



# DECISION

*Fair Work Act 2009*

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

**Bal Krishna Chapagain**

v

**St. Basil's**

(C2024/4068)

COMMISSIONER MATHESON

SYDNEY, 2 SEPTEMBER 2024

*Application to deal with a dispute about the right to request for flexible working arrangements – Orders made.*

[1] Mr Bal Krishna Chapagain (**Applicant**) has made an application seeking that the Fair Work Commission (**Commission**) deal with a dispute about a request for flexible working arrangements.

## **Background**

[2] The Applicant is a part-time aged care worker for St. Basil's (**Respondent**) which operates aged care facilities. There are four facilities operated by the Respondent being the Lakemba facility which is the largest facility, and facilities in Randwick and Miranda and Kogarah which is the smallest facility. During the hearing the Respondent indicated it has about 700 workers comprised of full-time, part-time and casual employees as well as volunteers.

[3] The Applicant is a long serving employee, having commenced employment with the Respondent in December 2012. The Applicant's contracted hours are 30 hours per fortnight.

[4] The Applicant has another job in which he works weekdays and says he had always worked only on weekends for the last 10 years of his employment with the Respondent. A Statement of Service filed by the Applicant indicates that the Applicant works on a full-time basis between 7am and 5.30pm, Monday to Friday in his other job.

## **The transfer**

[5] Until recently the Applicant worked in the Respondent's Kensington facility and worked weekend afternoon shifts at that facility. In January 2024 it was announced that the Kensington facility would be closed. During the hearing the Applicant explained that, as a result, he had been asked to fill out a form exploring his interest to work at a different site and seeking to understand availability. The Applicant said that when he completed that form he nominated Lakemba as the site that he was interested in working at and indicated that he was only available to work weekends. The Applicant said that before he commenced working at Lakemba he

contacted the manager at Lakemba and explained that he was only available weekends. The Applicant alleged that he was told that, taking into account his period of service with the Respondent, he would be given 'priority'.

[6] The Kensington facility closed in or around March 2024. On 7 March 2024 the Respondent wrote to the Applicant stating that:

- his employment would transfer to Lakemba, effective 27 February 2024, in the role of Aged Care Worker – Team Leader;
- if he had not been allocated agreed shifts, for a three month period up to 27 May 2024, he would be working 'supernumerary' in his current shifts;
- once the three month period had concluded the expectation is that he will 'slot into any vacant shifts' to fulfil his contracted working hours;
- all of his terms and conditions remained the same and he would continue to be an employee of the Respondent;
- should he have any questions or require clarification he could reach out and a meeting could be organised.

[7] The letter of 7 March 2024 had a place where the employee could sign to indicate acceptance however the letter provided by the Applicant is unsigned. The Applicant contends he did not agree to conditions in the transfer letter and did not sign it on that basis.

### **The initial request to work weekends and the response to that request**

[8] On 23 May 2024 the Applicant wrote to the Celina Jian Chen, the General Manager of the Lakemba facility as follows:

*"My name is Bal Chapagain, 1 of the staff from Kensington. I have been working as a team leader at Lakemba from my beginning days, these days I am roster as extra staff on floor. My 3 months end at the end of this month. Now I am a bit concern about the work. I have a new born at home and my wife doesn't work. I take work very seriously. I have been working at St. Basils from last 12 yrs. I am flexible to work as AIN and team leader  
My availability is only the weekend pm shifts, since last 10 yrs. If I can work on weekends, I will pick the shifts in the future.  
I am wondering what's the plan for me . If it is hard to accommodate me on the weekend, place let me know in advance, so I have to start looking for another job. My first priority is at Lakemba" (Initial Request).*

[9] Ms Chen replied that same day stating:

*"Hi Bal:*

*Thanks for your email, unfortunately, we don't have any vacant weekend shift available on Lakemba master roster, @Abinaya Krishna Rao – will be best person to answer your question on what will be plan if we don't have any vacant shift that suits your working availability after 3 month of your deployment from Kensington."*

### **The request to work at Kogarah**

[10] On that same day the Applicant contacted a manager at the Respondent's Kogarah facility to see if there were any weekend shifts available and was told that there were shifts available for a temporary period due to a COVID-19 outbreak.

[11] Ms Chen and the Applicant then had a telephone conversation and the Applicant sent a follow up email on the afternoon of 23 May 2024 stating:

*“Dear Celina,  
After our telephone conversation it is hard for you to accommodate me with my availability, at Lakemba. Can you please help me to transfer at Kogarah.  
Many thanks.  
Bal Chapagain”*

[12] Shortly thereafter Ms Chen responded:

*“Thanks Bal for your email, I am happy to release you from Lakemba site.  
@Wendy Goodall – can you kindly to do change of status form as Bal request below?”*

[13] However the transfer did not materialise as the manager at Kogarah subsequently advised the Applicant that he was unable to accommodate his contracted hours at that time given he was only available to work weekends.

### **The second request and the response to that request**

[14] On 4 June 2024 Ms Chen wrote to the Applicant as follows:

*“Hi Bal:*

*Hope you are doing it well; I have tried to reach you before regarding your plan or ongoing employment with St Basils as your 3 month deployment agreement as ended on 23.5.2024.*

*Unfortunately, we are unable to provide your shift based on your availability on weekends only, but we are happy to offer some shift during weekdays to maintain your contracted hours of 30 hours fortnightly.*

*Could you pls advise time we can have a meeting with you by reams with HR involvement, so we can stand on the same page about your plan of ongoing employment of St Basils.*

*Looking forward to hearing from your soon” (Second Request).*

[15] On 4 June 2024 the Applicant wrote to Ms Chen as follows:

*“Dear Celina,*

*Thank you for your email. I am humbly requesting you to adjust me on the weekend shifts temporarily until August because my wife is not working currently due to newborn and care responsibilities. It will be very difficult to survive due to financial hardship if I let go my weekend shifts in my circumstances.*

*In September, my wife is planning to return to work so that I can manage to move my shifts around or happy to be in casual if required.*

*I have been working with St.basil's for 12 years and still love to work more years. I hope you will kindly understand my circumstances and co-operate in my difficult situation. Thank you."*

[16] On the evening of 4 June 2024 Ms Chen responded stating:

*"Hi Bal:*

*Could you pls advice the time we can catch up with you over teams?  
Unfortunately, we don't have vacant shift available on weekends, but I am happy to offer you any shift that suits your availability to make up your financial status.  
We can discuss it further during our catch-up meeting."*

#### **Further discussions and correspondence about the request**

[17] On the evening of 11 June 2024 the Applicant, Ms Chen, and the Respondent's Human Resources representative Yvonne Nixon participated in an online meeting to discuss the Second Request in which the Applicant again indicated that he was only available to work weekends.

[18] On 14 June 2024 Ms Chen wrote to the Applicant stating:

*"Dear Bal,*

*In our letter to you dated 7 March 2024, we confirmed your transfer to the Lakemba facility upon the closure of the Kensington facility. In this letter, St Basil's agreed to maintain your current afternoon weekend shifts as supernumerary for a period of 3 months up to 27 May 2024 to provide you time to consider what vacant shifts you could slot into to fulfil your contracted hours of 30 a fortnight.*

*I have consulted with you and advised we do not have weekend shifts available, and we can offer you both day and night shifts on weekdays to maintain your contracted hours of 30 hours fortnightly.*

*I refer to your email dated 4 June 2024 requesting to extend your weekend shifts at Lakemba to August 2024. In our meeting on 11 June 2024 with Yvonne Nixon, Senior HR Business Partner, you advised that you wanted to continue weekend shifts as you had carer's responsibilities Monday and Tuesday and secondary employment Wednesday to Friday.*

*Unfortunately, we unable to accommodate your request as we do not have weekend shifts available in the roster and the business cannot sustain the cost of you working supernumerary. Your weekend shifts will conclude on 23 June 2024. We can put you on a waitlist if weekend shifts become available in the future.*

*Please advise us by 19 June 2024, if you wish to continue your employment with permanent part time employment with St Basil's working 30 hours a fortnight and we can further discuss available shifts for the next roster."*

[19] On 18 June 2023 the Applicant responded stating:

*"Dear Celina,*

*Thank you for your email. Currently, I can give you further Friday and Saturday night shift available. If you can adjust me those shift it will be highly appreciated."*

[20] Ms Chen responded later that afternoon stating:

*"Hi Bal*

*Unfortunately, as I mentioned before we don't have any weekend shift available to offer you at this stage, that includes Friday Nights as they are being allocated to our regular LAKEMBA staff before, but I am happy to offer you some vacant night shift during weekdays if you are interested."*

### **Notification of the dispute**

[21] On the afternoon of 18 June 2024 the Applicant emailed Ms Chen and Ms Nixon and sought permission to lodge a dispute about a request for flexible work arrangements and to submit the documents and communications about his request.

[22] On 19 June 2024 the Applicant advised Ms Chen that he was in the process of making an application in the Fair Work Commission for it to deal with a dispute regarding a flexible work arrangement request. In that letter the Applicant indicated:

- he had mentioned since the 'beginning' that he was not available to work other weekdays due to his parental responsibility and other job commitment;
- the Respondent had asked him to provide availability for weekdays which was not possible in his circumstances;
- the Respondent had responded that unfortunately weekend shifts are not available;
- he felt like the Respondent was indirectly pushing him to resign from his job;
- he did not hear or observe the Respondent to be trying its best to accommodate the request or consider his circumstances and would have been satisfied if it had tried its best;
- he believed that the Respondent was very big and that employees can go on different types of leave and that the Respondent could have better helped accommodate weekend shifts;

- he did not feel he was treated as equally in the workplace as Lakemba employees because he was redeployed from Kensington;
- he felt he had provided services for 12 years, had undergone emotional stress and job risk due to the closure of the Kensington facility and felt this was unfair for Kensington employees;
- in relation to the Respondent's comment that the redeployed Kensington staff had taken weekday shifts to maintain their contracted hours, other staff circumstances and the Applicant's circumstances may be different and individual circumstances should be considered on an individual basis.

### **Request for interim arrangements during the dispute**

[23] On 26 June 2024 the Applicant wrote to Ms Chen indicating that until the Fair Work Commission made a decision in relation to his application he would like to work available weekend shifts to maintain his contracted hours and, if this didn't provide a chance to work on the weekend, he would like to use his annual leave followed by long service.

[24] On 27 June 2024 Ms Chen responded stating:

- she would make a note to administration to call him to replace anyone who called in sick for their weekend shift;
- the process of staff replacement in Lakemba is 'first come, first served';
- she was happy for the Applicant to use his annual leave or long service leave if there were no vacant shifts on weekends but that he should keep his leave balance in mind and advise what the plan would be if all remaining leave hours ran out.

[25] On 2 July 2024 the Applicant wrote to Ms Chen via email stating:

- as she had mentioned there was no availability for him to work his regular weekend shifts that he had been working for the last 10 years, she could provide him with whatever leave he is entitled to once his paid leave runs out;
- due to his caring responsibilities and being on government funded paid parental leave he must not work Monday and Tuesday;
- there had been a shift available in the prior weekend but he had not been contacted first about this;
- his health and well-being had been badly impacted, he considered it was unsafe for him to work and he considered it appropriate to remain on leave until he felt better.

### **Jurisdictional prerequisites – when does s.65B apply?**

[26] Section 65B(1) of the Act provides that s.65B 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 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.

### When is a request made under s.65(1)?

[27] As noted by the Full Bench of the Commission in *Jordan Quirke v Bsr Australia Ltd*<sup>1</sup> the following requirements must be satisfied in order 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. The use of ‘apply’ connotes 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;<sup>2</sup>
- 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;<sup>3</sup>
- the request must be in writing.<sup>4</sup> 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;<sup>5</sup>
- the request must set out the details of the change sought;<sup>6</sup>
- the request must set out the reasons for the change<sup>7</sup>. In this regard the Full Bench 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;<sup>8</sup>
- the employee’s desire for changed working arrangements must be ‘because of’ the relevant circumstance in s.65(1A)<sup>9</sup> and the request for a change in working arrangements must ‘relat[e] to’ the relevant circumstance.<sup>10</sup>

[28] While it appeared to submit that the Initial Request did not constitute a flexible work request in its response to the application, the Respondent did not ultimately dispute that the Applicant has made a valid request for flexible working arrangements under s.65 of the Act. In its submissions the Respondent submitted that as per s.65 of the Act:

- the Applicant made a request for flexible working arrangements;
- the Applicant requested the change in working arrangements under the conditions referred to;
- the Applicant wishes to change his working arrangements because of those circumstances, being that he is the parent, or has responsibility for the care, of a child who is of school age or younger.<sup>11</sup>

[29] The Respondent did not ultimately dispute that a valid request had been made however given these are jurisdictional prerequisites for arbitration, I deal with these matters below.

*Does at least one of the circumstances in s.65(1A) apply to the Applicant?*

[30] 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.

[31] 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.

[32] It is not in dispute that one of the circumstances in s.65(1A) applies to the Applicant as he is, in accordance with s.65(1A)(a) the parent of a child who is of school age or younger.

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

[33] The Applicant is a part-time employee and is not a casual employee. 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 he has completed at least 12 months of continuous service with the Respondent immediately before the date on which he said he made the request, being 23 May 2024.

*Is the request in writing?*

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

[35] There are two requests that are relevant to the application, the Initial Request and the Second Request. Both requests are made via email in writing. I deal with the question of whether these requests meet the balance of the formal requirements in s.65(3) below.

**Does the Initial Request meet the requirements in s.65(3)?**



[36] On 23 May 2024 the Applicant made the Initial Request via email as follows:

*“My name is Bal Chapagain, 1 of the staff from Kensington. I have been working as a team leader at Lakemba from my beginning days, these days I am roster as extra staff on floor. My 3 months end at the end of this month. Now I am a bit concern about the work. I have a new born at home and my wife doesn’t work. I take work very seriously. I have been working at St. Basils from last 12 yrs. I am flexible to work as AIN and team leader*

*My availability is only the weekend pm shifts, since last 10 yrs. If I can work on weekends, I will pick the shifts in the future.*

*I am wondering what’s the plan for me . If it is hard to accommodate me on the weekend, place let me know in advance, so I have to start looking for another job. My first priority is at Lakemba.”*

#### *Submissions of the parties*

[37] The Applicant contends that the Initial Request constitutes a flexible work request. The Applicant submitted that while he “did not request directly for flexible work arrangement because [he] thought [his] manager [would] understand [his] circumstances and give [him the] option of flexible work arrangement request” he points out that he clearly mentioned that he had a newborn at home, his wife did not work and he needed flexibility to work weekends according to his availability in those circumstances.<sup>12</sup>

[38] In its response to the application, the Respondent submitted that the email of 23 May 2024 stated:

- that the Applicant’s 3 month period of guaranteed shifts was coming to an end at the end of the month;
- the Applicant’s availability is weekend shifts; and
- if the Applicant can work on weekdays, he will pick up extra shifts.

[39] The Respondent submitted there is no mention of a request for flexibility work arrangements in this email, only notification of the Applicant’s availability.

#### *Does the Initial Request set out the details of the change sought?*

[40] It is apparent from the Initial Request that:

- the three month period during which the Respondent had committed to offering him his regular weekend shifts was nearing its end; and
- the Applicant is seeking to work ‘only weekend pm shifts’ in line with his availability.

[41] In the context of the Applicant’s transfer to Lakemba in which, at the cessation of the three month period on 27 May 2024, he would be required ‘slot into any vacant shifts’ to fulfil his contracted working hours, the Initial Request sets out the details of the change sought, being a change to work only ‘weekend pm shifts’.

*Does the Initial Request set out the reasons for the change?*

[42] As noted above, the Full Bench in *Jordan Quirke v Bsr Australia Ltd*<sup>13</sup> 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;<sup>14</sup>

[43] The Initial Request identifies that the Applicant has a ‘new born at home’ and I find that it identifies the relevant circumstances in s.65(1A), i.e. that in accordance with s.65(1A)(a) the Applicant is the parent of a child who is of school age or younger.

[44] While the Initial Request states:

- that the Applicant has a newborn at home;
- that the Applicant’s ‘wife doesn’t work’;
- that the Applicant’s availability ‘is only the weekend pm shifts’ and this has been the case for the last 10 years; and
- if it is too hard to accommodate weekend shifts, the Applicant would ‘have to start looking for another job’

it is unclear from the Initial Request how the proposed change to work ‘only weekend pm shifts’ relates to the Applicant being the parent of a child who is of school age or younger and the listing of the above circumstances does not actually explain that nexus. While it explains that his availability is limited to ‘weekend pm shifts’ and that he wants to work weekends, it does not explain that this is a result of him being a parent of a child who is of school age or younger.

[45] I am not satisfied that the Initial Request sets out the reasons for the change.

*Finding regarding the Initial Request*

[46] I am not satisfied that the Initial Request is a valid request made under s.65(1) of the Act in that it does not set out the reasons for the change as required by s.65(3).

**Does the Second Request meet the requirements in s.65(3)?**

*Does the Second Request set out the details of the change sought?*

[47] On 4 June 2024 the Applicant made the Second Request via email as follows:

*“Dear Celina,  
Thank you for your email. I am humbly requesting you to adjust me on the weekend shifts temporarily until August because my wife is not working currently due to newborn and care responsibilities. It will be very difficult to survive due to financial hardship if I let go my weekend shifts in my circumstances.*

*In September, my wife is planning to return to work so that I can manage to move my shifts around or happy to be in casual if required.*

*I have been working with St.basil's for 12 years and still love to work more years. I hope you will kindly understand my circumstances and co-operate in my difficult situation. Thank you."*

[48] In the context of the Applicant's transfer to Lakemba in which, at the cessation of the three month period on 27 May 2024, he would be required to 'slot into any vacant shifts' to fulfil his contracted working hours, I find that the Second Request sets out the details of the change sought, being a change to work only 'weekend shifts temporarily until August'.

*Does the Second Request identify the relevant circumstances in s.65(1A) and set out the reasons for the change?*

[49] As noted above, the Full Bench in *Jordan Quirke v Bsr Australia Ltd*<sup>15</sup> 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;<sup>16</sup>

[50] The Second Request identifies that the Applicant's wife is not working currently 'due to newborn and care responsibilities'. While the Applicant could have expressed his circumstances more clearly, in the circumstances of this matter, it is discernible from the request that the request identifies the relevant circumstances in s.65(1A), i.e. that in accordance with s.65(1A)(a) the Applicant is the parent of a child who is of school age or younger. This is not contested.

[51] Further, the Second Request identifies that:

- the Applicant's wife is not working due to care responsibilities associated with his newborn child; and, in those circumstances
- if the Applicant is not able to work weekend shifts he would suffer financial hardship.

[52] This explains how the proposed change, to work only 'weekend shifts temporarily until August', relates to the Applicant being the parent of a child who is of school age or younger.

[53] I find that the Second Request sets out the reasons for the change as required by s.65(3).

*Finding regarding the Second Request*

[54] I find that the Second Request is a valid request made under s.65(1) of the Act.

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

[55] 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.

*Has the employer refused the request?*

[56] Section 65B of the Act sets out as a jurisdictional prerequisite for the making of an application a requirement that either the employer has ‘refused’ the request or 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 s.65A. Section 65B(1)(b)(i) does not expressly link the term ‘refusal’ to the employer’s obligations in s.65A.

[57] As noted above on the evening of 4 June 2024 Ms Chen responded to the Second Request stating:

*“Hi Bal:*

*Could you pls advice the time we can catch up with you over teams?*

*Unfortunately, we don’t have vacant shift available on weekends, but I am happy to offer you any shift that suits your availability to make up your financial status.*

*We can discuss it further during our catch-up meeting.”*

[58] In my view, in the context where the Applicant is requesting a change to be rostered to work on weekends, the above email establishes that the Respondent ‘refused the request’ at that point in time.

[59] Further, on 14 June 2024 Ms Chen wrote to the Applicant stating the Respondent was unable to accommodate the Applicant’s request as it did not have weekend shifts available in the roster and the business could not sustain the cost of the Applicant ‘working supernumerary’. The Respondent clearly ‘refused the request’ in this email at that point in time.

[60] On 8 July 2024 the Respondent orally provided the Applicant with the option of exploring the possibility of working weekend shifts at its Randwick facility however that option was refused by the Applicant. During the hearing the Respondent again indicated that it had weekend shifts that it was able to offer the Applicant at Randwick however that option was again refused. The change that the Applicant was seeking in the Second Request was not a change to his other working arrangements, such as work location. At the time of making the Second Request he was working at Lakemba and the requested change was that he only work weekends. In those circumstances, I do not consider that offers made on 8 July 2024 and on the date of the hearing mean that the employer has granted the request by offering shifts at another location. I find that the ‘employer has refused the request’.

**Have the parties attempted to resolve the dispute at the workplace level, by discussions between the parties?**

[61] Section 65B(2) of the Act provides that, in the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussion between the parties.

[62] It is apparent that an online meeting was held on 11 June 2024 where the Applicant's request was discussed but no resolution reached. I find that the parties attempted to resolve the dispute at the workplace level prior to the Applicant referring the dispute to the Commission.

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

[63] I have found that:

- in accordance with s.65B(1)(a) the dispute relates to a request by the Applicant to the Respondent under s.65(1) for a change in working arrangements relating to circumstances that apply to the Applicant, being the Second Request made by the Applicant to work weekend shifts temporarily until August; and
- in accordance with s.65B(1)(b)(i) the Respondent has refused the request;
- in accordance with s.65B(2) the parties attempted to resolve the dispute at the workplace level prior to the Applicant referring the dispute to the Commission.

[64] Section 65B(3) provides that if discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the Commission. Following discussions at the workplace level that were unsuccessful in resolving the dispute, the Applicant has referred the matter to the Commission.

#### *Conference to attempt to resolve the dispute*

[65] 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.

[66] A conference was held on 8 July 2024 in an attempt to resolve the matter via mediation however the matter did not resolve.

#### *Orders the Commission may make where the employer has not given the employee a written response to the request under s.65A*

[67] 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)).

[68] The balance of the requirements relate to form, process and substance and differ depending on the employer's response to the request.

**[69]** If the employer grants the request, the requirements relate to *form* of the response in that the response must state that the employer grants the request (s.65A(2)(a)).

**[70]** 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, the requirements relate to *form* of the response in that the response must set out the agreed change (s.65A(2)(b)).

**[71]** 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)).

**[72]** 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.

**[73]** Section 65A(5) provides that 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.

A note appearing under s.65A(5) states:

‘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)).’

**[74]** 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.

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

**[75]** 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.

*Orders the Commission may make where the employer has not responded or has not responded adequately under s.65A*

**[76]** Section 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.

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

**[77]** 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).

**[78]** 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*

**[79]** 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.

**[80]** 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.

**Should an order be made by the Commission?**

*Respondent's submissions*

**[81]** The Respondent submitted:

- it considered the Applicant's request in accordance with the legislation; and
- it refused the request based on reasonable business grounds.<sup>17</sup>

**[82]** The Respondent submitted that those business grounds are that:

- the new working arrangements requested would be too costly for the Respondent to sustain the Applicant working supernumerary;
- there is no capacity to change the working arrangements of other employees to accommodate the working arrangements requested;
- the working arrangements requested would result in additional costs to the organisation and significant loss in efficiency or productivity.<sup>18</sup>

**[83]** The Respondent sought to further elaborate upon its reasons for refusal stating in its submissions and during the hearing:

- it is in a community aged care environment and it is a not-for-profit organisation;
- it is subject to government funding;
- the Australian National Aged Care Classification (AN-ACC) system provides a framework to classify and fund residential aged care services;
- under the AN-ACC system its care minutes are determined based on care needs of each resident in aged care facilities and funding is allocated accordingly;
- staff rosters are aligned to the provided AN-ACC system funding;
- it doesn't have the budget to put on extra shifts beyond what it was allocated in AN-ACC care minutes;
- it has spoken to other employees to see if they have any flexibility to change their shifts in order to accommodate the Applicant and they have indicated they do not;



- the Respondent “will not take shifts off other people to give to someone else”;
- it is impractical to change the working arrangements of other staff;
- creating an additional weekend role will be over and above the AN-ACC system requirements and it does not have funding for this.

[84] The Respondent also said during the hearing that:

- it had looked at other sites and spoken to the management of other sites to see how the request could be accommodated;
- it did find an option of the Applicant working weekend shifts at its Randwick facility as a staff member indicated they had some flexibility to help out however that option was refused by the Applicant.

[85] In its response to the application, the Respondent submitted that the reasons for refusing the Applicant’s request are outlined in its letter dated 14 June 2024 which stated:

“Unfortunately, we [sic] unable to accommodate your request as we do not have weekend shifts available in the roster and the business cannot sustain the cost of you working supernumerary. Your weekend shifts will conclude on 23 June 2024. We can put you on a waitlist if weekend shifts become available in the future.”

[86] The Respondent also submitted:

- it consulted with the Applicant to provide him with currently available alternative options including:
  - morning, afternoon and night shifts Monday to Friday (with the exception of Friday nights) at Lakemba;
  - weekday shifts at Kogarah;
  - adding him to a waitlist for weekend afternoon shifts and to cover absences for weekend afternoon shifts at Lakemba and Kogarah;
  - taking available leave to cover the period if the Applicant wished to do so;
- it has genuinely tried to accommodate the Applicant’s request to the extent of:
  - contacting other locations within the Respondent to review shift availability;
  - contacting Lakemba staff currently working weekends asking if they wish to alter or change their shifts;
  - placing the Applicant on the waitlist to pick up any shifts that may become available due to staff absences;
- it has placed the Applicant on the roster records to be notified as soon as possible should any new weekend positions become available for him to consider;
- it suggested to the Applicant that he may want to talk to his primary employer to see what support they could offer for flexible working arrangements.<sup>19</sup>

### *Applicant’s submissions*

[87] The Applicant disputes that there were reasonable business grounds for the refusal of the request and submitted:

- since his redeployment to Lakemba, most of the time he had been working to cover staff leave (on weekends) and there were only a few shifts in which he was working supernumerary;
- in his request he clearly mentioned that he only needed flexibility until August because it was hard for him to survive financially;
- there was no explanation provided by the Respondent as to how the arrangement would be too costly when he was only seeking accommodation for two months and no evidence provided to demonstrate that the business cannot sustain those costs;
- the accommodation should be made to manage different types of leave taken by employees but instead his manager said that weekend shifts were not offered for any deployed staff;
- staff have to work overtime to cover leave and the Applicant was not given an opportunity to cover the leave of staff in order to maintain his contracted hours and this was very unfair;
- the business is large and approximately fifty employees work on the weekend shifts in his role in Lakemba.<sup>20</sup>

[88] The Applicant said that every weekend a text message is sent to all staff saying that shifts are available and when he contacts the Respondent he is told no shift is available.

[89] The Applicant also submitted that:

- the Respondent did not take the time to understand his request and did not explore the consequences for him if it refused;
- the Respondent did not genuinely try to reach an agreement on alternative work arrangements because there is no evidence that it tried to consider his request;
- he was not given shifts according to his availability;
- he was not given an opportunity to cover absences for weekend shifts because a message was sent to all staff about the shifts and when he called back the shifts had been taken. The Applicant said this means the Respondent has not communicated well to consider and prioritise his circumstances while maintaining his contracted hours;
- he has told the Respondent that his other employer does not operate on weekends and he does not understand why it is concerned about his other employer when he requires flexibility from the Respondent;
- he needs to work hard because he is the only person earning in his family at the moment.<sup>21</sup>

***Should the Commission exercise its discretion to make orders?***

[90] In his application, the Applicant submitted that on account of his circumstances and parental responsibility, he believed that the Respondent needed to ‘cooperate and consider [his] flexible work arrangements request, providing [him with his] own regular shift’ which he had worked for the last 10 years. However the application does not specifically state that a temporary change is sought. The Second Request, which I have found is the valid request under s.65, sought a temporary change up until the end of August.

[91] I note that certain events have followed the making of the Second Request. Of note:

- on 27 June 2024 the Respondent indicated that it was happy for the Applicant to use his annual leave or long service leave if there were no vacant shifts on weekends but that he should keep his leave balance in mind and advise what the plan would be if all remaining leave hours ran out. The Applicant did not however have a significant leave balance;
- on 8 July 2024 the Respondent orally provided the Applicant with the option of exploring the possibility of working weekend shifts at its Randwick facility however that option was refused by the Applicant.

[92] During the hearing the Respondent again indicated that it had weekend shifts that it was able to offer the Applicant at Randwick however that option was again refused.

[93] During the hearing I sought clarification as to what orders the Applicant was seeking that the Commission make and whether he was seeking to be rostered only weekends for an indefinite period or only for a temporary period. The Applicant indicated that his wife would be recommencing work in September and he only required a change in his working arrangements on a temporary basis. At the conclusion of the hearing the Applicant said that what he ‘wants now’ is for the Respondent to be flexible in getting him back to work at Lakemba working weekends for a month or two. When the Respondent pressed specifically for the Applicant to provide an end date for the arrangement sought, the Applicant indicated that he would be seeking a change to his arrangements until around the end of September 2024, noting that his wife was in the process of seeking an alteration to her working arrangements to enable her to work weekends from that time.

[94] The Applicant indicated he is flexible to work:

- any shifts on weekends (whether morning, afternoon or night shift);
- at either Lakemba or Kogarah;
- to take on those shifts in other roles within his qualifications including the role of AIN, Team Leader or Recreational Officer.

[95] During the hearing the Respondent indicated that Lakemba is the Respondent’s largest site with approximately 200 residents and in comparison, Kogarah has 36-40 residents so is smaller in comparison with lower care minutes and staffing requirements. I asked how many staff were at the Kogarah facility and the Respondent indicated there were about 65 employees including casual employees, with two employees working across each of the morning, afternoon and night shifts. The Respondent indicated that there were about 180-190 employees at the Lakemba facility. The Applicant indicated that around 50 people worked on Saturdays and around 50 people worked on Sundays across the morning, afternoon and night shifts in the roles of AIN, Team Leader and Recreational Officer. The Respondent indicated that across the morning, afternoon and night shifts about 35-40 employees work on a weekend day.

[96] Given the Respondent’s position that the Applicant did not have set days of work and it was able to roster the Applicant to work shifts that it has available, during the hearing I asked the Respondent why it was not able to allocate the Applicant to work weekend shifts and whether the other employees at the Lakemba facility did have set days of work. The Respondent said in response that the shifts “had been set into the roster”, indicating that employees have an

“allocated roster spot”. I asked whether employees work according to the same roster every week and the Respondent responded that:

- it had just gone through a roster review;
- it tries “not to alter the roster too much because [its] residents like consistency”, particularly residents who are memory impaired residents or have dementia for whom changes can be disruptive;
- it depends on the work area and it tries to keep staffing in some areas as consistent as possible;
- it does move employees around for training, development, cross-knowledge management purposes or if there are changing care needs;
- contracts of employment guarantee hours of work;
- it rosters according to the needs of the business and AN-ACC care minutes;
- if occupancy increases, AN-ACC care minutes increase and more shifts can be rostered.

[97] A problematic circumstance has arisen in this matter in that the Applicant:

- has historically worked only weekend shifts at the Kensington facility;
- has another job that he works between Monday and Friday;
- is only available to work weekend shifts for the Respondent; and
- the Applicant has been redeployed to work in a location where he cannot be guaranteed to be rostered weekend shifts to meet his availability.

[98] It is unclear to why the Applicant and Respondent did not discuss this problem in further detail at the time of the Applicant’s redeployment to Lakemba. In particular, it is not clear to me what the parties expected would happen if, at the end of the three month period during which the Applicant was guaranteed his usual weekend shift, the Applicant was rostered to work shifts at times where he was not available to work them. It does however seem likely that the Applicant may have formed the belief that he would continue to be rostered to work weekend shifts based on a discussion that he had with the manager before being redeployed to Lakemba where he took from that discussion that he would be given ‘priority’ taking into account his lengthy service.

[99] The change sought in the Second Request was however temporary until the end of August. There is no utility in the making of an order under s.65C(1)(f)(i) to grant the Second Request at this stage given the temporary nature of the change sought until the end of August and that events have since evolved. However s.65(1)(f)(ii) does provide that the Commission may make 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). Those are the circumstances that apply to the employee in respect of the Second Request. In that regard the Applicant is the parent of a child who is of school age or younger, his wife is off work and he needs or wants to maintain his income on weekends to support his family.

[100] Both parties were self-represented and provided little evidence to support their claims about their financial circumstances, which appears to be the main motivation underpinning their respective positions. I do however accept that:

- the Applicant has a new born child, his wife is not working and this would likely result in additional financial pressures;
- the Respondent is a not-for-profit organisation that is dependent on government funding and this likely constrains its capacity to roster staff to work care minutes in excess of the care minutes it is funded to provide;
- there are at least 35-40 employees working on a weekend day at the Lakemba site, but fewer employees working weekends at the Kogarah site;
- since his redeployment to Lakemba, most of the time the Applicant had been working to cover staff leave on weekends and there were only a limited number of shifts in which he was working ‘supernumerary’;
- when weekend shifts become available a text message is sent to *all* staff, the process for employees to be allocated these shifts is ‘first come, first served’ as described by Ms Chen, and this has resulted in the Applicant not being rostered to work replacement weekend shifts when other employees respond before him;
- where shifts become available at short notice, such as when covering unplanned leave, the Respondent may need to fill them quickly in order to meet patient care requirements;
- the arrangement needed by the Applicant is temporary and is only required until the end of September to enable his wife to adjust her working arrangements;
- the Respondent has offered the Applicant weekend shifts at Randwick. While this is not far from where the Applicant was working before his redeployment to Lakemba, Randwick is not the Applicant’s preferred location, noting that he lives in Campbelltown and Lakemba is closer to his home.

[101] Section 65C(3) provides that the Commission may make an order under s.65C(1)(f) if it is satisfied that there is no reasonable prospect of the dispute being resolved without the making of an order. As the matter did not resolve despite Commission facilitated attempts at resolution, I am satisfied that there is no reasonable prospect of the dispute being resolved without the making of an order. Section 65C(2) provides that in making an order under subsection 65C(1), the Commission must take into account fairness between the employer the and employee and I have done so in considering whether to make orders, seeking to balance the needs of the Applicant and the Respondent.

#### *Orders made by the Commission*

[102] Having regard to the above matters I have decided to order that:

1. The Respondent has refused the Applicant’s request for flexible working arrangements.
2. Subject to order 3 below, in respect of shifts falling between the date of the order and the end of September 2024, the Applicant be offered vacant weekend shifts at the Lakemba and Kogarah facilities before these shifts are offered to other employees, provided:
  - a. the Applicant is qualified to work the shifts that are vacant and doing so is not inconsistent with a term of a fair work instrument that applies to the Applicant and the Respondent; and
  - b. the Applicant communicates his acceptance to work the vacant weekend shift within two hours of being offered the shift.

3. In circumstances where the Respondent is provided with less than two hours' notice of a weekend shift becoming available, for example where an employee notifies that they are unable to attend work due to illness a short time prior to their rostered start time:
  - a. the Respondent will be able to offer the shift to employees more broadly to cover the absence;
  - b. however if the Applicant communicates that he is able to work the vacant shift before the Respondent rosters another employee to work that shift, the Respondent will roster the Applicant to work the vacant shift.

*Redundancy related matters*

[103] There are a range of other matters raised by the Applicant about the process for redeploying him to Lakemba including:

- that he did not sign the transfer letter dated 7 March 2024 because this disadvantaged him due to his availability;
- he requested redundancy but was not given that option and was instead told that he would be given priority in terms of accommodating his shift requests, considering his length of service;
- what he was told during an individual meeting was inconsistent with the condition in the transfer letter which he did not agree to and did not sign.

[104] The Applicant also indicated during the hearing he would be open to a redundancy payment.

[105] The application made by the Applicant, being an application made pursuant to s.65B of the Act, is not a dispute about:

- the change process that led to the Applicant being redeployed to Lakemba following the closure of the Kensington facility;
- whether the Applicant agreed to the terms of redeployment or whether the Respondent was able to change the Applicant's working arrangements in the way that it did in circumstances where he had been working only weekends prior to the change;
- whether the Applicant's role is redundant following the closure of the Kensington site or whether the role at Lakemba constitutes suitable alternative employment.

[106] Should the Applicant wish to dispute those matters, it is recommended that the Applicant seek advice as this dispute would need to be dealt with via a different type of application.



COMMISSIONER

*Appearances:*

*B Chapagain* on his own behalf.  
*Y Nixon* and *L Burns* for the Respondent.

*Hearing details:*

2024.  
August 13.  
Sydney (by Video).

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<sup>1</sup> [\[2023\] FWCFB 209](#) at [21] – [25].

<sup>2</sup> [\[2023\] FWCFB 209](#) at [22].

<sup>3</sup> [\[2023\] FWCFB 209](#) at [24], s.65(2).

<sup>4</sup> [\[2023\] FWCFB 209](#) at [25], s.65(3)(a).

<sup>5</sup> [\[2023\] FWCFB 209](#) at [26].

<sup>6</sup> [\[2023\] FWCFB 209](#) at [25].

<sup>7</sup> [\[2023\] FWCFB 209](#) at [25].

<sup>8</sup> [\[2023\] FWCFB 209](#) at [25].

<sup>9</sup> *Fair Work Act 2009* (Cth), s.65(1)(b).

<sup>10</sup> [\[2023\] FWCFB 209](#) at [23].

<sup>11</sup> Respondent’s submissions filed 8 August 2024.

<sup>12</sup> Applicant’s submissions filed 21 July 2024, response to q.11.

<sup>13</sup> [\[2023\] FWCFB 209](#) at [21] – [25].

<sup>14</sup> [\[2023\] FWCFB 209](#) at [25].

<sup>15</sup> [\[2023\] FWCFB 209](#) at [21] – [25].

<sup>16</sup> [\[2023\] FWCFB 209](#) at [25].

<sup>17</sup> Respondent’s Response to the Application

<sup>18</sup> Respondent’s submissions filed 8 August 2024.

<sup>19</sup> Respondent’s response to the application.

<sup>20</sup> Applicant’s submissions.

<sup>21</sup> Applicant’s submissions.