DECISION

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

Deborah Lloyd

v

Australia And New Zealand Banking Group Limited
(C2024/659)

DEPUTY PRESIDENT MASSON MELBOURNE, 21 AUGUST 2024

Application to deal with a dispute about the right to request for flexible working arrangements - whether the request was validly made – whether the request was refused on reasonable business grounds – request not validly made –no dispute capable of arbitration under s 65C – in alternative request was refused on reasonable business grounds - application dismissed.

Introduction

[1] On 5 February 2024, Ms Deborah Lloyd (Ms Lloyd) lodged an application pursuant to s 65B(3) of the Fair Work Act 2009 (Cth) (the Act) for the Fair Work Commission (the Commission) to deal with a dispute regarding the refusal of a request for a flexible working arrangement. Ms Lloyd, who is employed on a full-time basis with the Australia and New Zealand Banking Group Limited (ANZ), made a request to work from home on a full-time basis on 8 January 2024 on the basis that she was over 55 years of age. The request was refused by ANZ on 6 February 2024.

[2] The matter was subject to two conciliation conferences conducted by the Commission on 20 February and 8 May 2024. The dispute was not resolved through conciliation and Ms Lloyd then sought that the matter be arbitrated pursuant to ss 65B(4) and 65C of the Act. The matter was listed for hearing before me on 1 August 2024, in advance of which both parties filed material on which they sought to rely in accordance with directions issued.

[3] In seeking arbitration of the dispute, Ms Lloyd seeks determinations from the Commission that;

(i) ANZ did not discuss the request with the employee prior to sending the rejection letter;

(ii) did not genuinely try to reach an agreement prior to sending the rejection letter; and

(iii) that the reasons for the rejection are not based on reasonable business grounds.

[4] Ms Lloyd further seeks an order from the Commission that ANZ grant the request for the flexible working arrangement sought by her.

[5] At the hearing on 1 August 2024, Mr C Pym of Counsel was granted permission to appear on behalf of Ms Lloyd pursuant to s 596(2)(a) of the Act and called Ms Lloyd to give evidence. Mr S Crilly of Seyfarth Shaw Australia was also granted permission to appear on behalf of ANZ pursuant to s 596(2)(a) of the Act and called Carolyn Tatley (Group General Manager, Strategy and Transformation, Group Risk) to give evidence.

Background and evidence

Applicant's employment

[6] Ms Lloyd who is 62 years of age, commenced employment with ANZ on 1 July 2015 following which she was employed in various business analyst roles before moving into her current Project Business Analyst role on 19 March 2021. The terms and conditions for her current role (the Employment Contract) specify that she is employed on a full-time basis (160 hours per four-week cycle) and that her place of employment is ANZ's offices at 839 Collins Street, Docklands Victoria[1]. Ms Tatley states that Ms Lloyd works on the Information Delivery Project which involves building a cloud-based data platform for the risk function and that she works in a peer group of five employees who are all involved in related activities. The output of the Information Delivery Project will be a data platform that is going to be used by many of ANZ's employees. According to Ms Tatley, while Ms Lloyd's role has a technical focus, it is important for her to understand the 'bigger picture' and engage with her team and stakeholders. Key interactions include at least three 'stand-up' meetings per week (both in-person and remote), meetings and training sessions held on-line with participants in various locations as well as ad-hoc and one-on-one meetings.[2]

[7] Ms Tatley who was personally unfamiliar with Ms Lloyd prior to the current dispute, is responsible for the team in which Ms Lloyd works and made the decision to not approve Ms Lloyd's request. She described the reporting line as follows;

(a) Ms Lloyd's direct manager is Sebastian Biassini (Data Governance Manager);

(b) Mr Biassini reports to Jo Marshall (Cloud Lead - Info Delivery). In ANZ's internal terminology, Ms Marshall is Ms Lloyd's "skip manager".

(c) Ms Marshall reports to Artur Kaluza (Head of Reporting & Model Strategy). Mr Kaluza is the Group 2 executive for the purposes of Ms Lloyd's position.

(c) Mr Kaluza reports directly to Ms Tatley.[3]

[8] Ms Lloyd states that her immediate day-to-day team comprises 5 people in Melbourne and 5 people in India. She does not supervise anyone; her main interactions are with the Indian based technology employees who she meets with via Teams every second day and the Melbourne based employees are often located in different buildings, so she generally meets with them via Teams. She further states she has regular ad-hoc chat conversations with her team and other stakeholders via text or Teams and participates in the Enterprise Business Glossary

Forum which meets fortnightly on-line and includes colleagues from New Zealand and the Pacific region. She further states that even when she is the office, most meetings are conducted via Teams and as the office is open plan which is noisy and distracting, it is less effective for her than joining from home. If required to attend and meet in the office she sates she would wear a respirator which would impede facial cues[4].

Flexible working arrangement policies

[9] The 2020/2021 period was characterised by a period of COVID pandemic driven lockdowns and restrictions on movement throughout Australia, and in particular in Victoria, which meant that many of ANZ's employees worked exclusively from home in that period. In December 2020, ANZ released its 'How We Work Policy' which provided for three modes of work, 'Workplace First', 'Blended' and 'Remote First', with the majority of employees being assigned as 'Blended'. Employees were advised that the working modes would take effect once COVID related restrictions had been lifted. In or around March 2022, when COVID related workplace restrictions had been lifted in Australia, ANZ began to encourage staff to return to working in the office in accordance with the How We Work Policy[5].

[10] In November 2022, ANZ's How We Work arrangements were replaced, this being communicated to all staff on 3 November 2022[6]. The change involved the removal of the above-referred three modes of working and introduction of a 'Hybrid' working model, the principle of which is that employees are required to work an average of half their time in the office. A further email was sent on 3 November 2022 to Risk Division staff by Kevin Corbally setting out how these matters would be dealt with in the Risk Division[7]. On 21 November 2023, Mr Corbally sent a further email to Risk Division staff in which he reiterated the expectation of the 50:50 office/home mode of working, and that moving forward this mode of working would be managed and assessed like any other behavioural expectation and that exceptions to the Hybrid mode of working would be considered but needed to be 'exceptional'[8].

[11] Ms Lloyd disagrees with Ms Tatley's statement that an arrangement where an employee was seeking to work from on a home full-time basis would have to be exceptional. She relies on ANZ's 'Flexibility Best Practice Principles' published in 2015 which she states is still current and which in part states that performance is defined by results, not physical presence in the office. The emphasis in the principles is said by Ms Lloyd to be on the ability of the employee and their manager to identify and agree on flexible work arrangements that address both personal and business needs[9].

[12] The above-referred Hybrid model is now reflected in ANZ's Flexible Working Policy[10] which sets out the process for requesting flexibility in working arrangements, including requests for exceptions to the 50:50 Hybrid model. The policy provides for a general procedure to make a flexible working arrangement request, but more specific approval requirements apply in relation to requests for exceptions to the 50:50 working arrangement. Ms Tatley explains that ANZ's approach to 50% office attendance is flexible and leaves scope for employees and their direct managers to decide how they work within those parameters. The frequently asked questions (FAQ's)[11] accompanying the Flexible Working Policy provide the following examples of the flexibility available to employees in that they may;

(a) work set days in the office over the course of a week or fortnight;

(b) work a particular set "anchor day" in the office, where all members of the relevant team(s) attend for the purpose of in-person meetings or events, and otherwise work flexibly as between the office and remotely;

(c) split their time between home and the office differently at different times, such as working more from home when a partner who travels for work is absent and more often in the office when they have additional support to meet responsibilities at home;

(d) work flexibly between locations depending on work demands; or

(e) work a combination of some or all the above, or different arrangements determined at the individual or team level.

Ms Lloyd's flexible working arrangement request

[13] Ms Lloyd made her request on 8 January 2024[12]. The request identified that her 'Prescribed Personal Circumstance' in making the request to work from home on a 100% basis was that she was 55 years or older, that working remotely had not negatively impacted her productivity and that given her age and World Health Organisation (WHO) advice she was at a higher risk of suffering serious illness from catching COVID if she caught it. The request was initially approved by Ms Lloyd's direct Manager Mr Biassini, endorsed by the relevant Group 2 executive Mr Kaluza and was then referred to Mr Corbally for endorsement at which point Ms Tatley became aware of the request.

[14] On 25 January 2024, Mr Biassini discussed Ms Lloyd's request with her during which he raised a number of alternate options including a staged return to work, providing her with an anchor desk away from others in the office, providing additional breaks during the day so she can leave the office to get some fresh air and use of an outdoor space or meeting room for lunch. Mr Biassini reported Ms Lloyd's negative responses to the proposed alternate working arrangements in an email to Jo Novicio on 25 January 2024, but also stated she was in Mr Biassini's opinion a valued member of the team, was necessary to delivery of the project and that the business leads supported the request[13].

[15] By the time Ms Tatley was alerted to the request on or about 2 February 2024, the required 21-day response period had already passed, but Ms Tatley was aware that Ms Lloyd had agreed on 29 January 2024 for ANZ to take additional time (7-day extension) to consider and respond to the request[14]. After receiving a briefing and considering the request, Ms Tatley decided to reject the request which was reflected in a letter to Ms Lloyd dated 6 February 2024[15]. In its letter ANZ set out the reasons for declining Ms Lloyd's request as follows;

> "ANZ has discussed the Request with you, and we have genuinely tried to reach an agreement with you about making changes to your working arrangements to accommodate the circumstances. We have also considered changes other than those requested. Unfortunately, we have not reached such an agreement.

While ANZ has carefully considered the Request, unfortunately it has determined to refuse it on the following basis:

a. ANZ acknowledges the benefits of flexible work and is committed to supporting flexible work practices. For this reason, ANZ has adopted a flexible work policy position which enables most employees to work up to half their time remotely. The policy is designed to provide employees flexibility as a default to accommodate their own individual circumstances;

b. ANZ considers that the current expectation of a minimum of 50% of an employee's time in an ANZ workplace is already a significant amount of flexibility;

c. There is no medical reason or evidence to support your request; and

d. Whilst you have concerns regarding contracting COVID- 19, you did attend the office on occasion until November 2023, recently travelled interstate to care for your mother and do have occasion to leave your house to undertake required tasks. In doing so, you have shown that you can and do break from your reported self-isolation despite the concerns you hold. On this basis, ANZ believes the attendance expectations it holds of you are not unreasonable."

[16] ANZ also set out in the letter other forms of flexibility that had been proposed by ANZ but were not agreed to by Ms Lloyd;

"Although ANZ has refused the Request, we have discussed with you the following forms of flexibility ANZ is able to offer to accommodate your request:

- Staged return to 50% attendance in the office over 3 months;
- Arrangement of an anchor desk so you sit in the same desk each day you attend the office, which would avoid others using your desk;
- Provision of hand sanitiser to be used only by you and stored in your office locker so it is not used by others;
- Increased breaks to allow time to go outside and remove the N95 mask for the purposes of eating and drinking; and
- The ability to book a meeting room for breaks or lunch to allow removal of the N95 mask."

[17] Ms Tatley explained that in rejecting Ms Lloyd's request, she was conscious of the thinking underlying ANZ's attendance expectations and that long-term exceptions would be granted in exceptional circumstances. She further stated that she believed there were significant benefits to employees meeting and collaborating in person at least some of the time, those benefits being that;

- working together in an office allows for spontaneous interactions that foster collaboration and the exchange of ideas in a way that make staff more effective and efficient in performing their work;

- while it may be that a person's duties can all be performed remotely, that does not mean that fully remote work encourages them to perform work to the best of their ability or foster ongoing improvement;

- work interactions are an essential ingredient in staying aligned, collaborating and collectively delivering outcomes;

- it is important for colleagues to interact in person to build the social bonds that produce a healthy and desirable office culture;

- face to face catch ups between leaders and their teams enable more effective visibility and identification of issues at the earliest opportunity;

- it encourages a feeling of belonging and a sense of community among one's team and colleagues more broadly; and

- some discussions - for example, about performance, or where difficult news needs to be shared - are best conducted in person.[16]

[18] Ms Lloyd disagrees that working remotely on a full-time basis cuts off certain opportunities. In fact, she argues that being in the office has no positive benefit in her circumstances and is detrimental as she finds it stressful to be in the workplace which she says poses the greatest risk to her well-being[17]. Under cross-examination Ms Lloyd conceded that during her employment with ANZ, she had developed her knowledge over time, and this had occurred in part through learning from her colleagues. She also agreed that she also imparted her knowledge to and assisted her colleagues[18].

[19] She goes on to state that she does not by her request propose to never attend the workplace and that there may be circumstances where her attendance could be beneficial, and she would not in these circumstances refuse reasonable requests for office attendance[19]. When pressed during cross-examination on how a 'reasonable request' to attend the office would be determined if she were allowed to work from home 100% of the time, Ms Lloyd was equivocal. She firstly replied that she hoped such attendance would be 'by agreement' and 'mutually agreed' with her. She then indicated however that she would be quite reluctant to attend and that her 'agreement' would be required unless it was a 'direction'.[20] When pressed further she agreed that no matter how beneficial it might be for her to attend the office there was no circumstances in which she would be willing to attend the office[21].

[20] Ms Lloyd also states that she is now 62, approaching retirement and attendance at the office only when required would best meet the CEO's objective which was articulated in an interview on 3AW in October 2023 when he said *"The reason I want people in … it's for them. I think people, particularly younger people but not just, it's good for social cohesion, coaching people on the job, career progression, learning, training."*[22]

[21] While acknowledging Ms Lloyd may be able to perform her duties remotely, Ms Tatley states that she does not agree there is no effect on Ms Lloyd's interactions with peers. Working from home on a 100% basis would in Ms Tatley's opinion cut off the opportunities of the kind identified above that might lead to Ms Lloyd's development and/or that of her colleagues or generate improvements to work processes and collective output[23]. Ms Tatley further states that there was no medical information that indicated Ms Lloyd had a medical condition that made her particularly vulnerable to COVID and that the request was based solely on Ms Lloyd's age. Ms Lloyd agreed during cross-examination that she had no medical conditions relevant to her request and that ANZ had sought to confirm this prior to it deciding to reject her request[24].

[22] Further, ANZ had proposed a series of measures to assist Ms Lloyd comply with the 50% office requirement including a staged return to the office which were rejected by her[25]. In manging risks arising from COVID, Ms Tatley further states that ANZ has measures in place to manage the risk of employees contracting COVID in the workplace, which are summarised in ANZ's 'CovidSafe Plan – Major Buildings'[26] There are also measures individual employees can take including vaccination, mask-wearing and regularly washing or sanitising hands. She accepts however that while public health measures to respond to COVID have been rescinded and vaccinations and boosters are widely available, the risk of contracting airborne illnesses including influenza and COVID can never be eliminated. Ms Tatley further states that remote working arrangements were always intended to be temporary during the COVID pandemic and notes that Ms Lloyd's place of employment remains ANZ's Docklands offices[27].

[23] Ms Lloyd rejects that ANZ's proposed measures address her safety concerns. Being seated at a remote area and in on quiet days as proposed by ANZ fails to address the risk present in common areas and defeats the contended benefit of collaboration. She further claims that sitting remotely in the office would not address the risk of airborne disease circulating through air conditioning. When directed to attend the office on 6 July 2024, Ms Lloyd states she measured the distance between her allocated seat and the seat next to her as being 1 metre and notes that in the area where she was seated there were about 40 workstations in close proximity and that clusters of desks typically comprise 6-7 people[28]. When cross-examined Ms Lloyd agreed that the only way ANZ could address her concerns was to allow her to work from home on a full-time basis.[29]

[24] In responding to Ms Taley's evidence on COVID risk management, Ms Lloyd states that she has no confidence in ANZ's management of that risk in the workplace, particularly when employees are no longer required to complete a COVID-19 Notification Form as was required during the pandemic phase. She says employees are only advised that they should stay home until their acute symptoms have resolved. As to the risks of COVID infection, she refers to a Victorian Government Health Department document[30] that estimates that 5-10% of people who catch COVID will go on to suffer 'long COVID' and which is most common in people aged 35-70 years of age. She also claims that the long-term impacts of COVID are unknown. Because of the known risks she chooses to reduce her risk of catching COVID by minimising time spent outside the home or her car and wears a respirator at all times she is in public. She says these measures have assisted her avoid any respiratory illness since 2020.[31] Ms Lloyd also states that while vaccinations and boosters are widely available, and which she has obtained since they became available, the efficacy of the vaccination and boosters diminish over time due to emerging mutations and variants. She refers to advice she received from Professor Adam Esterman, Chair of Biostatistics and Epidemiology, University of South Australia.[32]

[25] Ms Lloyd states that in all the circumstances, the only effective protection against the COVID virus that is available to her is to avoid exposure. She further states that if she is required to attend the office regularly, she may unfortunately consider looking for alternate employment opportunities that would allow her to continue working from home on a full-time basis. She also rejects that her concerns are disproportionate to the risk which Ms Tatley accepts can never be eliminated and states that her risk of catching a communicable disease can be easily eliminated consistent with ANZ's obligations under the Occupational Health and Safety Act (Vic). That is, ANZ is required to eliminate risks to health and safety as far as reasonably practical which Ms Lloyd claims can be easily done in her case by allowing her to work from home on a full-time basis[33].

[26] Ms Lloyd also claims that based on her experience in conducting risk assessments she is in a better position than most to assess her risk objectively. She assesses her risk of catching COVID as extremely high if she comes into the office 50% of the time, particularly in circumstances where there is good evidence based on the June 2024 Victorian COVID-19 Surveillance Report of a significant increase in cases over the last 12 months and that the risk of hospitalisation or death has not diminished compared to 2023[34]. The report also identifies that mortality at her age (62) is much higher than young people, that being she is twice as likely to finish up in hospital than someone in their 30s, a person of her age is five times more likely to end up in ICU and the risk of death is also dramatically higher[35]. When cross-examined Ms Lloyd agreed that she does not have any qualifications in epidemiology or virology and has never been responsible for managing risks associated with airborne viruses in any organisation.[36]

[27] Ms Tatley acknowledges there were matters favouring the grant of Ms Lloyd's request. These included that in a strictly mechanical sense, many of Ms Lloyd's duties may be performed remotely, the request was supported by her line manager Mr Biassini, and she continues to hold a genuine fear of contracting and becoming ill with COVID. Ms Tatley further notes however that Ms Lloyd's Managers appeared in their support of the request to have been influenced by their view that the duties could be performed remotely and were concerned at the prospect of her taking leave if the request were declined. These matters weighing in favour of the request were not sufficient in Ms Tatley's mind to persuade her that ANZ should grant the request. She says she also considered fairness between employees and that it would be unfair to deny the same accommodation to other employees holding similar reservations about office attendance.[37]

[28] Ms Tatley when cross-examined on matters telling in favour of or against the granting of Ms Lloyd's request, gave the following evidence that;

- she was not able to comment on whether a person of 62 years in age was at a higher risk to infection, illness or complications from COVID than a younger person;
- cannot deny that Ms Lloyd holds a genuine fear of COVID or age-related complications arising;
- Ms Lloyd is a respected employee, there are no performance concerns, and she has an unblemished record;

- there was no evidence that Ms Lloyd was either not meetings targets, hard to contact or that there were tasks not being completed to the required standard;

- she could not comment on Ms Lloyd's views about how office attendance may impact on her socialisation in the workplace;

- while Ms Lloyd may have worked productively and efficiently during the pandemic phase of COVID, the overall view of ANZ is that that the organisation will be collectively more productive if time is spent by staff in the office; and

- ANZ had not identified any specific economic cost of Ms Lloyd working from home on a full-time basis.

[29] Ms Tatley was adamant that her thinking would have been different if Ms Lloyd had provided ANZ with medical evidence that for example indicated she had a particular condition or medical contraindication making it especially risky for her to commute or be in the workplace or if a treating medical practitioner had expressed a view that requiring office attendance posed risks to her mental health[38].

Legislative framework

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

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

> "**65 Requests for flexible working arrangements**
>
> *Employee may request change in working arrangements*
>
> (1) If:
>
> (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
>
> (b) the employee would like to change his or her working arrangements because of those circumstances;
>
> then the employee may request the employer for a change in working arrangements relating to those circumstances.
>
> Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.
>
> (1A) The following are the circumstances:

(aa) the employee is pregnant;

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(b) the employee is a carer (within the meaning of the Carer Recognition Act 2010);

(c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing family and domestic violence;

(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing family and domestic violence.

…….

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

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

(b) for a casual employee—the employee:

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

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

……

Formal requirements

(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change."

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

"**65A Responding to requests for flexible working arrangements**

Responding to the request

(1) If, under subsection 65(1), an employee requests an employer for a change in working arrangements relating to circumstances that apply to the employee, the employer must give the employee a written response to the request within 21 days.

(2) The response must:

(a) state that the employer grants the request; or

(b) if, following discussion between the employer and the employee, the employer and the employee agree to a change to the employee's working arrangements that differs from that set out in the request—set out the agreed change; or

(c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).

(3) The employer may refuse the request only if:

(a) the employer has:

(i) discussed the request with the employee; and

(ii) genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances mentioned in subsection (1); and

(b) the employer and the employee have not reached such an agreement; and

(c) the employer has had regard to the consequences of the refusal for the employee; and

(c) the refusal is on reasonable business grounds.

Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances: see subsection 65C(5).

(4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to a change to the employee's working arrangements if the employer would have reasonable business grounds for refusing a request for the change.

Reasonable business grounds for refusing requests

(5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:

(a) that the new working arrangements requested would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;

(d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

Note: 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)).

Employer must explain grounds for refusal

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

(a) include details of the reasons for the refusal; and

(b) without limiting paragraph (a) of this subsection:

(i) set out the employer's particular business grounds for refusing the request; and

(ii) explain how those grounds apply to the request; and

(c) either:

(i) set out the changes (other than the requested change) in the employee's working arrangements that would accommodate, to any extent, the circumstances mentioned in subsection (1) and that the employer would be willing to make; or

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

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

Genuinely trying to reach an agreement

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

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

"65B Disputes about the operation of this Division

Application of this section

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

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

(b) either:

(i) the employer has refused the request; or

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

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

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

Resolving disputes

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

FWC may deal with disputes

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

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

(a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and

(b) the FWC may deal with the dispute by arbitration in accordance with section 65C.

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

…….”

65C Arbitration

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

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

(b) if the employer refused the request:

(i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or

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

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

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

(i) an order that the employer grant the request; or

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

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

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

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

(a) a provision of this Act; or

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

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

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

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

(a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or

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

Contravening an order under subsection (1)

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

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

Case for Applicant

[34] Ms Lloyd submits that the Commission has the jurisdiction to deal with the dispute as the *'five discernible requirements'* identified by the Full Bench in *Jordan Quirke v BSR Australia Pty Ltd*[39] (Quirke) are present. They are that she has completed at least 12 months service, her request was made in writing on 8 January 2024, the reasons for the request were set out in the written request, she is 62 years of age thus meeting one of the required circumstances specified in s 65(1A) and the request relates to that circumstance.

[35] In relation to the required 'nexus' between the circumstance (Ms Lloyd's age) and the request, Ms Lloyd relies on the now well accepted medical evidence and opinion that persons over the age of 60 are more vulnerable to infection, serious illness and mortality arising from

COVID. Ms Lloyd rejects ANZ's submissions that the required 'nexus' is not established and distinguishes the circumstances in *Quirke* in which case the applicant had failed to prove she had one of the relevant 'circumstances' set out in s 65(1A). In the present case, Ms Lloyd submits that she is over 55 years of age and made the request specifically because of her age and consequent increased risk of COVID infection and age-related complications that may arise from such infection. She submits the nexus is beyond question.

[36] As regards the other statutory requirements, Ms Lloyd contends that ANZ failed to 'genuinely' try and reach agreement with her prior to rejecting her request. She points to the limited discussion with her immediate Manager Mr Biassini who along with the 'Skip Line Manager' Mr Kaluza had approved the request. Despite their approval, the request was subsequently rejected by Ms Tatley on 6 February 2024 without further discussion with Ms Lloyd. She submits that in the absence of discussion including in relation to her circumstances (that of being over 55 years of age) following initial approval by her Manager and Skip Line Manager, there was no genuine attempt to reach agreement.

[37] In determining whether there were reasonable business grounds for refusal of Ms Lloyd's request taking into account fairness between the parties, Ms Lloyd submits that the balance of fairness favours the granting of an order that ANZ implement the change in working arrangements sought for the following reasons;

- Ms Lloyd faces a greater risk of COVID infection and serious illness because of her age if she is required to attend the workplace 50% of the time.

- Ms Lloyd has a heighted concern about the risk of COVID.

- Measures ANZ could take to mitigate the COVID risks in the workplace would be futile given Ms Lloyd's required work commute and entry to work through public spaces cannot be controlled by ANZ.

- Arrangements proposed by Ms Lloyd removes ten hours of travel per week, which is time she could use to work for ANZ.

- Retention of Ms Lloyd in a male dominated industry by working from home 100% of the time would aid the objective of encouraging female workforce participation.

- If a solution is not found that enables Ms Lloyd to work from home on a 100% basis, she is fearful she may have to seek alternate employment.

- Ms Lloyd's request is not premised on never attending the workplace and attendance would occur where actually necessary.

- Ms Lloyd's line manager who has the greatest visibility of her work approved the request.

- ANZ has not identified any economic cost to accommodating the Ms Lloyd's request.

- Ms Lloyd has no supervisory responsibilities and considerations of teamwork are not relevant.

- ANZ's rationale for having staff in the office does not appear to apply to Ms Lloyd's present circumstances having regard to the CEO's comments in an interview on 3AW in October 2023.

- Just as there are detriments to remote work there are also benefits including potential productivity and retention.

- The size and nature of ANZ's operations are a relevant consideration.

- Ms Lloyd has worked for several years in the manner she now seeks by her request in a productive and efficient manner.

Case for Respondent

[38] ANZ argues that Ms Lloyd has failed to satisfy the jurisdictional requirements necessary to enliven the Commission's jurisdiction to deal with the dispute. It accepts that Ms Lloyd satisfies 4 of the 5 jurisdictional requirements identified in *Quirke* necessary to make a request pursuant to s 65(1), those being she is over 55 years of age, has at least 12 months service, made the request in writing and set out the details and reasons for the change in working arrangements. According to ANZ, Ms Lloyd failed to meet the requirement that the request be because of the relevant circumstances, that being she was over 55 years of age.

[39] ANZ submits that while the Commission may accept Ms Lloyd subjectively made her request because of her age under s 65(1) because of her age, that is not in fact what she did. That is because her request was not sufficiently related to her being over 55 years of age to fall within the meaning of the section. Hence, while she meets each of the other requirements in ss 65(1)(a) & (b) she nonetheless has not made a request of the kind s 65(1) permits.

[40] ANZ further submits that while the Commission may take on notice that all other things being equal, older people as an aggregate group may experience worse outcomes than younger people if exposed to COVID, there is no basis for it to go further than these worldwide, population level generalisations. That is because firstly, there is no evidence that Ms Lloyd has an elevated risk of contracting or becoming seriously ill from COVID. Secondly, there is no basis in the material before the Commission on which it could be found that a person who is 60 years of age is, all other things being equal, is definitively at greater risk than one who is 50 or 54 for that matter. Thirdly, there is no basis to accept that the WHO webpage cited by Ms Lloyd is determinative of a particular age threshold for vulnerability. In fact, Victorian and Federal Government departments of health cite 70 and 65 years of age as thresholds at which greater risk of serious illness arises[40].

[41] ANZ submits that as a matter of fact (that is evidence before the Commission), no sufficient objective 'nexus' has been demonstrated between being over 55 years of age and a request to work full-time from home to enable a conclusion that the request is one 'relating' to the circumstance of being over 55 years of age.

[42] In the alternative if the Commission finds the request was validly made, ANZ submits it remains for the Commission to determine whether to issue orders sought by Ms Lloyd. In considering whether to make an order the Commission cannot make an order if it would be inconsistent with a provision of the Act or a fair work instrument (s 65C(2A)) and is satisfied that there is no reasonable prospect of the dispute being resolved (s 65C(3)). In making any order the Commission must also take into account fairness between the employer and employee (s 65C(2).

[43] ANZ submits that while the objects of the Act that the Commission must consider include *"assisting employees to balance their work and family responsibilities by providing for flexible working arrangements" (s 3(e)),* Part 2-2, Division 4 does not have its own objects section, but it is plain on the face of the provision that they are firstly intended to allow employees in particular situations to make requests. Secondly, the SJBP Act and insertion of s 65C was intended to give employees greater ability to make such requests, impose additional obligations on employers to consider and deal with such requests and to give employees access to an effective remedy where their requests were declined. Finally, employees do not have an absolute right to obtain flexible working arrangements and the interests of both parties must be considered.

[44] ANZ further submits that the exercise of powers under s 65C is not confined to circumstances where the Commission considers that the employer did not have reasonable business grounds to decline a request. In according fairness to both parties and considering whether the employer had reasonable business grounds (as defined at s 65(5A)) to decline the request, it is noted that the grounds set out in s 65(5A) are not exhaustive. A balancing or weighing exercise must be undertaken between the interests of the employee and employer.[41]

[45] In considering whether to exercise its discretion ANZ submits that the following matters are relevant;

- It has been recognised that while the duties of a position may be mechanically or in a narrow sense performed from home, there are many benefits of office attendance for employees, their colleagues and the employer.

- Ms Tatley deposed to the background of the Flexible Working Policy and that Ms Lloyd's view about the performance of her duties is unlikely to yield the best means of performing these tasks.

- The impact on other employees of Ms Lloyd working exclusively from home must also be considered.

- Ms Lloyd does not seek to rely on any disability circumstance or condition specific to herself to establish a request to work solely from home but has argued that because of her age she is entitled to protect herself from COVID at all costs.

- The significant measures taken by Ms Lloyd to protects herself from COVID in her personal life are measures that go beyond what is reasonable or proportionate to the risks posed by COVID in 2024.

- If Ms Lloyd's request was because of a disability or condition from which she suffers, be that a physical or mental condition, then the circumstances confronting ANZ and now the Commission would be very different.

- ANZ has adopted a generally applicable, rational and reasonable expectation that employees attend work half the time and should not be obliged to make exceptions based on the expectations of Ms Lloyd because of the preventative measures that with respect to her age are not commonplace in the community.

[46] ANZ further submits that other matters relied on by Ms Lloyd should not be relied on by the Commission for the following reasons;

- Firstly, it is not relevant that Ms Tatley did not personally hold discussions with Ms Lloyd as Mr Biassini did, consistent with the obligation in s 65A(3) that the 'employer' hold discussions.

- Secondly, it is unclear what consequence Ms Lloyd submits should flow from what she says is a failure by ANZ to satisfy her that it can provide a safe workplace. The OHS Act does not require 'elimination' of risk per se but requires elimination of risks to the extent reasonably practicable.

- Ms Lloyd's evidence on non-compliance of employees with ANZ's COVIDSafe measures is at best unsourced hearsay but in any case, it is unlikely that ANZ would ever be able to persuade her that it can provide her with a safe workplace.

Consideration

Has Ms Lloyd made a valid request for a flexible working arrangement? (s 65)

[47] As earlier stated, Ms Lloyd made her request to the ANZ on the 8 January 2024 pursuant to s 65(1) of the Act. The Full Bench in *Quirke* considered the jurisdictional pre-requisites that must be satisfied for a request under s 65(1) to have been validly made. Absent a valid request having been made within the meaning of s 65, the Commission has no jurisdiction to hear and determine applications made under s 65B. Six discernible jurisdictional requirements were identified by the Full Bench as necessary to establish that there had been a valid request made[42]. Those requirements are as follows;

1. Section 65(1)(a) requires that at least one of the circumstances set out in s 65(1)(A) must apply to the employee.

2. The employee's desire for a changed working arrangements must be 'because of' the relevant circumstances in s 65(1A) (s 65(1)(b)) and the request for the change must 'relate to' the relevant circumstances.

3. The employee has a minimum period of service, which in the case of a non-casual employee, is 12 months of continuous service immediately before the request.

4. The request must be in writing.

5. The request must set out the 'reasons for the change' which is understood to be connected with the requirements for a valid reason for the request.

6. The request was made after 6 June 2023.

[48] It is uncontroversial that Ms Lloyd is a non-casual employee and immediately before her request, had been continuously employed by ANZ for at least 12 months (s 65 (2)(b)) and that the request was made after 6 June 2023 (s 65B(4)). Nor is it in dispute that the request was made in writing (s 65(3)(a)), set out the reasons for the request (s 65(3)(b)) and that Ms Lloyd was over 55 years of age thus establishing one of the required circumstances (s 65(1A)(d)).

[49] ANZ have raised the jurisdictional objection that the second discernible requirement identified by the Full Bench in *Quirke* has not been met, that is, Ms Lloyd has not established that the request for a changed working arrangement is 'because of' her age. ANZ argue that the request was not made because she was over 55 years of age and that no sufficient 'nexus' has been established between Ms Lloyd's age and the claimed increased risk of COVID infection and serious illness to enable a conclusion that the request to be allowed to work from home 100% of the time is one 'relating' to her circumstance of being over 55 years of age. Ms Lloyd rejects ANZ's argument and relies on widely accepted medical evidence and opinion that persons over 60 years of age confront a greater risk of COVID infection and serious illness, thus establishing that the required nexus is beyond question.

[50] In considering whether Ms Lloyd's request was 'because of' her circumstance (over 55 years of age) it is also useful to set out an extract from the 2013 Explanatory Memorandum (EM) that accompanied legislation to amend the original s 65(1) of the Act. Section 65(1) of the Act in its original form only provided for flexible working arrangement requests where the employee making the request was a parent or had responsibility for the care of a child who was under school age or was under 18 and had a disability. Sections 65(1, (1A) and (1B) in substantially the same form as their current form were introduced by the *Fair Work Amendment Act 2013* (Cth). In relation to s 65(1), the 2013 EM said the following (at [27]-[28]).

> "New subsection 65(1) provides that if an employee would like to change his or her working arrangements because of any of the circumstances specified in new subsection 65(1A), then the employee is entitled to request a change in his or her working arrangements. The terms of new subsection 65(1) make clear that the reason the employee would like to change their working arrangement is because of the particular circumstances of the employee. That is, there must be a nexus between the request and the employee's particular circumstances.
>
> These provisions are not intended to limit the timing or nature of discussions about flexible working arrangements generally. For example, where an employee can foresee that he or she may need to assume caring responsibilities in the short to medium term, it is anticipated that the employee could commence discussions ahead of assuming those responsibilities to 'flag' that a request in accordance with these provisions may be coming, and to give the parties an opportunity to explore suitable alternative arrangements that accommodate the needs of both parties. Consistent with the current operation of the right to request provisions and the intent of these provisions to promote

> discussion between employers and employees about flexible working arrangements, there is no evidence requirement attaching to the request. It would be expected that documentation relating to the particular circumstances of an employee would be addressed in discussions between employers and employees." (underlining added)

[51] The requirement for a 'nexus' to be established between one of the 'circumstances' in s 65(1A) and the request suggests that more is required than simply identifying that the employee satisfies one of those circumstances. In my view there needs to be an objective and rational connection between the circumstance of the employee and the request.

[52] To illustrate the above point the following simple hypothetical examples are offered. An employee engaged on a full-time basis has caring responsibilities for a school aged child in every second week due to agreed custody arrangements. A request is made by the employee for a flexible working arrangement to the effect that that their working hours (Monday to Friday) are reduced to allow them to drop off and pick up their child from school. One can readily see the 'nexus' between the request and their carer status, but only in respect of every second week when they have custody of the school age child. There is however no objective rational connection between the request and their status as a carer of a school aged child for the week in which they do not have custody of the child.

[53] To use another example, an employee has an incapacity with respect to their 'mental ability' that meets the definition of 'disability' as defined within the meaning of s 4 of the *Disability Discrimination Act*. The employee's disability and its symptoms do not manifest in a manner that impacts on the employee's capacity to perform the full range of tasks required of them. The employee makes a request to reduce their hours of work without any medical evidence to support the request beyond their meeting one of the 'circumstances' set out in s 65(1A). In my view, in the absence of more information and/or accompanying medical information there is a not an objective and rational nexus between the circumstance and the request. That may be contrasted with a request made by an employee who has a disability and wishes to reduce their hours of work and work from home two days per week to receive required in-home therapy/treatment that is related to their disability. An objective rational connection between the request and the circumstance is readily apparent in the latter example.

[54] Returning to Ms Lloyd's circumstances and her request. The argument may be simply summarised. Ms Lloyd argues that as she is over 55 years of age, and based on accepted medical evidence, she is likely to be more vulnerable to the risk of infection and serious illness arising from COVID. As such, her request to work from home on a full-time basis which would enable her to eliminate the COVID risk arising from workplace attendance, and in her submission has a clear nexus with her circumstances (being over 55 years of age).

[55] I believe it to be uncontroversial based on medical evidence from over the past 4 years that the risk of serious illness arising from COVID increases with age. There appears to be some debate in respect of at what age that risk increases. It seems unlikely however that there is a particular age at which a person is less vulnerable and then one year later becomes more vulnerable. For example, the fact that a 54-year-old turns 55 would seem unlikely to dramatically increase their risk just for having attained the age of 55. The same would apply in the case of a person turning 60. Nevertheless, the material filed by Ms Lloyd is consistent with and supports my generalisation. The same in terms of age-related risk may be said to arise in

respect of other diseases, influenza for example, although no material was put before me on that point. What I also believe to be accepted medical opinion is that underlying medical conditions and/or co-morbidities increase the risks of serious illness arising from COVID infection, regardless of age.

[56] The difficulty however with Ms Lloyd's contention is that of applying the generalised risks of COVID infection and serious illness said to increase with age to her individual circumstances. There is nothing in the material filed by Ms Lloyd that goes beyond the argument that because she is over 60, she is at an increased risk of infection and illness. She certainly led no evidence that she has an underlying medical condition or contraindication that would make her more vulnerable to COVID. The proposition that increasing age leads to a greater risk of COVID infection and serious illness may indeed be correct at a population wide level. It cannot be sustained in my view when applied to an individual without more information. Just as it cannot be said that a particular 35-year-old is not as vulnerable to COVID infection and illness. That is because they may have a range of underlying medical conditions and/or co-morbidities (such as obesity) that makes them more vulnerable to COVID infection and serious illness.

[57] The nexus Ms Lloyd draws between her age and the request is based solely on an age based statistical risk of contracting COVID. The risk of Ms Lloyd contracting COVID and then suffering serious illness is said by her to be significant in circumstances of being required to attend the workplace 50% of the time. That assessment which is claimed to be informed by Ms Lloyd's experience in conducting risk assessments must be rejected. Ms Lloyd has no virology or epidemiology qualifications/expertise and has never had any responsibility for managing risks associated with airborne viruses in any organisation. There is simply no material before me that would indicate what level of risk of infection or serious illness Ms Lloyd would face if required to attend the workplace. As to Ms Lloyd's claim that ANZ has an obligation to eliminate risk as far as reasonably practicable, I agree. That obligation cannot be elevated however to an obligation to ensure the absolute elimination of all risk as Ms Lloyd is essentially demanding. That is not the obligation.

[58] Based on the foregoing I am not persuaded that there is an objective rational connection between Ms Lloyd's age (being over 55) and the request. As such, Ms Lloyd has not made a request within the meaning of s 65(1) of the Act. As such, there can be no dispute about such a request that is capable of being arbitrated by the Commission under s 65B(4)(b) of the Act.

[59] If, however I am wrong in that conclusion and was required to determine the dispute, I would nonetheless decline to issue an order in the terms sought by Ms Lloyd for the reasons that follow.

Employer response to the request? (s 65A)

[60] Section 65A(1) requires that a written response must be provided by an employer to the request within 21 days. As Ms Lloyd made her request on 8 January 2024, a written response was required on or by 29 January 2024. ANZ did not respond in writing until 6 February 2024, falling outside the required 21 days and as such failed to comply with s 65A(1) of the Act. The fact that Ms Lloyd was alerted to and accepted that ANZ needed an additional seven days to

consider and respond to her request does not militate against a finding of ANZ's non-compliance with s 65A(1).

[61] Section 65(2)(a)-(c) then states that the written response to the employee must state that either the request is agreed, an agreement has been reached for an alternate flexible working arrangement to that requested or that the request is refused. ANZ's response to Ms Lloyd on 6 February 2024 advised that her request was refused.

[62] An employer may only refuse a request if it has complied with the requirements of ss 65A(3) & (5). Those requirements are that the employer has discussed the request with the employee (s 65A(3)((a)(i)), genuinely tried to reach agreement with the employee (s 65A(3)((a)(ii)), no agreement has been reached between them (s 65A(3)(b)), the employer has had regard to the consequences of the refusal on the employee (s 65A(3)(c)) and the refusal is on reasonable business grounds (s 65A(3)(d)) as defined in a non-exhaustive list at s 65A(5).

[63] Ms Lloyd contends that ANZ in refusing her request failed to genuinely try and reach agreement on her request and that the refusal was not made on reasonable business grounds. On Ms Lloyd's first contention, it is apparent from a review of the chronology of events that after she made her request, her line manager Mr Biassini and Mr Kaluza endorsed the request and was then referred to Mr Corbally at which point the approving executive Ms Tatley became aware of the application. There were clearly discussions between Mr Biassini and Ms Lloyd prior to the rejection of the request including on or about the 25 January 2024 when he discussed modified office working arrangements to try and mitigate her concerns.

[64] In considering whether ANZ genuinely tried to reach agreement with Ms Lloyd it is important to understand the nature of request. Ms Lloyd was not seeking a deviation from a rigid policy requirement that she attend the office on a full-time basis. The arrangements already in place at ANZ permit employees to work flexibly such that there is an expectation that employees work at least 50% of their time in the office. This 50:50 Hybrid model as it is known already affords Ms Lloyd considerable flexibility, although it is noted she has largely worked from home since the outset of the COVID pandemic. Not unreasonably, ANZ has sought to encourage a return to the office through implementation of the 50:50 Hybrid model since late 2022 following relaxation of COVID community and work restrictions.

[65] Ms Lloyd for reasons relating to her concerns over potential COVID infection and illness is not content to work based on the 50:50 Hybrid model. She is seeking an accommodation from ANZ to allow her to work from home on a 100% basis. There was no flexibility on the part of Ms Lloyd in making that request and in reality, there was no room for negotiation on her part to try and reach a mutually agreed arrangement. This was made clear by Ms Lloyd during cross-examination when she agreed that there were no measures that ANZ could take to address her concerns over COVID risks and that the only way her concerns could be addressed was by ANZ allowing her to work from home on a full-time basis.

[66] Ms Lloyd sought to soften her position during the proceedings by stating that by her request she was not saying she would never come into the office and would do so if her attendance would be beneficial. I found Ms Lloyd's evidence on this point to be disingenuous because of her responses during cross-examination on this point. Ms Lloyd initially responded that she would not refuse a reasonable request to attend the office then clarified that her

attendance would have to be 'by agreement.' When pressed further she conceded that no matter how beneficial her attendance at the office might be, there were no circumstances in which she would be willing to attend the office. This evidence serves to reinforce that there was no flexibility on the part of Ms Lloyd in making her request and any suggestion to the contrary is simply not believable.

[67] It must also be said that ANZ's approach to consideration of Ms Lloyd's request reveals a degree of inflexibility and a strong desire to adhere to the 50:50 Hybrid model, at least on Ms Tatley's part. While Mr Biassini and Mr Kaluza initially endorsed the request, Ms Tatley was not willing to approve it. That may be explained by Ms Tatley's broader accountability and consideration of the corporate position and implications. That position stands in contrast to Mr Biassini's view that Ms Lloyd's request could be accommodated although I accept that view may have been influenced by a concern he held on delivery of the project on which Ms Lloyd was working if her request were not agreed to. In any case, there was not a common view held by the relevant line managers on Ms Lloyd's request. Ms Tatley's view as the accountable executive prevailed.

[68] The above provides important context when considering whether ANZ sought to genuinely reach agreement with Ms Lloyd before refusing her request. Mr Biassini discussed the request with her on 25 January 2024. The fact that Ms Tatley was not directly involved in discussions prior to refusing the request is not significant in my view. While she may have been the decision maker, the onus is on the 'employer' to hold discussions with the employee, not a specific individual. Mr Biassini as Ms Lloyd's manager represented ANZ in the discussions. In doing so he canvassed alternate workplace arrangements with Ms Lloyd that might assist address her concerns about workplace attendance. Those alternate working arrangements proposed by ANZ, which were also noted in ANZ's response on 6 February 2023, were rejected by Ms Lloyd. Considering the respective positions of the parties in late January 2024 and in particular the dogmatic view of Ms Lloyd on her request and rejection of the modifications to working arrangements put forward by ANZ, I am satisfied that ANZ discussed the request with Ms Lloyd and genuinely tried to reach agreement with her, thus meeting the requirements of ss 65A(3)(a) of the Act.

[69] Turning to the other requirements of s 65A(3), it is clear enough that ANZ in refusing Ms Lloyd's request was unable to reach agreement on her request (s 65A(3)(b)). The 6 February 2024 response and Ms Tatley's evidence also indicates that ANZ had regard to the consequences of refusal of the request (s 65A(3)(c)). That consequence was that Ms Lloyd would be required to attend the office at least 50% of the time in circumstances where ANZ accepted that Ms Lloyd had strongly held concerns about the COVID risks in the workplace and while commuting to the workplace.

[70] For the reasons set out above I find that while ANZ failed to respond to Ms Lloyd's request within the required 21 days. It did however discuss the request with her and genuinely tried to reach agreement with Ms Lloyd on her request, thus meeting the requirements of s 65A(3).

[71] The further necessary element in refusing a request is that it must be made on reasonable business grounds (s 65A(3)(c)). The reasons stated in ANZ's letter dated 5 February 2024 may be shortly summarised as; ANZ is committed to flexible work arrangements, its existing policy

which has a 50% workplace attendance expectation affords considerable flexibility, no medical evidence was provided by Ms Lloyd in support of her request, and she had previously attended the workplace and left her residence for other reasons despite her COVID concerns. In the proceedings ANZ raised a further ground on which it states it relied in refusing Ms Lloyd's request. That ground is the positive impact that workplace attendance has on individual and team performance arising from collaboration, feedback, workplace learning, performance management and feedback and the other difficult to quantify benefits arising from face-to-face engagement. Ms Lloyd contends that the grounds relied on by ANZ in refusing her request did not constitute reasonable business grounds. I will return to consider this matter later in this decision.

[72] Turning now to the required content of an employer's written response in circumstances where a request has been refused, s 65(6) sets out the matters that must be addressed by the employer in its written response. Those matters are the reasons for the refusal (s 65A(6)((a)), the particular business grounds for the refusal (s 65A(6)((b)(i)) and how those grounds relate to the request (s 65A(6)((b)(ii)). The response also requires the employer to set out either the changes (other than the requested change) the employer would accommodate or would be willing to make (s 65A(6)(c)(i)) or state that there are no such changes that would be made (s 65A(6)(c)(i)). Finally, the employer response is required to set out the effect of ss 65B & 65C which respectively set out the dispute resolution process for dealing with a request and the conciliation and arbitration role of the Commission in that dispute resolution process.

[73] In relation to the required content of the ANZ's response on 6 February 2024, there were some deficiencies in that response. In refusing the request ANZ failed to detail all the reasons and grounds it has sought to rely on in these proceedings, including the culture and performance benefits arising from workplace attendance. Furthermore, how the grounds related to the request was not explained. By these failures ANZ did not comply with ss 65A(6)(a) & (b). ANZ did however set out changes in working arrangements it would accommodate and were willing to make (s 65A(6)(c)(i)) under the heading of *'Flexible working arrangements that ANZ is able to accommodate'*. In the next section of its response, ANZ also set out the process for dispute resolution including the internal referral of a 'case' by Ms Lloyd to the Employee Relations Team and if unresolved to the Commission for conciliation and arbitration, thus meeting the requirements of s 65A(6)(d).

Should Commission exercise its discretion to issue orders?

[74] By her application to the Commission, Ms Lloyd seeks an order that would require ANZ to grant her request. That order is sought on various basis including that ANZ failed to discuss and genuinely try and reach agreement with her on the request, contentions I have rejected above. The final basis on which she seeks an order is that ANZ in refusing her request did so on grounds that do not constitute reasonable business grounds. It is that matter I am now required to consider, however before doing so it is necessary to say something about the relevant provisions in ss 65B &C.

[75] Section 65B deals with disputes about the operation of Division 4 – Requests for flexible working arrangements. The section applies to disputes between an employer and employee if the dispute relates to a request made under s 65(1) and either the request has been refused (s 65B(1)(a)) or 21 days has passed since the employee made the request. It is clear enough that

the dispute is about a request made under s 65(1) and that ANZ has refused the request. Section 65B consequently applies to the dispute.

[76] The parties attempted to resolve the dispute at the workplace without success (s 65B(2)) and Ms Lloyd having not received a response from ANZ within the required 21 days referred the dispute to the Commission (s 65B(3)) on 5 February 2024. Following allocation of the matter to my chambers, conciliation conferences were held on 20 February and 8 May 2024 however the dispute remained unresolved (s 65B(4)(a)) at which point Ms Lloyd requested that the dispute be arbitrated (s 65B(4)(b). The requirements of s 65B are met to enliven the Commission's jurisdiction to deal with the dispute by way of arbitration.

[77] Section 65C of the Act sets out the requirements in respect of the Commission dealing with a dispute by arbitration. In doing so, it permits the Commission to make various orders, relevantly including that if the employer has refused the request, an order that the grounds of the refusal are taken to be reasonable business grounds (s 65C(1)(b)(i)) or an order that the grounds for refusal of the request are taken not to be reasonable business grounds (s 65C(1)(b)(i)). If the Commission is satisfied that the employer has not responded or has not responded adequately, it may make an order that the employer takes further steps as the Commission considers appropriate having regard to matters in s 65A (s 65C(1)(c)). The Commission may also make orders that the employer grant the request (s 65C(1)(f)(i)) or that the employer makes other specified changes to the employee's working arrangements ((s 65C(1)(f)(i)).

[78] In making an order, the Commission may only do so if it is satisfied that there is no reasonable prospect of the dispute being resolved without making such an order (s 65C(3)). It must also in making an order take into account fairness between the employer and employee (s 65C(2)) and must not make an order that is inconsistent with a provision of the Act or a term of a fair work instrument that applies (s 65C(2A)).

[79] As stated, I may only make orders if I am satisfied that there is no prospect of the dispute being resolved without making an order. As will be plainly apparent from my earlier description of the competing positions of the parties, there is a significant gulf between what Ms Lloyd seeks in terms of her working arrangements and what ANZ is prepared to accommodate. The 50:50 Hybrid model with modified office working arrangements proposed by ANZ has been rejected by Ms Lloyd, both prior to and during two conciliation conferences conducted by the Commission. Ms Lloyd also made clear in her evidence that there are no circumstances in which she would be willing to attend the workplace. Such a position makes it unlikely that any compromise by ANZ short of agreeing to allow Ms Lloyd to work from home 100% of the time would resolve the dispute. In all these circumstances I am comfortably satisfied that the dispute is unlikely to be resolved other than by formal determination and issuing of an order or orders.

[80] Moving now to the key matter that requires determination and that is whether the reasons relied on by ANZ in refusing Ms Lloyd's request constitute reasonable business grounds and whether an order or orders should be made. In determining whether to issue orders in relation to that matter I would also be required to take into account fairness between Ms Lloyd and ANZ.

[81] The grounds relied on by ANZ in refusing Ms Lloyd's request are as set out above at [71]. The reasons included those matters dealt with in ANZ's letter to Ms Lloyd dated 6 February 2024 and the additional matter that ANZ also relies on, that of the benefits of individual, team and organisational performance arising from face-to-face collaboration in the workplace. None of the reasons set out in by ANZ in its 6 February 2024 response fall within the non-exhaustive grounds set out in s 65A(4). ANZ's written response did not address issues of cost, the capacity to change the working arrangements, the impracticality of changing the working arrangements, the impact on productivity or efficiency or that the arrangements sought would have a significant negative impact on customer service. The grounds relied on by the ANZ in their formal response letter rely on the flexibilities available within ANZ's existing policy, the lack of any medical evidence that Ms Lloyd is more vulnerable to COVID and the fact that Ms Lloyd may have ventured outside her house from time to time despite her stated fear of catching COVID. The response of ANZ failed to grapple with the business impact of the request and as such it failed to provide 'reasonable business grounds' for its refusal. I am consequently not persuaded that the grounds relied on by ANZ in its 6 February 2024 response constitute reasonable grounds for refusing the request.

[82] In the proceedings ANZ raised a further ground on which it relies in refusing Ms Lloyd's request. That ground is the positive impact that workplace attendance has on individual and team performance arising from collaboration, feedback, workplace learning, performance management/feedback and the other benefits arising from face-to-face engagement. The benefits ANZ attributes to regular workplace attendance are difficult to quantify although I do accept that a positive and engaging workplace culture is more likely to support workplace learning, productivity, and efficiency. While that may not be exclusively realised through workplace attendance, working arrangements that involve some office attendance can in my opinion support those outcomes in the context of balanced and flexible working arrangements such as ANZ provides through its 50:50 Hybrid model.

[83] Ms Lloyd contends that in her circumstances the benefits attributed by ANZ to workplace attendance are limited, both to her and the organisation. That is because of her age as she heads towards retirement which she argues means she is less likely to benefit from development through face-to-face engagement with colleagues. She also refers to a range of other countervailing factors including her lack of supervisory responsibility, the small number of her colleagues who are actually located in Melbourne, the routine conduct of on-line meetings via Teams even when in the office, the benefits of reduced travel on her own productivity and that attendance at the office is not likely to yield close collaboration with her colleagues because of physical separation from the team under the modified workplace measures proposed by ANZ. She also foreshadowed the potential consequence of her request not being met, that of being potentially forced to seek alternate employment.

[84] ANZ requires its employees to maintain at least 50% office attendance with flexibility in how those office attendance hours are managed. This it submits ensures that employees can flexibly manage their work/life balance while maintaining the necessary individual and team connection through workplace attendance. I am satisfied that the benefits of workplace attendance by its employees that ANZ has identified, while difficult to quantify in a financial sense are real. On the evidence before me I am satisfied that ANZ has sought to strike a balance between accommodating employees' expectation of increased flexibility in working arrangements following the lifting of COVID workplace attendance restrictions, while

preserving what it regards as necessary face to face engagement. That flexibility will also remain available to Ms Lloyd.

[85] I readily accept Ms Lloyd's submission that remote work brings with it a range of benefits including allowing employees to better manage their work/life balance and by reducing unproductive and tiring commute time. I find however that Ms Lloyd's arguments that downplay the benefits of workplace attendance in her case and the implication that she may be forced to seek employment elsewhere to be self-serving. For example, Ms Lloyd conceded during cross-examination that she had developed her own knowledge over time with ANZ and this had occurred in part through learning from colleagues. While it may be the case that Ms Lloyd has less to learn from others as she moves towards the end of her career, her steadfast belief that workplace attendance is not required in her case ignores the benefits that her colleagues may gain from in-person collaboration with her. This weighs against Ms Lloyd when considering fairness between the parties.

[86] There are several other matters of fairness raised by Ms Lloyd which she submits weigh in her favour. These include her line manager's support for her request, the absence of supervisory responsibilities and her work performance, which the evidence reveals has not generated complaint, criticism or performance concerns over the past four years while she has worked from home. While I accept these matters favour Ms Lloyd's case, the fact that Ms Lloyd and many of her colleagues successfully worked from home on a full-time basis over an extended period does not however make good the argument that it is desirable to preserve those working arrangements once the government imposed COVID community and workplace restrictions were relaxed. Nor does it support the argument that exclusively working from home is as efficient or beneficial for ANZ as some required workplace attendance of its staff would produce.

[87] I also accept that in a strict sense, most of Ms Lloyd's duties can be theoretically performed from home. That is clear from Ms Lloyd's work from home arrangements over the past 4 years along with the experience of many of her colleagues during the period of COVID pandemic community and workplace restrictions from 2020-2022. This point weighs in Ms Lloyd's favour when considering fairness between the parties.

[88] There are other matters raised by Ms Lloyd however which I am not persuaded of the merit of. Ms Lloyd submits that if spared the commuting burden that 50% office attendance would otherwise require of her, she would work an additional 10 hours per week. This would lead to Ms Lloyd regularly working at least 50 hours per week rather than the average 40 hours per week her contract of employment requires. Aside from the difficulty of testing the accuracy of that submission, it is not something that ANZ could agree to, that being to allow an employee to work from home on a full-time basis on the understanding the employee would devote the saved commute time to additional hours of work. Ms Lloyd also argues that granting her request would aid her retention in a male dominated industry, thereby encouraging female participation. As no evidence was led by Ms Lloyd on female participation rates in ANZ or the banking and finance industry more generally, I am unable to draw any conclusions on this point. In any case it would be difficult to extrapolate Ms Lloyd's personal circumstances more broadly.

[89] Ms Lloyd's position, as I have found above, ignores the individual and organisational benefits of at least 50% workplace attendance, which ANZ in my view has a legitimate right to

expect. A final point to be made is that taken at its highest, the premise of Ms Lloyd's case appears to be that ANZ is required to accommodate her fears about attending the workplace due to the risk of contracting COVID. That ANZ should be expected to accommodate those fears no matter how disproportionate those fears may be to the risk is simply unreasonable. To accommodate the request in those circumstances would lead to a standard for evaluation by ANZ of flexible working arrangement requests that is simply not required by the Act. While Ms Lloyd may choose to take precautionary measures in her private life to protect herself against the risk of contracting COVID, that does not oblige ANZ to accept or apply measures in the workplace beyond what is reasonably practicable, particularly when community and workplace restrictions were relaxed by the Victorian government almost two years ago. I also note the measures that ANZ has proposed to assist mitigate Ms Lloyd's concerns over workplace attendance.

[90] I am not persuaded that the above-referred matters of fairness raised by Ms Lloyd displace ANZ's legitimate expectation that employees attend the office for at least 50% of the time. In all the above circumstances I would, but for my earlier finding that Ms Lloyd had not made a request within the meaning of s 65(1), find in arbitrating the dispute that the grounds relied on by ANZ in refusing Ms Lloyd's request are taken to have been reasonable business grounds. I would also in those circumstances issue an order to that effect. Such an order if issued would not be inconsistent with a provision of the Act or a term of a fair work instrument that applies (s 65C(2A)).

Conclusion

[91] For the reasons set out above I have determined that Ms Lloyd has not made a request under s 65(1). As such there can be no dispute that is capable of arbitration by the Commission under s 65B(4)(b). In the alternative if I am wrong in that conclusion, I would nonetheless decline to issue an order in the terms sought by Ms Lloyd and would in fact issue an order to the effect that the ANZ's grounds for refusing her request constituted reasonable business grounds.

[92] Ms Lloyd's application is dismissed.

DEPUTY PRESIDENT

Appearances:
C Pym of Counsel for the Applicant.
S Crilly for the Respondent.

Hearing details:
2024.

Melbourne:
August 1.

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[1] Exhibit R1, Witness Statement of Carolyn Tatley, dated 24 June 2024, Annexure CT-1, Employment Contract

[2] Exhibit R1, at [5]

[3] Exhibit R1, at [6]-[7]

[4] Exhibit A2, Second Witness Statement of Deborah Lloyd, dated 14 July 2024, at [1]-[3]

[5] Exhibit R1, at [8]-[12]

[6] Exhibit R1, Annexure CT-2, Group email to all ANZ staff, titled 'Adapting how we work at ANZ'

[7] Exhibit R1, Annexure CT-3, Email to all Risk Division staff from Kevin Corbally, dated 3 November 2022, titled 'How we work in Risk'

[8] Exhibit R1, Annexure CT-4. Email to all Risk Division staff from Kevin Corbally, dated 21 November 2022, titled 'Resetting ANZ's hybrid working practices

[9] Exhibit A2, at [6]

[10] Exhibit R1- Annexure CT-5, Flexible Working Policy

[11] Exhibit R1, Annexure CT-6,

[12] Exhibit R1- Annexure CT-7,

[13] Exhibit R1, Annexure CT-10, Email chain dated 19 January – 1 February 2024

[14] Exhibit R1, Annexure CT-8, Email exchange between Applicant and Sebastian Biassini, dated 29 January 2024, titled 'Re: Flexible WFH Request – Deb – 7 day extension'

[15] Exhibit R1, Annexure CT-9, Letter to Applicant dated 6 February 2024, titled 'ANZ's response to your request for flexible working arrangements'

[16] Exhibit R1, at [28]-[29]

[17] Exhibit A2, at [5]

[18] Transcript at PN47-PN49

[19] Exhibit A2, at [7]

[20] Transcript at PN63-PN67

[21] Transcript at PN76-PN77

[22] Exhibit A2, Annexure DL2-J, 'WFH: ANZ's warning to staff refusing to come into the office'

[23] Exhibit R1, at [30]

[24] Transcript at PN85-PN87

[25] Exhibit R1, at [31]-[32], Annexure CT-10, Email chain between Sebastian Biassini and Joy Novicio, titled 'Re: Flexible Work Request'

[26] Exhibit R1, Annexure CT-11, CovidSafe Plan – Major Buildings

[27] Exhibit R1, at [35]-[36]

[28] Exhibit A2, [8]-[9]

[29] Transcript at PN71-PN73

[30] Exhibit A2, Annexure DL-2-A, Victorian Government COVID-19 Key Messages

[31] Exhibit A2, at [5]

[32] Exhibit A2, at [13], Annexure DL2-D, Email from Professor Adam Esterman, Chair of Biostatistics and Epidemiology, University of South Australia

[33] Exhibit A2, at [14]

[34] Exhibit A2, at [15]-[16], Annexure DL2-G, Victorian COVID-19 Surveillance Report, 28 June 2024

[35] Ibid at p.3

[36] Transcript at PN122-PN124

[37] Exhibit R1, at [38]-[39]

[38] Exhibit R1, at [40]

[39] [2023] FWCFB 209.

[40] Australian Government – Department of Health and Aged Care, 'Groups at higher risk from COVID-19', https://www.health.gov.au/topics/covid-19/protect-yourself-and-others/high-risk-groups, accessed 18 June 2024'; Victorian Government – Department of Health, 'Increase in COVID-19 activity', Health Alert No. 240510, 10 May 2024, https://www.health.vic.gov.au/health-alerts/increase-in-covid-19-activity, accessed 18 June 2024.

[41] Gration v Bendigo Bank [2024] FWC 717 at [50]; Police Federation of Victoria v Victoria Police [2021] FWC 5983 at [78]

[42] *Quirke* at [21]-[25], [28]