or
 - the details of any new or different roster by reference to particular roster patterns;
- the concept ‘details of the change sought’ is not in the practicality of an employment relationship something that would be difficult to set out;
- a statement that the employee can do what they like is hardly ‘details of the change sought’.⁷³

[65] The Respondent submitted the proposed changes in the 28 May Letter do not contain any detail at all and simply provide the Applicant with the capacity to travel and work how, when and where she wishes, spending the Respondent's money as and how she pleases.⁷⁴

[66] As set out in the 28 May Letter and repeated in the 26 June Letter the change sought by the Applicant is that she be automatically approved and authorised to travel between the Town and the Office for work related purposes, subject to some conditions. While the letter sets out the things that the applicant will consider in exercising that discretion, such as expenditure, reasonable hours of work and the Applicant's carers responsibilities it does not detail things such as:

- the times the Applicant would be travelling, including whether those times are within or outside working hours; and
- how often the Applicant will be travelling.

[67] Notwithstanding the lack of certainty around these matters, I consider the 28 May Letter still details the change sought by the Applicant which are essentially that she be able to choose her travel arrangements and have them approved provided she considered certain matters. In setting out the details of the request the specifics in the request are limited because it is apparent the Applicant is seeking flexibility to make arrangements that are 'appropriate' balancing her carer's responsibilities and other considerations.

[68] The question as to whether the requested change constitutes a change in 'working arrangements' is more complex.

[69] The Respondent submitted that the words 'working arrangements' in s.65(1) means the plan or procedure by which work is to be performed such as commencement time, finishing time, lunch time, duration over which work is to be performed or the place where work is to be performed or may even be the kind of work to be performed at particular places.⁷⁵ The legislative note to s.65(1) states:

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

[70] The Respondent submitted that the changes sought are not to 'working arrangements' but are to matters that concern the Applicant's travel arrangements and entitlements to and from work.⁷⁶ In particular, the Respondent submitted that the note to s.65(1) is illustrative of the legislative intention behind the words,⁷⁷ that it is difficult to see how time spent travelling to and from work is part of work arrangements and, far less, how the entitlements that might be paid or reimbursed in travelling to and from work are part of the concept of 'work arrangements' and in ordinary English they are private travel arrangements which stand outside of work.⁷⁸

[71] I accept the Respondent's submission that how entitlements might be paid or what expenses might be reimbursed would generally fall outside the remit of 'working arrangements' as contemplated by s.65(1) of the Act. However, the times during which work is performed and where it is performed fall within the concept of 'working arrangements'.

[72] Without knowing when the Applicant would travel and the times of such travel, it is difficult to assess the impact of the change in the Applicant's working arrangements. However if the Applicant's request was approved her likely expectation would be that the travel arrangements previously declined by the Respondent would be approved in future and would provide the Applicant with the ability to travel at times to meet her needs, and at times that the Respondent did not want her to, including travelling during working hours. In my view, this would constitute a change in 'working arrangements'.

Does the request set out the reasons for the change and are the changes sought 'because of' one of the circumstances in s.65(1A)?

[73] As noted above, the Full Bench in *Jordan Quirke v Bsr Australia Ltd*⁷⁹ said that 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 circumstances in s.65(1A); and
- explain how the proposed changed working arrangements relates to that circumstance.⁸⁰

[74] The Respondent submitted:

- that there was not much by explanation about these matters;⁸¹
- the 28 May Letter did not set out any particular instance where the Applicant was unable to travel to or from work because of carer responsibilities or domestic violence or any particular instance of how her carer's responsibilities were affected by her being required to travel to and from work on any particular day or at any particular time;
- the 28 May Letter did not explain in any way how the Applicant's carer's responsibilities were impacted by any particular aspect of her working arrangements;⁸²
- the 28 May Letter did not contain the reasons, explanation or justification for why either carer's responsibilities or domestic violence considerations meant that the Applicant's proposal for changes to her work arrangement should be accepted;⁸³
- although the 28 May Letter referred to earlier letters where the Applicant had complained about changes to her terms and conditions of employment, it took the matter no further;
- the earlier letters referred to an issue concerned with the Applicant's child on one occasion in October 2023, and on one occasion about a month later but not in May 2024;
- for the most part, the 28 May 2024 Letter concentrated on the Applicant's complaints about the way expense claims were dealt with, late notice of travel requirements, having stress placed on her as a result of 'doubt placed on her employment' but not anything in reasoned terms connected with carer responsibilities or domestic violence against her or her child.⁸⁴

[75] The Respondent also submitted:

- the word 'reasons' is an ordinary English word and means the rationale, explanation or justification for something;
- 'reasons' means the rationale or explanation or justification for something;

- ‘reasons’ are, in context, the ‘why’ for what is sought by way of change, e.g. ‘I wish to change my work hours because childcare closes at 4.00pm so I need to finish work before 4.00pm so I can pick up my child’;
- the reference to the explanation or justification for the change must, in order to fall within s.65, be casually connected to one or other of the circumstances in s.65(1A) and this is the work to be done by the phrase ‘because of those circumstances’ in s.65(1)(b);⁸⁵
- the request must be ‘because of’ one of the defined circumstances in s.65(1A), must ‘relate to’ that circumstances, must identify the change sought and the reasons why it is sought (s.65(3)) and these things are to be satisfied by reference to the writing required by s.65(3) and are the threshold or gateway requirements arising out of s.65.⁸⁶

[76] The Respondent submitted that to the extent that any of the circumstances that the Applicant relies on ‘apply’ at that time her request was made, there is nothing in the 28 May Letter that would suggest that any change that is sought is ‘because of’ one or other of those circumstances.⁸⁷

[77] The Respondent submitted that it is important that the 28 May Letter is considered the request for flexible working arrangements that was made as made clear by the letter from the Applicant’s representative on 16 June 2024 and responses in the Applicant’s application.⁸⁸

[78] I accept that the 28 May Letter is the request that should be considered, and this is the request that the Applicant points to in her application.⁸⁹ The 28 May Letter states:

- the Applicant had been “experiencing capricious resistance in organising and gaining approval for travel and or at appropriate times that [took] into account her carer’s responsibilities for [school aged child]”; and
- the Applicant had previously made the Respondent aware of the dangers that she faced from a former partner who is a domestic violence perpetrator and one of the reasons she needed to continue to live in the Town is to ensure her child’s safety;
- sought that the Applicant “be permitted to travel from her home in The Town on the most appropriate flights balancing flight schedules, cost to the [Respondent], reasonable hours of work and [the Applicant’s] carers responsibilities”.

[79] It is apparent from 28 May Letter that the Applicant seeks to have the ability to choose her flights and travel arrangements to enable her to meet her carer’s responsibilities to her child, subject to certain considerations.

[80] I accept that the Applicant could have set out the reasons for the change she was seeking in *better* detail. However, the reference to the Applicant’s carer’s responsibilities was not without context given the history of communications between the Applicant and Respondent. In particular:

- on 23 March 2023 the Applicant emailed Ms Di Staso indicating her partner’s work commitments were such that he needed to commence work by 8.30am, there was no before school care available and this was leading to an overreliance on help from neighbours who were occasionally away or unable to assist;⁹⁰
- on 28 March 2023 the Applicant indicated:

- her child's school opened at 8.40am and she was able to commence by 9am when she dropped her child to school;
- she was able to finish work at 5pm as after school care was available; and
- on days when she was travelling she had asked the neighbours to take her child to school;
- her child was the subject of bullying at school and wanted the Applicant at home more often;⁹¹
- in her 24 November Letter the Applicant indicated she had sought to reduce the number of nights she was away in order to care for her child;⁹²
- in the 26 June Letter the Applicant indicated she was willing to work in any Local Health District to which she was assigned but while her child was still young she would not be able to spend more than three nights away from her and had stated this in a letter to Ms Di Staso on 23 March 2023.

[81] Having regard to that context, it is apparent from the 28 May Letter, that the key reason for the request is that the Applicant is a parent of a school aged child and seeks a change to enable her to choose her own travel arrangements, including her time of travel, so she can provide care for that her child who lives and goes to school in the Town.

Finding regarding the Request

[82] Having regard to the above matters, I find that the 28 May 2024 matter constitutes a valid request for the purposes of s.65 of the Act.

Have one of the circumstances in s.65B(b) met?

[83] There is a further jurisdictional prerequisite to the Commission's power to deal with a dispute under s.65B in that s.65B(1)(b) of the Act requires that:

- (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.

Section 65B(1)(b)(i) - Has the employer refused the request?

[84] The Applicant submitted that the Respondent has failed to comply with s.65(a) of the Act in that it did not respond to the 28 May 2024 letter until 21 June 2024, which is a period of 24 days after the 28 May 2024 rather than 21 days as required by the Act.⁹³ The Applicant submits that the impact of the failure is unclear. In my view a late response does not prevent a finding that an employer has 'refused' the request for the purposes of s.65B(1)(b).

[85] The Applicant also submitted that the Respondent has not complied with ss. 65A(3)(a)(i) and/or (ii) of the Act in circumstances where the satisfaction of these subsections is a precondition for refusing the flexible work request.⁹⁴

[86] In particular the Applicant pointed out that s.65(3) of the Act provides that the employer may refuse the request only if the employer has:

- (i) discussed the request with the employee; and
- (ii) genuinely tried to reach agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances.⁹⁵

[87] The Applicant submitted that none of these events happened, and the Respondent is therefore statutorily precluded from rejecting the Applicant's flexible working request.⁹⁶

[88] The Respondent submitted that it is not clear where the Applicant takes this proposition or what it suggests the consequence of it might be, but the submission secures something of an 'own goal' because without the claim being rejected there is no dispute and without a dispute there is nothing for the Commission to arbitrate.⁹⁷

[89] The Respondent submitted that:

- even presuming the 28 May Letter is a flexible work arrangement request, the consequence of the absence of a response is that s.65B applies to the dispute, noting that s.65(1)(b)(ii) contains a condition precedent to arbitration that no written response has been received in time;
- subsection 65B(2) lays down the procedure for dealing with disputes which if unresolved on the way through concludes with arbitration under s.65C;
- there is no other consequence following from a lack of a response;⁹⁸
- that this is the scheme of the Act is confirmed by the relief available on arbitration, in particular:
 - the making of an order that the employer refused the request (s.65C(1)(a)); or
 - by making an order about other steps that should be taken in the absence of a response (s.65C(1)(e));
- the steps referred to in s.65C(1)(e) could, if necessary, include requiring the employer to discuss the supposed request or genuinely try and reach agreement about it, which the Respondent submitted was not desirable or appropriate in the current matter given that the parties tried hard before and after the 28 May Letter to obtain agreement without success.⁹⁹

[90] Section s.65A sets out the obligations of an employer which arise when an employee makes a request under s.65(1) and provides that regardless of outcome, the response is required to:

- be in writing; and
- be provided to the employee within 21 days (s.65A(1)).

[91] The balance of the requirements differs depending on the employer's response to the request. If the employer *refuses* the request the requirements relate to:

- *form* in that the written response needs to:
 - state that the employer refuses the request (s.65A(2)(c));
 - include the details of the reasons for the refusal (s.65A(6)(a));

- set out the employer’s particular business grounds for refusing the request (s.65A(6)(b)(i));
- explain how those business grounds apply to the request (s.65A(6)(b)(ii));
- 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 (s.65A(6)(c)(i)); or
 - state that there are no such changes (s.65A(6)(c)(ii));
- set out the effect of ss.65B and 65C of the Act (s.65A(6)(d));
- *process* in that the employer may refuse the request only if:
 - the employer has discussed the request with the employee (s.65A(3)(a)(i));
 - the employer has genuinely tried to reach agreement with the employee about making changes to the employee’s working arrangements to accommodate the circumstances in subsection 65A(1) (s.65A(3)(a)(ii));
 - the employer and employee have not reached such an agreement (s.65A(3)(b));
 - the employer has had regard to the consequences of the refusal for the employee (s.65A(3)(c));
- *substance* in that the employer may refuse the request only if the refusal is on reasonable business grounds (s.65A(3)(d)).

[92] Section 65A(4) provides that 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.

[93] I do not consider that a deficiency in the form, process or substance of a response to a request that is validly made under the Act precludes the Commission from dealing with a dispute about the employer’s response or lack thereof given the nature of the orders available to the Commission which contemplate a way for the Commission to deal with such deficiencies.

[94] In particular, and as noted by the Respondent, s. 65C(1)(e) provides that if the Commission is satisfied that the Respondent has not responded, or has not responded adequately, to the employee’s request under s.65A, it may make an order that the employer take such further steps as the Commission considers appropriate, having regard to the matters in s.65A, which I have set out earlier above. Section 65C(1)(a) provides that in circumstances where the employer has not given the employee a written response to the request under s.65A, the Commission may make an order that the employer be taken to have refused the request.

[95] In the circumstances of this matter, the Applicant and Respondent have engaged in dialogue via their representatives since the 28 May Letter. In particular, the Respondent responded to the 28 May Letter via the 21 June Letter. While the 21 June Letter encourages the Applicant to ‘submit a flexible work arrangement request that can be considered’, it did expressly state in its 21 June Letter that:

“The Branch does not agree to the three proposals put in relation to “automatic approval for travel” (at the Branch’s cost), permission to travel in work time or maintaining her current organising area (seemingly this last proposal is a request for **permanent** allocation to [LHD 2])”.

[96] I find that the Respondent refused the request. Whether it did so on reasonable business grounds is a further consideration that I deal with below.

[97] Even if the Respondent's response is somewhat deficient in terms of the requirements of the Act, in these circumstances I agree with the Respondent that ordering that the Respondent take certain steps under s.65C(1)(e) such as requiring further discussions would not be an appropriate or desirable course of action. Such a course is likely futile and will only serve to further protract the dispute.

Section 65B(2) - Have the parties attempted to resolve the dispute at the workplace level, by discussions between the parties?

[98] The Applicant made her request for flexible working arrangements via the 28 May Letter. The Respondent refused the request via the 21 June Letter. The Applicant engaged with the Respondent further via her representative as evident from the 26 June Letter. The Respondent responded via its representative as evident from the 12 July Letter.

[99] While they relied on their legal representatives to do so, it is apparent that the parties have attempted to resolve the dispute at the workplace level by discussions between the parties and that the dispute remained unresolved.

[100] Section 65B(3) provides that if discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Commission. The Applicant has done so.¹⁰⁰

Referral of the dispute to the Commission and Commission's arbitral powers

Conference to attempt to resolve the dispute

[101] Section 65B(4) provides that if a dispute is referred under section 65(3):

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

Should an order be made by the Commission?

Orders the Commission may make where the employer has refused the request

[102] Section 65C(1)(b) provides that for the purposes of paragraph 65B(4)(b), the Commission may deal with the dispute by arbitration by making any of the following orders in circumstances where the employer has 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;

- (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.

Commission may make orders that the employer grant the request or make specified changes

[103] Section 65C(1)(f) provides that subject to section 65C(3) the Commission may make:

- (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 s.65B(1)(a).

[104] Section 65C(3) provides that the Commission may make an order under paragraph 1(f) only if the Commission is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.

Other matters relevant to the making of orders by the Commission

[105] Section 65C(2) provides that in making an order under subsection (1) the Commission must take into account fairness between the employer and the employee.

[106] Section 65C(2A) provides that the Commission must not make an order under ss. 65C(1)(e) and (f) that would be inconsistent with:

- (a) a provision of the 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.

Is it appropriate for the grounds on which the Respondent refused the request to be taken to be reasonable business grounds?

[107] As noted above, the request made by the Applicant in her 28 May Letter was refused by the Respondent in its 21 June Letter. In the 21 June Letter the Respondent asserts that:

- organisers are allocated different areas from time to time based on operational needs, re-allocations happen frequently and there are no regionally based organisers apart from one organiser on a pre-existing 'grand-parented' arrangement;
- the Respondent did not dictate where employees live, many employees travel long distances from home to work and their expenses are not met by the Respondent;
- travel from home to the office is undertaken on personal time for all staff and the Applicant was not an exception;
- it did not agree to proposals put in relation to 'automatic approval for travel' at the Respondent's cost, permission to travel in work time or permanent allocation to the LHD 2.

[108] The 21 June Letter also stated that on 27 November 2023, Ms Di Staso requested 'the specifics' of the arrangement that the Applicant wished to have considered¹⁰¹ as her request was unclear and stated:

‘As indicated in previous correspondence, [Ms AB] is encouraged to submit a flexible work arrangement request that can be considered’.

[109] It is apparent from these statements that the Respondent did not consider the changes that Applicant were seeking to be clear because of the limited detail in her request.

[110] The Respondent sought to rely on the evidence of Ms Candish in support of its position that there were reasonable business grounds for rejecting the proposed changes¹⁰² and submitted:

- the organising model adopted by the Respondent involves it having the ability to move organisers around from health district to health district as and when may be required;¹⁰³
- the Respondent is responsible for determining when and how funds are to be spent and members (and less relevantly the *Fair Work (Registered Organisations) Act 2009* (Cth)) entrust that obligation to be fulfilled by branch officers and not employees;¹⁰⁴
- without any detail relevant to the changes that the Applicant proposes, it is simply not possible to determine the extent to which they encroach upon the prohibition in s.65C(2A)(b);
- the changes the Applicant proposes would, on the face of things, involve potential inconsistency with the *New South Wales Nurses and Midwives Association and Australian Nursing and Midwifery Federation New South Wales Branch Enterprise Agreement 2023* (Enterprise Agreement) because:
 - ‘work’ as provided for in the Enterprise Agreement does not include private time spent travelling to and from work; and
 - absent the detail what the Applicant seeks is potentially inconsistent with clauses 8, 9, 10 and 20 of the Enterprise Agreement.¹⁰⁵

[111] Ms Candish gave evidence that the Applicant was invited, on a number of occasions, to clarify what it was she was seeking.¹⁰⁶

[112] Section 65A(5) provides:

‘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: The 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)).

[113] As I have earlier found, if the Applicant's requested change were granted it would provide the Applicant with the ability to travel at times to meet her needs, and at times that the Respondent did not want her to, including travelling during working hours. The limited detail in the request was clearly a concern for the Respondent in its decision to refuse the request.

[114] While I appreciate that the nature of the work undertaken by the Applicant is somewhat dynamic, which might preclude an arrangement that locks in static days of travel and times during which this would occur, the request seeks to confer upon the Applicant broad discretion to choose her travel arrangements and does not set out clear parameters within which the Applicant proposes to organise her work and travel time. In this regard I accept that the form in which the Applicant has made her request does not provide the Respondent with certainty around when she will be travelling to the Office, whether she would be available for face-to-face meetings at the times the Respondent requires that she be available and how much of her travel would be undertaken in paid work time rather than personal time. This means the Respondent is unable to assess the actual impact of the request while it remains in its current form. In these circumstances I have decided to make 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.

[115] Even if I had not been persuaded that the grounds on which the Respondent refused the request to be taken to be reasonable business grounds, s.65C(2) of the Act requires the Commission to consider fairness between the employer and the employee in making an order under subsection (1). As noted above the form of the request is such that it would confer upon the Applicant broad discretion to choose her travel arrangements. While the request suggests that the Applicant would be travelling on the 'most appropriate' flights balancing certain considerations, it is unclear as to who is to make the assessment of what is 'most appropriate'. Given that the change sought proposes automatic approval and authorisation to travel, it can be assumed that it is intended the Applicant would make the assessment. This would have the practical effect of impeding the Respondent from making decisions about the times during which the Applicant would travel between the Town and Office for work related purposes, the flights the Applicant would take and therefore the times during which she would travel.

[116] I accept that the Applicant is the parent of a child who is of school age who has experienced some challenging circumstances in life, including exposure to domestic violence among other matters. The Applicant is separated from the child's other parent, the child resides with the Applicant, and it is reasonable for the Applicant here to seek to balance her need to care for her child in those circumstances and it is understandable that she has done so. However the broad discretion the request seeks concerning travel arrangements would tip the scales too

far in the Applicant's direction from the perspective of fairness. The Respondent is, as it has noted in its submissions and evidence, a member-based organisation and those members will have expectations that the Respondent use its funds and resources in a way that is subject to sound governance, including when it comes to oversight of employee travel arrangements. In this regard it should not be excluded from the decision-making process regarding approval of Respondent resourced travel arrangements.

Commission may make orders that the employer grant the request or make specified changes

[117] Section 65C(1)(f) provides that subject to section 65C(3) the Commission may make:

- (iii) an order that the employer grant the request; or
- (iv) 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 s.65B(1)(a).

[118] Section 65C(3) provides that the Commission may make an order under paragraph 1(f) only if the Commission is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.

[119] I have found that the Respondent had reasonable business grounds for the refusal of the request and decline to make an order that the Respondent grant the request in those circumstances.

[120] The Applicant is not precluded from making a further request for flexible working arrangements in a different form. However, there is an 'elephant in the room' in this respect which lies at the centre of the matters in dispute between the Applicant and Respondent and this concerns the direction of the Applicant's travel.

[121] It is apparent that the Applicant has multiple places of work being the member workplaces in LHD 2 to which she has been assigned as an organiser, the Office and sometimes her home in the Town. As a part of her role as an organiser it is apparent that the Applicant needs to move between these locations on a regular basis. The key issues that emerge are:

1. on whose 'time' should the Applicant be permitted to travel between these locations, i.e. whether during personal time or paid work time; and
2. who should pay for the travel between these locations.

[122] Until such time as these questions are answered it seems likely that the disputation between the Applicant and Respondent is unlikely to resolve, even if the Applicant makes another request for flexible working arrangements.

The orders proposed by the Applicant

[123] The nature of requests for flexible working arrangements and disputes about them are dynamic in that the Act contemplates discussions about the request,¹⁰⁷ the employer genuinely trying to reach agreement with the employee about making changes,¹⁰⁸ discussions at the workplace level to try and resolve the dispute,¹⁰⁹ and an attempt by the Commission to deal with

the dispute other than by arbitration.¹¹⁰ While questions of jurisdiction focus on the form of the request, is often the case that these matters evolve from the point of the initial request.

[124] In this regard, during the proceedings the Applicant proposed that the Commission make the following orders pursuant to s.65(1)(f)(ii) of the Act:

1. The Respondent reimburse the Applicant for all reasonably incurred expenses related to her travel and accommodation from her home in the Town to the Office where required by the Respondent.
2. Where required by the Respondent to travel to and from her home in the Town to its Office, the Applicant be permitted to travel in work time between 7am and 7pm, or otherwise any travel outside those hours be treated as paid work time.
3. In order to accommodate her caring duties for her primary school aged child, the Applicant's work be limited by the Respondent to three days overnight travel per fortnight.

[125] I have earlier found that the question of reimbursement of expenses falls outside the remit of 'working arrangements' as contemplated by s.65(1) of the Act. However, I have also found the times during which work is performed and where it is performed fall within the concept of 'working arrangements'.

[126] The orders sought by the Applicant effectively seek a reorganisation of her work time such that she be permitted to:

- travel in work time between the hours of 7am and 7pm;
- have her travel time undertaken outside of this span of hours and treated as paid work time;
- have her travel limited to three days overnight travel per fortnight.

Respondent's position

[127] The Respondent takes issue with what the Applicant is seeking on a number of grounds, including because:

- it considers the Applicant wants these entitlements because she chose to live in the Town rather than the location of the Office where she lived and worked until commencing a period long service leave and her career break in May 2021;¹¹¹
- it considers that what she is seeking has nothing to do with what flexible work arrangements are intended to facilitate.¹¹²

Context in which the Applicant moved to the Town

[128] It is not in contention that when the Applicant commenced her employment with the Respondent she lived near the Office. The decision to move to the Town and enrol her child in school there a significant life decision. It is a decision that the Applicant made in April 2021 during the time of the COVID-19 pandemic and immediately prior to her taking leave from

May 2021 to July 2022.¹¹³ The Applicant has since purchased a house in the Town. There is conjecture as to whether the Applicant told the Respondent about her decision at this time. In many cases the introduction of public health measures which restricted movement and other precautionary policy responses during this period disrupted where people lived and worked. In the context of her leave arrangements and the COVID-19 pandemic, it is likely that this change caused little material impact.

[129] I accept that Applicant and the Lead Organiser were friends and that the Lead Organiser knew the Applicant had moved to the Town. The Applicant's evidence suggests the Lead Organiser wanted the Applicant to return to work and organise LHD 1 on a full time basis and the Leader was prepared to be somewhat flexible about how this was to happen. It seems unlikely that the Applicant would have agreed to a move that would involve her incurring considerable travel costs and is apparent from the Applicant's evidence that the Lead Organiser implicitly indicated to the Applicant that her costs associated with travel to the Office would be paid by the Respondent when she told her to "just put in the forms". It is not clear that the Lead Organiser had the authority to authorise this 'wink and nod' style of approach but in any case, it had the effect that the 'elephant in the room', being the Applicant's personal decision to move a significant distance from the Office, was not called into issue at the time of the Applicant's return from her career break in July 2022.

[130] The Applicant had an acting manager at the time of her return from her career break.¹¹⁴ However Ms Di Staso became the Applicant's manager a short time thereafter in around September 2022.¹¹⁵ In about February 2023 the Applicant asked Ms Di Staso if she could change her organising area to the LHD 2 so she could spend more time with her child.¹¹⁶ Within a month or so following this, the Applicant and Ms Di Staso discussed the Applicant's need to drop her child to school at around 8.30am or 8.40am and they agreed a that the Applicant would not start work until 9am as a temporary arrangement which was to be reviewed within 12 months.¹¹⁷ There were no discussions about the Applicant's travel expenses associated with travelling from the Town to the Office.¹¹⁸

The post-pandemic shift

[131] It seems likely that the Respondent's expectations regarding travel began to shift as it sought to transition back to arrangements that more closely resembled its pre-pandemic ways of working and it is apparent that by March 2023, the Applicant started to experience difficulties in meeting travel expectations. Evidence of this evidence is apparent in the Applicant's email to Ms Di Staso on 23 March 2023 in which she states:

"I am still able to travel for a few nights every few weeks (as required for meetings in [the Office]), but I feel that I can't properly represent our members on an ongoing basis as they require an organiser who can be on the ground for a number of days every week or fortnight."

[132] There is implicit acknowledgement by the Applicant in this email that the Respondent needed an organiser in the Office for a number of days but that she was not able to continue doing this in the context of the decisions she had made about her place of residence and child's schooling. It is apparent that in March 2023 the Applicant had initiated conversations with Ms Di Staso to try and deal with this complication indicating that:

- she was unable to continue overnight travel at the quantity of nights that she was undertaking at that time;
- when she was at home, she needed to drop her child at school but could start work at 9am but was able to finish work at 5pm as after school care was available;
- she could ask neighbours to take her child to school when she was travelling but she sought to minimise travel to the location of the Office to ‘a few nights every few weeks’, including because she considered there had been an overreliance on neighbours and because her child had been bullied at school and wanted her home more.

The agreement to ‘temporary arrangements’

[133] It is apparent that Ms Di Staso extended flexibility to the Applicant to enable her to deal with her personal circumstances and that this coincided with discussions about the Applicant’s request to become the Organiser of LHD 2. In an email to Berice King dated 1 May 2023, in which the Applicant was copied, Ms Di Staso indicated that certain conditions had been agreed as a temporary measure with a review period of 12 months and seeking that the arrangement be formalised.¹¹⁹ The email indicated that the agreement had been reached following a discussion with the Applicant on 5 April 2023 about formalising a request for flexible work arrangements in “relation to work hours due to access to childcare, overnight stays and the impact on the work allocation”.

[134] The Applicant became the organiser covering LHD 2 and it seems likely that at this time, and when the temporary arrangements were agreed to, Ms Di Staso knew that:

- the Applicant was residing in the Town with her child;
- the child’s ‘school’ was not a school near the location of the Office but was a school in the Town and the Applicant generally needed to drop the child off at around 8.40am and finish work at 5pm to pick the child up when after school care ceased;
- the Applicant wanted to spend more time with her child and reduce overnight stays and the move to the LHD 2 would assist in this regard; and
- the Respondent had been paying the Applicant’s travel costs to the Office during her time as Organiser for the LHD 1 and the Applicant wanted this practice to continue.

[135] Ms Candish’s evidence was that she was informed that the Applicant made requests about later starts so she could drop her child to school and a limit on overnight travel so as not to be away from home for more than three nights and these requests were agreed to.¹²⁰ However the further specifics of the agreed arrangements referred to in the email to Berice King are unclear. It seems likely that Ms Candish was unaware of the arrangement and directed Ms Di Staso to formalise the arrangement so that she had visibility over it.¹²¹ As such, on 21 November 2023 Ms Di Staso emailed the Applicant and said:

“As per our conversation just now and our telephone conversation last Friday, we note there is an arrangement in place, but it sits outside policy and there is no documentation to support this on file.

Should you wish to request a formal arrangement you should write the reasons – what and why you are requesting to support your FWA request.”

The catalyst for the dispute and Hybrid Work Policy

[136] The catalyst for the dispute, at least in part, appears to stem from resistance the Applicant began to experience when booking and seeking reimbursement for her travel between the Regional Airport and City Airport to the Office. This appears to have escalated since the Respondent implemented its 'Hybrid Work Policy'.¹²²

[137] In this regard Ms Candish gave evidence that:

- the Hybrid Work Policy was developed when restrictions relating to COVID-19 pandemic lifted and involved a long period of consultation;
- an agreement with the relevant unions was reached in April 2024;
- the Hybrid Work Policy commenced in May 2024.¹²³

[138] Ms Candish gave evidence that during consultation about the Hybrid Work Policy it was evident that most staff who were onboarded between 2019 and 2023 lacked relationships with peers outside of their immediate teams and this impacted:

- their onboarding experience;
- their experience of the organisational culture; and
- their ability to be as productive in a remote setting as their longer-term peers, who had organisational knowledge from prior to the COVID-19 pandemic and which new employees were struggling to access.¹²⁴

[139] Ms Candish gave evidence that ensuring all employees participate in face-to-face work each week has helped to address these issues and ensure equity of learning and opportunities to all staff.¹²⁵ Ms Candish also said that the introduction of a hybrid approach to working has helped to improve equity of access to remote work and equity of expectation that all staff are also present for face-to-face work each week.¹²⁶

[140] The Hybrid Work Policy states, among other things:

- At a minimum, employees will work in the Office between 2-3 days per week for team collaboration and to build rapport with fellow colleagues. Part-time employees can apply for this on a pro-rata basis.
- All staff learn while working, and collectively from each other, therefore staff who proactively wish to attend the office on more days may do so.
- Some weeks staff may be required to work more than 2-3 days in the office or to attend the office at short notice.
- Where the date of a scheduled in-office meeting is changed or a meeting is convened at short notice for which office attendance is required, employees who are unable to attend and cannot reasonably adjust other commitments within the notice period can attend the meeting in hybrid form where appropriate.
- Examples of some activities which would require office attendance include but are not limited to:

- onboarding new starters;
- team planning days;
- all team or sub team meetings;
- face to face education or training with staff or members;
- campaign activities.
- Employees who require more than 3 days per week (pro-rata for part-time employees) working from home will need to apply for a Flexible Work Arrangement.
- Teams are encouraged to set at least one day per week for team members to get together in the office, work collaboratively and build strong connections.
- A prescriptive one size fits all approach is not practical or operationally possible.

[141] In respect of hours of work and travel the Hybrid Work Policy states:

- An employee's hours of work will be in accordance with the Enterprise Agreement.
- Travel between an employee's home and the office is not considered to be part of the working span of hours and will be in an employee's own time.
- Cost of travel between the employee's home and location where work is performed off site as part of normal operations (such as time spent in member workplaces, campaigning, travelling for work purposes, stakeholder and all other off-site meetings, and in courts and/or tribunals) is considered part of an employee's working span of hours.

[142] In respect of caring arrangements, the Hybrid Work Policy states:

'We acknowledge that working from home may provide some flexibility in regard to our employee's ability to meet their family responsibilities such as school drop off and pick up however working from home is not a substitute for childcare or care arrangements of other dependants. Employees must ensure they are fully able to undertake required work when they are working from home and any other non-work-related interests will not compete with the employee's work requirements during the agreed work hours'.

[143] It is apparent from the Hybrid Work Policy that:

- if an employee is travelling between their home and the Office, this is not considered work time, and the employee will need to do it in their own time; and
- if employees are travelling from their home and other work locations such as member workplaces, this is considered work time and will fall within their span of work hours.

The current requirement for Office attendance

[144] Despite the Hybrid Working Policy stating that at a minimum, employees will work in the Office between 2-3 days per week, Ms Candish gave evidence that the current arrangements for Organisers are that:

- they are required to attend the office at least one day per week;
- they are permitted to work from home, on average, one day per week;
- they are expected to attend workplaces on the other three days.¹²⁷

[145] Ms Candish gave evidence that the Applicant's team is specifically required to attend the office regularly (once per week at the moment) to:

- participate in campaign planning and review discussions;
- network across the team and sub-team;
- contribute and collaborate on campaign activities, participate in explicit and unplanned opportunities for knowledge transfer;
- participate in consultation relating to changes to policy or procedures, monitoring/review of the teams' shared goals and actively participate in the building and maintenance of the team and sub-team culture.¹²⁸

[146] Ms Candish's evidence was that:

- most of this work is best achieved in a face-to-face setting and difficult to replicate online or when some are in the office and others join on-line;¹²⁹
- some of this work, such as strategic planning, goal setting and monitoring/review is predictable with a quarterly cadence and is planned months in advance;
- other work related to campaigning is less predictable, requiring the team to be agile and reassess new information frequently to determine next steps;
- a standard office day where the whole team are available for face-to-face work allows this work to progress without delay;
- this work is done most effectively in person as there often a process of brainstorming on a whiteboard, small group discussions, debate and collaboration on ideas and strategies which lead to collective decisions on the next steps;
- the team are usually working to short deadlines of 24-48 hours to then take this new information back to their members;
- replicating this work in a hybrid manner, when some are in the office and others on-line, is not feasible given the size of the team, the participation needed and the timeframes to deliver.¹³⁰

[147] Ms Candish also gave evidence that there are times within campaigns where the team is required to attend these sessions for multiple days and by way of example, early in 2024 in preparation for the Respondent's Public Health System campaign, the team were involved in a week of face-to-face sessions that developed shared understanding across the team, consistent templates and work processes for all Organisers and communications tools to assist field work.¹³¹ Ms Candish said that one this field work commences:

- there is a standard analysis and review process with the leads each fortnight;
- this work is also often done face-to-face as it allows the staff to share materials, analyse documents like workplace and reports, and evolve their discussion based on the evidence;
- it involves strategic questioning of outcomes, and the delivery of feedback which is often better accepted when face-to-face.¹³²

Specific circumstances of LHD 2

[148] Ms Candish gave evidence that in LHD 2:

- there are two medium sized hospitals and five smaller facilities;
- there are approximately 2200 members and five branches.¹³³

[149] Ms Candish also gave evidence that:

- LHD 2 covers approximately 11,000 square kilometres and in comparison, most other regional local health districts cover approximately 40,000 – 250,000 square kilometres with longer distances between members' workplaces;
- other regional local health district allocations require more frequent and lengthy periods of travel;
- most metropolitan local health districts have more than 5000 members and 10-20 branches;
- the Applicant's workload is considerably less than many other organisers and LHD 2 has been allocated as a part-time workload in the past or has been combined with a second local health district to make up a full-time workload.¹³⁴

[150] It seems likely that in these circumstances it may be easier to organise work in LHD 2 around the requirements for Office attendance, which involves work involving multiple team member at times that may be unpredictable, and which require working to tight deadlines.

The Applicant's circumstances

[151] The Applicant does not appear to contest that her role requires her to be in the Office. However, the difficulty for the Applicant is that she now lives a considerable distance away from the Office, as does her child for whom she is the primary carer.

[152] Ms Candish gave evidence that she directed Ms Di Staso to advise the Applicant that the Respondent would continue to meet her travel costs from the Town to the Office while the Hybrid Work Policy was being developed but that such costs needed appropriate pre-approval.¹³⁵ The Hybrid Work Policy is now in place and in essence the Respondent takes issue with it being asked to make accommodations around the way in which the Applicant is required to make her way to the Office and pay costs associated with that in circumstances where she has made a personal decision to live a considerable distance from the Office. On its face, this presents as a compelling argument as to why orders should not be made. The Applicant is not the only person to have moved residence during the COVID-19 pandemic. Many people did this and in doing so took a risk that when the pandemic concluded they would be faced with the difficulty of having to make their way to their place of work from a considerable distance and incurring considerable time and cost in doing so.

[153] However, complexity arises in this matter in that:

1. the Applicant she says she encounters circumstances in s.65(1A) which necessitates her and her child living in the Town and the arrangements she is seeking; and
2. the Applicant has more than one workplace and frequent travel is required between her multiple workplaces in her role as an organiser.

[154] In this regard, the Applicant's gave evidence about her experience of domestic violence and the concerns she continues to experience as a result of this. This evidence is the subject of confidentiality orders.¹³⁶ The Applicant also gave evidence concerning impacts upon her child and her ongoing fears about returning to live in a location near the Office.¹³⁷ This evidence is also the subject of confidentiality orders.

[155] The Commission may only make an order that the employer make specified under s.65C(1)(f) if there changes (other than the requested changes) in the employee's working arrangements are to '*accommodate, to any extent, the circumstances mentioned in s.65B(1)(a)*'. Section 65B(1)(a) provides:

- '(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 the circumstances that apply to the employee...'

[156] The 'circumstances' referred to in s.65B(1)(a) must be taken as a reference to the circumstances in s.65(1A).

[157] The 'circumstances' in s.65(1A) that the Applicant points to are that she:

- is the parent, or has responsibility for the care, of a child who is of school age or younger (s.65(1A)(a));
- is experiencing family and domestic violence (s.65(1A)(e));
- 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 (s.65(1A)(f)).¹³⁸

[158] Section 106B of the FW Act defines 'family and domestic violence' as violent, threatening or other abusive behaviour by a close relative of a person, a member of a person's household, or a current or former intimate partner of a person, that:

- (a) seeks to coerce or control the person; and
- (b) causes the person harm or to be fearful.

[159] I am satisfied that the Applicant has experienced domestic violence in the past. Whether the Applicant and her child are 'experiencing' domestic violence is a more complex question. Notwithstanding this, I am persuaded on the basis of the evidence it is apparent that the Applicant perceives an ongoing threat to her and her child, and this is why she wishes to live away from the Office. Based on the Applicant's prior experience with domestic violence I do not consider her perception to be misplaced and her decision to live in the Town has been made to protect not only herself but her child from a perceived threat of violence from someone who has been violent in the past. This in my view, this is at the very least a personal arrangement she has made in discharging her responsibility for the care of her child who is school aged or younger and who has clearly encountered some very challenging life circumstances. The circumstances surrounding the child's care need are beyond typical and the Applicant clearly

meets the circumstances in s.65(1A)(a). The Applicant now seeks working arrangements that complement these personal circumstances.

Cost considerations

[160] The Applicant's evidence is that by allowing her to continue to work and live in the Office, she estimates that she will save the Respondent around \$1677 per fortnight as it is less expensive to have the Organiser of LHD 2 live and work in the same place compared to flying that person to the Office, having them stay in hotels and paying for transfer costs multiple times each week.¹³⁹

[161] The Respondent did not provide any alternative modelling, however based on Ms Candish's evidence that office attendance is required at least one day per week and attendance at other workplaces on the other three days,¹⁴⁰ I accept the general proposition that it is going to be less costly for the Respondent to meet the costs of the Applicant traveling from the Twon to the Office for a day a week than it would be for the Respondent to fly the Applicant to LHD 2 from the Office and accommodate her for her activities there three days a week. While there will be occasions where the Applicant needs to come to the Office for multiple days at a time, this would not change that outcome.

Equity considerations

[162] However, the Respondent's objection to the arrangements sought go beyond cost and are directed toward staff equity. In this regard Ms Candish's evidence was that:

- the Applicant would be the only employee who does not have to pay for the cost of travelling to Office other than Ms Guinea¹⁴¹ who is on a grand-parented arrangement and was asked to move to suit the Respondent;¹⁴²
- the Branch has no other Organisers who are authorised to travel to the office on work time, other than Ms Guinea;¹⁴³
- many of the Respondent's staff travel significant distances to attend their face-to-face responsibilities in the Office and some routinely travel more than two hours per day in their personal time meeting costs associated with petrol, public transport, tolls and wear and tear on their vehicles;¹⁴⁴
- the Hybrid Work Policy deliberately sought to address the inequity that exclusive remote work was creating, and the arrangements would set up circumstances far superior to others in her workforce, including her own team;¹⁴⁵
- other staff have relocated to locations away from the Office and have sought similar agreements, but these have been denied due to them giving rise to inequity.¹⁴⁶

[163] It is apparent that the arrangement for Ms Guinea is an anomaly and unlike the Applicant's circumstances in living and working in LHD 2, Ms Guinea was directed to work in the Local Health District to which she was assigned, did not want to but that a situation had developed in that particular Local Health District that required a local approach.¹⁴⁷

[164] Ms Candish's evidence also suggests that she was also considering the Respondent's members who are unable to work from home and need to pay their own way to and from home and considered that members would find it unpalatable if membership fees were used in a

manner inconsistent with their own working experience, where the Respondent's staff had their transport to and from their place of work paid for.¹⁴⁸

Impacts of the proposal taking into account availability of travel options

[165] The most direct method of transport from the Town to the Office involves air travel.

[166] If travel is to be arranged within the 7am to 7pm span the earliest available flight is at 10am arriving at 11.20am.¹⁴⁹ By the time the plane taxis to the terminal and the Applicant arrives at the Office half the working day is gone.

[167] In commuting back to the Town from the Office, the latest flight the Applicant would need to take to fall within the 7am to 7pm span is a 3.05pm flight which lands at the Regional Airport at 4.20pm. Assuming the Applicant would need to get to the airport half an hour before the flight for boarding and make her way from the Office to the City Airport, this is again a significant amount of the working day lost.

[168] To be able to spend one whole day in the Office the Applicant could catch the 6.30am flight from the Regional Airport to the City Airport, stay overnight and then catch the 8.20am flight home the following day. However, the Applicant is suggesting in the orders she is seeking that travel outside of the hours of 7am and 7pm be treated as 'paid work time'. The Respondent submitted that without detail relevant to the changes that the Applicant proposes it is simply not possible to determine the extent to which they encroach on s.65C(2A)(b)¹⁵⁰ which provides that the Commission must not make an order under s.65C(1)(e) or (f) that would be inconsistent with 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. The Respondent submitted that on the face of things the arrangements would be inconsistent with the *New South Wales Nurses and Midwives Association and Australian Nursing and Midwifery Federation New South Wales Branch Enterprise Agreement 2023 (Agreement)* because 'work' as provided for in the Agreement does not include private time spent travelling to and from work.¹⁵¹ The Respondent also pointed to clauses 8, 9, 10 and 20 as potential areas of inconsistency.¹⁵²

[169] It is not necessary to delve into the proper construction of all of these provisions however I observe that:

- Clause 8 relevantly provides that ordinary hours will be 140 hours per four week period however goes on to state that employees may also be required to work reasonable additional hours¹⁵³ and other than for nominated administrative positions in clause 7, there is no indication that an employee is entitled to be 'paid' for the additional time outside of ordinary hours.¹⁵⁴ It is unclear how the balance of the Applicant's working time would be structured in order to comply with clause 8.
- Clause 9(a) provides that (unless subject to rostering to maintain staffing arrangement) all employees may work flexible hours from day-to-day between the hours of 7am and 7pm, provided that the approval of their Manager is obtained for any variation from the span of hours from 8am to 6pm, subject to operational requirements. The Applicant's contemplation of working time outside of 7am to 7pm would appear to conflict with this provision and to this extent the Respondent's submissions have some merit.

[170] To remain within the 7am to 7pm span and spend a single day in the office it seems likely that the Applicant would need to travel to the Office location the night before and leave the day after. There are also going to be times where the Applicant is needed in the office for multiple days. However, the Applicant's orders propose that she would only stay overnight for three nights per fortnight.

Conclusion

[171] The Applicant is a long serving employee who, when she commenced her employment in 2012, did so on the understanding that she was employed to work in the Office and make her own way there. However, in 2021 the Applicant made some major life decisions which cannot be undone 'quickly'. While the Respondent had extended some flexible arrangements to accommodate the Applicant's move to the Town, I am persuaded that discussions were had with Ms Di Staso about the nature of these arrangements, including during negotiations to support the Applicant's move to LHD 2, and it was agreed that the arrangements would be temporary and subject to a 12-month review. It is unclear what the parties understood would happen if the temporary arrangements were not renewed after the 12-month period and a formal 'review' does not appear to have occurred. Instead, the way in which the Applicant appeared to have learned that her temporary arrangements were no longer going to be continued was somewhat 'organic' in that she started encountering difficulty in having her travel arrangements approved.

[172] At the time of these changes the Respondent knew the Applicant lived in the Town, had a child who went to school there and was the parent with caring responsibility for that child. It would also have been apparent to the Respondent that requiring the Applicant to cover her costs associated with her travel to from the Town to the Office would have been a very costly exercise for her.

[173] There are some roles in which it may be possible for people to work remotely from the Office and independently with little face to face interaction with their peers. However, Ms Candish's evidence establishes that the Applicant's role is not such a role. While technologies such as online meetings can assist in connecting peers for group discussions, I accept that such technologies have limitations and are less effective for the work of an Organiser employed by the Respondent as compared to face-face discussions involving brainstorming on a whiteboard and debating ideas and strategies in a group decision making setting. The Applicant was employed to undertake work in the Office and the nature of the Applicant's role as an Organiser requires a presence in the Office so she can participate in the face-to-face group activities identified by Ms Candish. The arrangements the Applicant proposes in her orders are going to impede her ability to meet these requirements by limiting the block time she is able spend in this office. In the circumstances of this matter and having regard to those factors, I decline to make the orders in the form the Applicant has proposed.

[174] While I accept that it is entirely reasonable for the Respondent to require the Applicant's attendance at the Office undertake the important face to face activities required of her role, its focus should have been on the actual problems that both parties encountered and working to solve for them, including exploring transitional arrangements if the temporary arrangements were to cease. While I accept that the Respondent consulted with its workforce about the Hybrid Working Arrangements Policy, the bespoke temporary arrangements in place for the Applicant

were unique to her and I consider that the communication about the cessation of these arrangements was poor.

[175] In particular, bringing the arrangements to an end without discussion about the consequences and how they may be mitigated was unreasonable in the circumstances of this matter because if the arrangements are to cease the Applicant will likely need to explore, among other things:

- places of alternative residence so she can commute to the Office with greater ease, including to meet the Respondent's requirements for full day, block and unplanned office attendance;
- alternative school arrangements for her child;
- mechanisms to ensure her safety and the safety of her child that may be available other than the physical distance of the Town.

[176] The change should have been handled in a more structured way to enable the Applicant to make the significant life adjustments she was going to need to make in response.

[177] There is an obvious pathway forward and that is to implement some practical transitional arrangements. It is apparent that the Applicant had negotiated temporary arrangements with Ms Di Staso involved the following aspects:

- on the days on which the Applicant is working in LHD 2 the Applicant would be permitted to start at 9am so she could drop her the child off at around 8.30am or 8.40am; and
- that the Applicant's overnight travel be limited to three nights per week.

[178] It also seems likely that these temporary arrangements would have involved the Respondent meeting the Applicant's travel costs to the Office given the Applicant had her travel expenses approved previously, albeit with questionable authorisation from the approvers. The orders the Applicant is seeking would reinstate the temporary arrangements in part.

[179] However, in negotiating these temporary arrangements I consider it unlikely that either Ms Di Staso or Ms Candish would have agreed that the Applicant be able choose her own travel arrangements without some form of approval. There does not seem to be a shared understanding about the times during which travel would occur and conflict between the parties has resulted from this. The parties clearly have different perspectives about what is reasonable, and they are unlikely to resolve their differences in this respect. If I don't resolve this aspect of the dispute, the parties will remain at an impasse.

[180] As such, and considering fairness between the parties, I consider it appropriate to order transitional arrangements. In considering the duration of any transitional arrangement I am conscious that the Applicant's child is school aged, the Applicant will need to organise care around school arrangements and that relocation to another school will be disruptive. I consider it appropriate to end any transitional arrangements at the conclusion of a school term to mitigate the disruption. However, I need to consider fairness to both the Applicant and Respondent and ordering the implementation of an arrangement that constrains, for a very lengthy period, the

capacity of the Applicant to participate in important face to face activities does not strike the right balance.

[181] I consider it appropriate to order that the Respondent implement the following arrangement until Friday 4 July 2025, which ends around the same time as the end of term 2 of the 2025 school year:

- the Applicant's overnight travel be limited to three nights per fortnight; and
- when attending the Office, the Applicant be permitted to undertake travel time from her home between the hours of 7am and 7pm, with LHD 2 to be considered her base for work and for this time to be taken as work time for the limited duration of this arrangement.

[182] Thereafter it is contemplated that the Applicant would be required to comply with the Respondent's lawful and reasonable directions in respect of its requirements for the Applicant to work in the Office and as contemplated by the Hybrid Work Policy and that she would make her way to the Office in her own time and therefore meet the costs associated with this.

[183] I would further note that while I consider that disputes about travel expenses and reimbursement of them generally fall outside the remit of the disputes of this kind, s.353(1) of the Act prohibits an employer from requiring an employee to spend, or pay to the employer or another person, an amount of the employee's money if the requirement is unreasonable in the circumstances and for (for a payment) the payment is for the benefit of the employer or a related party to it.



COMMISSIONER

Appearances:

Ms Morgan-Cocks for the Applicant.
Mr Reitano for the Respondent.

Hearing details:

2024
24 October at the Fair Work Commission in Sydney.

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- ¹ Applicant's Statement in Chief dated 18 September 2024 (Applicant's Statement), Applicant's Reply Statement dated 17 October 2024 (Applicant's Reply Statement).
- ² Witness Statement of Zoe Guinea dated 12 September 2024 (Guinea Statement).
- ³ Witness Statement of Shaye Candish dated 10 October 2024 (Candish Statement).
- ⁴ Applicant's Statement at [58].
- ⁵ Applicant's Statement at [59].
- ⁶ Applicant's Statement at [66].
- ⁷ Transcript of Proceedings, PN191; see also 21 June Letter.
- ⁸ Transcript of Proceedings, PN188.
- ⁹ Applicant's Statement at [63] – [64].
- ¹⁰ Applicant's Statement at [73].
- ¹¹ Applicant's Statement at [67].
- ¹² Applicant's Statement at [68].
- ¹³ Transcript of Proceedings, PN 123.
- ¹⁴ Applicant's Statement at [69].
- ¹⁵ Transcript of Proceedings, PN 123.
- ¹⁶ Applicant's Statement at [70], Transcript of Proceedings, PNs 133 – 138.
- ¹⁷ Transcript of Proceedings, PNs 139 – 143.
- ¹⁸ Applicant's Statement at [74].
- ¹⁹ Applicant's Statement at [76].
- ²⁰ Applicant's Statement, Attachment BP9.
- ²¹ Applicant's Statement, Attachment BP9.
- ²² Applicant's Statement, Attachment BP9.
- ²³ Applicant's Statement, Attachment BP9.
- ²⁴ Applicant's Statement, Attachment BP12.
- ²⁵ Applicant's Statement, Attachment BP12.
- ²⁶ Applicant's Statement, Attachment BP13.
- ²⁷ Applicant's Statement at [86].
- ²⁸ Applicant's Statement, Attachment BP14.
- ²⁹ Applicant's Statement, Attachment BP14.
- ³⁰ Applicant's Statement at [89], Attachment BP15.
- ³¹ Applicant's Statement, Attachment BP15.
- ³² Applicant's Statement, Attachment BP15.
- ³³ Applicant's Statement, Attachment BP15.
- ³⁴ Applicant's Statement, Attachment BP19.
- ³⁵ Applicant's Statement, Attachment BP19.
- ³⁶ Applicant's Statement, Attachment BP19.
- ³⁷ Applicant's Statement, Attachment BP19.
- ³⁸ Applicant's Statement, Attachment BP23.
- ³⁹ Applicant's Statement, Attachment BP24.
- ⁴⁰ Application – Form F10C, Annexure A.

- ⁴¹ Application – Form F10C, Annexure A.
- ⁴² Application – Form F10C, Annexure B.
- ⁴³ Application – Form F10C, Annexure C.
- ⁴⁴ Application – Form F10C, Annexure D.
- ⁴⁵ Respondent’s Submissions at [35].
- ⁴⁶ [\[2023\] FWCFB 209](#) at [21] – [25].
- ⁴⁷ [\[2023\] FWCFB 209](#) at [22].
- ⁴⁸ [\[2023\] FWCFB 209](#) at [24], s.65(2).
- ⁴⁹ [\[2023\] FWCFB 209](#) at [25], s.65(3)(a).
- ⁵⁰ [\[2023\] FWCFB 209](#) at [26].
- ⁵¹ [\[2023\] FWCFB 209](#) at [25].
- ⁵² [\[2023\] FWCFB 209](#) at [25].
- ⁵³ [\[2023\] FWCFB 209](#) at [25].
- ⁵⁴ *Fair Work Act 2009* (Cth), s.65(1)(b).
- ⁵⁵ [\[2023\] FWCFB 209](#) at [23].
- ⁵⁶ Applicant’s Submissions at [4].
- ⁵⁷ Applicant’s Application at question 10.
- ⁵⁸ Respondent’s Submissions at [21].
- ⁵⁹ Applicant’s Submissions at [6].
- ⁶⁰ Applicant’s Statement at [89], Attachment BP15.
- ⁶¹ Applicant’s Statement at [95], Attachment BP23.
- ⁶² Applicant’s Statement at [97], Attachment BP24.
- ⁶³ Applicant’s Statement at [98], Attachment BP26.
- ⁶⁴ Applicant’s Statement at [100], Attachment BP31.
- ⁶⁵ Applicant’s Statement at [89], Attachment BP15.
- ⁶⁶ Applicant’s Statement at [95], Attachment BP23.
- ⁶⁷ Applicant’s Statement at [97], Attachment BP24.
- ⁶⁸ Applicant’s Statement at [98], Attachment BP26.
- ⁶⁹ Respondent’s Submissions at [37].
- ⁷⁰ Applicant’s Statement at [100], Attachment BP31.
- ⁷¹ Applicant’s Statement at [100], Attachment BP31.
- ⁷² Respondent’s Submissions at [17].
- ⁷³ Respondent’s Submissions at [25].
- ⁷⁴ Respondent’s Submissions at [38].
- ⁷⁵ Respondent’s Submissions at [22].
- ⁷⁶ Respondent’s Submissions at [38].
- ⁷⁷ Respondent’s Submissions at [22].
- ⁷⁸ Respondent’s Submissions at [23].
- ⁷⁹ [\[2023\] FWCFB 209](#) at [21] – [25].
- ⁸⁰ [\[2023\] FWCFB 209](#) at [25].
- ⁸¹ Respondent’s Submissions at [12].
- ⁸² Respondent’s Submissions at [13].
- ⁸³ Respondent’s Submissions at [15].
- ⁸⁴ Respondent’s Submissions at [16].

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- ⁸⁵ Respondent's Submissions at [26].
- ⁸⁶ Respondent's Submissions at [30].
- ⁸⁷ Respondent's Submissions at [36].
- ⁸⁸ Respondent's Submissions at [17].
- ⁸⁹ Applicant's application at question 11.
- ⁹⁰ Applicant's Statement, Attachment BP9.
- ⁹¹ Applicant's Statement, Attachment BP9.
- ⁹² Applicant's Statement, Attachment BP15.
- ⁹³ Applicant's Submissions at [29].
- ⁹⁴ Applicant's Submissions at [30].
- ⁹⁵ Applicant's Submissions at [31].
- ⁹⁶ Applicant's Submissions at [31].
- ⁹⁷ Respondent's submission at [32].
- ⁹⁸ Respondent's submission at [32].3
- ⁹⁹ Respondent's submission at [34].
- ¹⁰⁰ Applicant's application, question 14.
- ¹⁰¹ Applicant's Statement, Attachment BP19.
- ¹⁰² Respondent's Submissions at [41].
- ¹⁰³ Respondent's Submissions at [42].
- ¹⁰⁴ Respondent's Submissions at [43].
- ¹⁰⁵ Respondent's Submissions at [43].
- ¹⁰⁶ Candish Statement at [20].
- ¹⁰⁷ *Fair Work Act 2009* (Cth), s.65A(3)(a)(i).
- ¹⁰⁸ *Fair Work Act 2009* (Cth), s.65A(3)(a)(ii).
- ¹⁰⁹ *Fair Work Act 2009* (Cth), s.65B(3).
- ¹¹⁰ *Fair Work Act 2009* (Cth), s.65B(2).
- ¹¹¹ Respondent's Submissions at [2].
- ¹¹² Respondent's Submissions at [3].
- ¹¹³ Applicant's Statement at [63], [64] and [66].
- ¹¹⁴ Transcript of Proceedings PN147.
- ¹¹⁵ Transcript of Proceedings PN149.
- ¹¹⁶ Applicant's Statement at [76].
- ¹¹⁷ Transcript of Proceedings PNs 154 – 157.
- ¹¹⁸ Transcript of Proceedings PNs 161.
- ¹¹⁹ Applicant's Statement, Attachment BP12.
- ¹²⁰ Candish Statement at [10].
- ¹²¹ Transcript of Proceedings, PNs 542 - 544.
- ¹²² Candish Statement, Annexure A.
- ¹²³ Candish Statement at [7].
- ¹²⁴ Candish Statement at [12].
- ¹²⁵ Candish Statement at [12].
- ¹²⁶ Candish Statement at [13].
- ¹²⁷ Candish Statement at [14].
- ¹²⁸ Candish Statement at [16].

¹²⁹ Candish Statement at [16].

¹³⁰ Candish Statement at [167].

¹³¹ Candish Statement at [18].

¹³² Candish Statement at [19].

¹³³ Candish Statement at [10].

¹³⁴ Candish Statement at [10].

¹³⁵ Candish Statement at [9].

¹³⁶ Applicant's Statement at [22], [24], [29], [33], [36], Attachment BP4, Attachment BP6.

¹³⁷ Applicant's Statement at [43], [45], [47], [48], [50], [53] – 54], Attachment BP7.

¹³⁸ Applicant's Application at question 10.

¹³⁹ Applicant's Statement at [106], Annexure BP35.

¹⁴⁰ Candish Statement at [14].

¹⁴¹ Candish Statement at [23].

¹⁴² Candish Statement at [32] – [33],

¹⁴³ Candish Statement at [29].

¹⁴⁴ Candish Statement at [26].

¹⁴⁵ Candish Statement at [26].

¹⁴⁶ Candish Statement at [29].

¹⁴⁷ Guinea Statement at [11] to [13].

¹⁴⁸ Candish Statement at [28].

¹⁴⁹ Exhibit R2.

¹⁵⁰ Respondent's Submissions at [44].

¹⁵¹ Respondent's Submissions at [44].

¹⁵² Respondent's Submissions at [44].

¹⁵³ *New South Wales Nurses and Midwives Association and Australian Nursing and Midwifery Federation New South Wales Branch Enterprise Agreement 2023*, cl. 8(a).

¹⁵⁴ *New South Wales Nurses and Midwives Association and Australian Nursing and Midwifery Federation New South Wales Branch Enterprise Agreement 2023*, cl. 12.