DECISION

Fair Work Act 2009
s.65B—Dispute about requests for flexible work arrangements

Jordan Quirke
v
BSR Australia Ltd
(C2023/5287)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
COMMISSIONER DURHAM

SYDNEY, 10 NOVEMBER 2023

Request for flexible working arrangements – whether the request was validly made – whether the request was refused on reasonable business grounds – meaning of 'disability' – Fair Work Act 2009 (Cth) ss 65(1), 65B, 65C – request not validly made – no dispute capable of arbitration under s 65C – application dismissed.

Introduction

[1] On 1 September 2023, Ms Jordan Quirke lodged an application pursuant to s 65B(3) of the *Fair Work Act 2009* (Cth) (FW Act) for the Commission to deal with a dispute relating to a refusal of a request for flexible working arrangements.[1] The dispute concerns Ms Quirke's request for her working hours as a part-time Customer Experience Coordinator employed by BSR Australia Ltd (BSR) to be changed. In her application, Ms Quirke contends that she made a written request for flexible working hours on 5 April 2023, that the reason for the request was that she had a disability, and that the request was refused on 30 August 2023. As we explain later, Ms Quirke altered some important aspects of her pleaded case at the hearing before us.

[2] The dispute the subject of the application was initially the subject of two conciliation conferences conducted by the Commission on 13 and 19 September 2023, but this did not result in any resolution of the dispute. Ms Quirke then sought that the matter be arbitrated pursuant to ss 65B(4)(b) and 65C of the FW Act. The matter was the subject of a hearing before us on 2 November 2023.

[3] For the reasons which follow, we determine that Ms Quirke's application was not validly made under s 65B(3) and, accordingly, we have no jurisdiction to arbitrate the dispute the subject of the application under ss 65B(4)(b) and 65C.

The facts

[4] Although the evidentiary material before us was limited, the facts of the matter relevant to the determination of the application were, for the most part, not in dispute, and may be

recounted as follows. Ms Quirke commenced employment with BSR on 23 May 2022. BSR is a retailer and franchisor of electrical and furniture products. BSR's head office in Brisbane provides support to its approximately 200 franchisees throughout Australia. Ms Quirke's role involves the provision of such support. Her usual place of work is from her home, subject to working one day per week from BSR's office. Ms Quirke reports directly to BSR's Customer Experience Team Leader, Mr Lewis Friend, and the National Customer Experience Manager, Ms Chloe Dennis.

[5] Ms Quirke's hours of work are stipulated in Schedule 2 of her employment contract as follows:

- Mon: 9am – 5pm (WFO[2])
- Tues: 4pm – 10pm (WFH[3])
- Wed: 4pm – 10pm (WFH)
- Thurs: Day Off or as required during peak selling periods (WFH)
- Fri: 4pm – 10pm (WFH)
- Sat: 9am – 5pm (WFH)
- Sun: Day Off or as required during peak selling periods (WFH)

[6] From 22 February 2023, by mutual agreement, Ms Quirke's 4:00 pm to 10:00 pm shifts on Tuesdays, Wednesdays and Fridays were moved forward an hour (3:00 pm to 9:00 pm) to accommodate when the phone lines were inactive.

[7] Prior to the 5 April 2023 request referred to in her application, Ms Quirke had verbal discussions with Mr Friend and BSR's HR Manager, Ms Alex Southeron, concerning a request by her for a change to her working hours. BSR understood Ms Quirke's reasons for this request to be that Ms Quirke struggled to wake up in the morning and get to work, that there was insufficient work to complete on a Saturday to justify her shift commencing at 9:00 am, and that she felt stressed asking her partner for a lift to and from work on Mondays. However, Ms Quirke's evidence was that she explained to Mr Friend and Ms Southeron that her request for a change to her working hours was recommended by her GP to aid in the relief of her insomnia and anxiety. There is no evidence that Ms Quirke, in terms, communicated that she had a disability.

[8] On 5 April 2023, Ms Quirke sent the following email to Mr Friend:

> Hi Lewis,
>
> As discussed on Monday, I've attached the mock roster that would be in-line with my doctor[']s recommendations.

CURRENT	HOURS	DESIRABLE	HOURS
Monday WFO	9-5	Monday WFO	11-5
Tuesday WFH	3-9	Tuesday WFH	1-9
Wednesday WFH	3-9	Wednesday WFH	1-9
Thursday	OFF	Thursday	OFF
Friday WFH	3-9	Friday WFH	3-9
Saturday WFH	9-5	Saturday WFH	10-4
Sunday	OFF	Sunday	OFF

> Change required: Saturday Phone Number changed to be in line with Sunday[']s times. (10-4)
>
> Understandably a 2-3pm start every day is not realistic but if this or something similar could be accommodated it would do wonders for me.
>
> Thanks…

[9] We note at this point that, although the above email refers to Ms Quirke's doctor's recommendations, it makes no reference to Ms Quirke having a disability. Ms Quirke received no formal written response to this email, although she and Mr Friend exchanged Microsoft Teams (MS Teams) messages about it on 14 April 2023 which indicate that there had been some internal discussions about Ms Quirke's request. On 8 May 2023, Ms Quirke sent the following email to Ms Southeron with her 5 April 2023 email attached:

> Hi Alex,
>
> Thank you for speaking with me today, I really appreciate you taking the time to listen.
>
> I've attached my email to Lewis below.
>
> As discussed, due to travel concerns, I would be more than happy to have Monday remain the same, which would make my ideal roster look like the below:

DESIRABLE	HOURS
Monday WFO	9-5
Tuesday WFH	2-9
Wednesday WFH	2-9
Thursday	OFF
Friday WFH	3-9
Saturday WFH	10-4
Sunday	OFF

[10] On 14 August 2023, Ms Quirke engaged in an exchange of MS Teams messages with Mr Friend which included the following:

> **Quirke**: need to have a chat about my hours (again lol) if there[']s a good time today, wasnt sure whether to speak to you or alex
>
> **Friend**: I was gonna book in some WIPs today – so we can chat
> only problem
> I feel I have passed stuff on before and it hits a wall
> but your call
>
> **Quirke**: yeah thats why I wasnt sure hahaha
> I might see if alex has some free time today, but ill let you know in the wip what the hippy hap is so youre at least aware [emoji]

[11] On 30 August 2023, in a MS Teams meeting, Ms Southeron verbally informed Ms Quirke that her request for a change in working hours was denied.

[12] As earlier stated, Ms Quirke filed her application on 2 September 2023. In respect of the outcome that she wanted, Ms Quirke stated in her application that '[u]pon further consideration, I would like to amend my request to closer reflect my needs under the recommendation of my doctor and myself.' In an attachment to her application, Ms Quirke set out her amended request as follows:

• Monday	3:00 pm to 9:00 pm	Working from home.
• Tuesday	3:00 pm to 9:00 pm	Working from home.
• Wednesday	3:00 pm to 9:00 pm	Working from home.
• Thursday	RDO.	
• Friday	11:00 am to 5:00 pm	Working from the office.
• Saturday	11:00 am to 5:00 pm	Working from home.
• Sunday	RDO.	

Legislative framework

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

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

> **65 Requests for flexible working arrangements**
>
> *Employee may request change in working arrangements*
>
> (1) If:
>
> (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
> (b) the employee would like to change his or her working arrangements because of those circumstances;
>
> then the employee may request the employer for a change in working arrangements relating to those circumstances.
>
> Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.
>
> (1A) The following are the circumstances:
>
> (aa) the employee is pregnant;
> (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
> (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
> (c) the employee has a disability;
> (d) the employee is 55 or older;
> (e) the employee is experiencing family and domestic violence;

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

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

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

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

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

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

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

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

Formal requirements

(3) The request must:

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

[15] In its original form upon the enactment of the FW Act in 2009, s 65(1) provided for the right to make a request for flexible working arrangements only where the employee was a parent of or had the responsibility for the care of a child who was under school age or was under 18 and had a disability. Sections 65(1), (1A) and (1B) were introduced by the *Fair Work Amendment Act 2013* (Cth) in substantially their current form (except for s 65(1A)(aa))[4]. The Statement of Compatibility with Human Rights in the Explanatory Memorandum for the *Fair Work Amendment Bill 2013* (2013 EM) stated that:

> Part 3 of Schedule 1 to the Bill extends the right to request a change in working arrangements to a broader category of persons, including to employees with caring responsibilities, parents with children that are school age or younger, employees with a disability, those who are mature age, as well as to employees who are experiencing violence from a family member or are providing care and support to a member of their immediate family or a member of their household as a result of family violence.
> . . .

> Extending the right to request a change in working conditions to this additional range of employees recognises the interests of these particular groups and further enhances the assistance provided to them.
> …
> These amendments reinforce existing protections against discrimination contained in the FW Act.

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

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

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

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

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

> **65A Responding to requests for flexible working arrangements**
>
> *Responding to the request*
>
> (1) If, under subsection 65(1), an employee requests an employer for a change in working arrangements relating to circumstances that apply to the employee, the employer must give the employee a written response to the request within 21 days.
>
> (2) The response must:
>
> (a) state that the employer grants the request; or
> (b) if, following discussion between the employer and the employee, the employer and the employee agree to a change to the employee's working arrangements that differs from that set out in the request—set out the agreed change; or

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

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

(a) the employer has:

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

(b) the employer and the employee have not reached such an agreement; and
(c) the employer has had regard to the consequences of the refusal for the employee; and
(d) the refusal is on reasonable business grounds.

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

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

Reasonable business grounds for refusing requests

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

(a) that the new working arrangements requested would be too costly for the employer;
(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;
(d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
(e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

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

Employer must explain grounds for refusal

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

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

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

(c) either:

(i) set out the changes (other than the requested change) in the employee's working arrangements that would accommodate, to any extent, the circumstances mentioned in subsection (1) and that the employer would be willing to make; or
(ii) state that there are no such changes; and

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

Genuinely trying to reach an agreement

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

[19] Sections 65B and 65C of the 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)).

Representatives

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

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

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

65C Arbitration

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

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

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

(e) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request under section 65A—an order that the

employer take such further steps as the FWC considers appropriate, having regard to the matters in section 65A;

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

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

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

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

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

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

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

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

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

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

Contravening an order under subsection (1)

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

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

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

Jurisdictional prerequisites for arbitration

[21] Section 65B(1) relevantly provides that s 65B applies to a dispute between an employer and an employee if, first, the dispute relates to 'a request by the employee to the employer under subsection 65(1) for a change in working arrangements relating to circumstances that apply to the employee' and, second, the employer has either refused the request or has not given the employee a written response under s 65A within 21 days. Thus, to the extent that s 65B(3) permits a dispute to be referred to the Commission and s 65B(4) empowers the Commission to deal with the dispute (including, if necessary, by arbitration under s 65C), the dispute must be of the type referred to in s 65B(1). Absent the existence of such a dispute, the Commission lacks jurisdiction under s 65B(4) and cannot engage in arbitration under ss 65B(4)(b) and 65C. Because, as explained, the first predicate for such a dispute is that it must relate to a request by the employee under s 65A(1), then the Commission's jurisdiction is dependent on a request of that nature having been made.

[22] There are five discernible requirements in s 65 that must be satisfied in order for a request under s 65(1) to have been validly made. The first two requirements are contained in s 65(1) itself. *First*, s 65(1)(a) requires that 'any' — that is, at least one — of the circumstances in s 65(1A) must *apply* to the employee. The use of 'apply' in the present tense connotes that the relevant circumstance must, as a matter of fact, exist (rather than being anticipated or the subject of anticipatory discussions) in respect of the employee at the time the request is made. It follows that, where the Commission is asked to arbitrate pursuant to s 65B(4)(b), it must be able to be satisfied that one of the circumstances in s 65(1A) applied to the relevant employee at the time of the employee's request for flexible working arrangements.

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

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

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

[26] Ms Quirke submitted, in respect of s 65(3), that the 'in writing' requirement in paragraph (a) only applies to the requested change in working arrangements and that the matters referred to in paragraph (b) do not have to be set out in writing. We reject this submission. The reference to '[t]he request' in the chapeau to s 65(3) may only reasonably be read as referable to a single and entire solicitation process of the type described in s 65(1), such that the requirement for the request to be in writing is to be understood as meaning that it must be wholly in writing. Section

65(3)(b) requires that the prescribed content be 'set out' — a phrase which is not apt to describe something other than in writing. The prescribed content includes 'the details of the change sought' and, if Ms Quirke's submission that this does not need to be in writing were to be accepted, the requirement that the request be in writing would be left with little or no work to do. Finally, the use of the conjunction 'and' to connect paragraphs (a) and (b) of s 65(3) indicates that the requirements in the two paragraphs are intended to operate cumulatively and are not exclusive of each other.

[27] Ms Quirke submitted, in support of her construction of s 65(3), that a requirement that the request be wholly in writing might defeat the purpose of Division 4 of Part 2-2 in respect of employees with no knowledge of the FW Act or with other limitations on their capacity to make a written request setting out the matters in s 65(3)(b). However, such a consideration cannot overcome the plain language of the provision. We also note that there are sound policy considerations in favour of the construction that we prefer. In particular, because the making of a request under s 65(1) enlivens the obligation of the employer under s 65A(1) to respond in writing within 21 days, a requirement that the request be wholly in writing and set out the matters in s 65(3)(b) may be understood as allowing the employer to reasonably comprehend that a formal s 65(1) request has been made. As earlier set out, the 2013 EM distinguished between a s 65(1) request and other, less formal discussions about flexible working arrangements generally which may be made outside the statutory framework of Division 4 of Part 2-2.

[28] In order for the Commission to have jurisdiction under s 65B(4) to deal with a dispute about a request under s 65(1), there is also a further requirement (*sixth* requirement) applying to the request arising from item 64 of Schedule 1 to the FW Act, namely that the request has to have been made on or after 6 June 2023.

Applicant's case

[29] As earlier stated, Ms Quirke's application as filed proceeded on the basis that the relevant request under s 65(1) was constituted by her email of 5 April 2023 to Mr Friend, subsequently forwarded to Ms Southeron on 8 May 2023. However, at the hearing before us, Ms Quirke altered her position and contended that the request was constituted by her MS Teams message to Mr Friend on 14 August 2023 in which she requested a further 'chat about my hours'. This was, she contended, a written request which was to be understood as referable to earlier communications she had made about changes to her working hours.

[30] The evidence provided by Ms Quirke to demonstrate the existence of the disability which she contends was the reason for her request for changed working hours primarily consisted of two documents. The first was a 'Mental Health Care Plan' prepared by Dr Matthew Isbel, Ms Quirke's GP, on 10 August 2023. This document described Ms Quirke's presenting issues as 'anxiety' and indicated past mental health issues of 'mixed anxiety and depression'. The document then set out Dr Isbel's 'Assessment' and 'Plan' as follows:

ASSESSMENT

Mental Status Examination			
Appearance and General Behaviour	casual active wear, well groomed, some acne	**Mood** (Depressed/Labile)	depressed

Thinking (Content/Rate/ Disturbances)	worrying, catastr[o]phising	**Affect** Flat/Blunted	reactive
Perception (Hallucinations etc)		**Sleep** (Initial Insomnia/Early morning wakening)	initial insomnia, then difficult to wake
Cognition (Level of consciousness/delirium/ intelligence)	intact	**Appetite** (Disturbed Eating Patterns)	reduced
Attention & concentration	no change	**Motivation & Energy**	tired always
Memory (Short & long term)	poor but longer term	**Judgement** (Ability to make rational decisions)	slightly impair[ed], anxiety preventing taking good options
Insight	good	**Anxiety Symptoms** (Physical & Emotional)	panic
Orientation (Time/place/person)	intact	**Speech** (Volume/Rate/Content)	good flow and volume

Risk Assessment			
Suicidal ideation	Nil	Suicidal intent	nil

Outcome tool used: K10	**Score Result: 33**

PLAN

Formulation - Main Problem/Diagnosis: anxiety

Issues	**Goals**	**Actions/Treatments:**
anxiety	**reduce**	**psychologist: CBT and other focussed therapies as indicated GP: refer and support +/- meds**
depression	**prevent**	**psychologist: CBT and other focussed therapies as indicated**

[31] The second document is a letter dated 9 September 2023 which is signed by Dr Isbel and addressed 'To Whom It May Concern'. The letter states:

> I have been Jordan's regular GP for three years.
>
> Jordan experiences anxiety and I have referred her for counselling with a Mental Health Care Plan to Dr Alistair Campbell clinical psychologist. Her first Mental Health Care Plan was prepared in November 2020.
>
> I had a consult with Jordan on 23.3.23. At this time I identified her shift roster as the cause of her insomnia and contributing to her anxiety. I encouraged Jordan to approach her employer to request a more suitable shift rotation.

> We had a follow up appointment on 27.4.23 where Jordan noticed significantly improved sleep quality when having some time off work.
>
> Good sleep quality is an important strategy for managing anxiety. I would medically recommend avoid switching between evening and morning shifts in the same week.

[32] Ms Quirke accepted at the hearing that the above documents constituted the only medical evidence that she had a disability. We note that, in addition to these, there are documents which evidence that Ms Quirke attempted to obtain an appointment with a clinical psychologist on 31 March 2023 by completing an online form. Her answers to questions in the form included the following:

> *Do you have a current mental health care plan from your GP?*: yes
>
> *Can you tell us a bit about how we can best help you during your sessions?*: Looking for help with managing severe anxiety and coping with depression among other things. My doctor has recommended Dr Alistair Campbell.
>
> *Have you been diagnosed with a mental health condition if so can you tell us a bit about it?*: Anxiety/Depression - Interferes with daily life, unable to move forward with things.

[33] In response to her request, Ms Quirke was informed that Dr Campbell was not available for an appointment until July and would not be available for other than monthly appointments thereafter. In a reply the following day, Ms Quirke said:

> Thank you for your email.
>
> I have looked into some other psychologists in the area but it has been hard to find one suitable.
>
> If you are able to fit me in at the next available with Dr. Campbell in July, that would be great.
>
> Otherwise, if you have another male psychologist that is available sooner and would be a suitable fit, that would be good too.
>
> If I find anything in the meantime, I'll be sure to let you know.

[34] Ms Quirke's written submission in support of her application, which contained a number of factual contentions which we treated as evidentiary in nature, included the following:

> The basis of my request for flexible working arrangements is established by ongoing health concerns and conflicts, primarily associated with an unhealthy sleep schedule exacerbating symptoms related to my psychosocial disability. … Since the request was made, I have sought further treatment as recommended by my General Practitioner, Dr. Matthew Isbel. Due to a delay in available appointments, I was unable to begin this treatment with Clinical Psychologist Dr. Alistair Campbell until July 2023…

[35] The primary remedy which Ms Quirke seeks is an order under s 65C(1)(f) requiring BSR to grant her request for altered hours. At the hearing, Ms Quirke indicated that she no longer sought the pattern of working hours specified in her application and sought to revert to the position stated in her email of 8 April 2023 which, she said, more closely aligned with her

medical advice. She submitted that the changes she sought would have a minimal impact on the business, that other staff had been granted flexible working arrangements that had greater impacts on the business with 'little or no delay or discussion', and that BSR's refusal of her request lacked adequate justification or reasoning and had not been accompanied by any alternative options.

Consideration

[36] It is plain that the request for altered working hours contained in Ms Quirke's email of 5 April 2023, which she originally relied upon as the basis for the application, does not meet the jurisdictional requirements for a request under s 65(1) which can be the subject of arbitration under s 65B(4)(b). It does not meet the third requirement identified above, in that Ms Quirke had not completed 12 months' continuous service in s 65(2) when she made the request by email to Mr Friend on 5 April 2023, nor had she met this requirement when she forwarded the email to Ms Southeron on 8 May 2023. It also does not meet the fifth requirement, in that nowhere does Ms Quirke identify in writing the reasons for the change sought by reference to any of the circumstances in s 65(1A). Nor does it meet the sixth requirement, in that the request predates the commencement date of the SJBP Act amendments on 6 June 2023.

[37] Ms Quirke's change of position at the hearing as to the identity of the request relied on was, we infer, intended to surmount at least the temporal difficulties associated with the 5 April 2023 request. However, the 14 August 2023 MS Teams message could not, on any view, be considered a request under s 65(1) because it does not communicate any request for a change in working arrangements supported by reasons, but is rather only a request for a discussion, and thus does not meet the second and fifth requirements earlier identified.

[38] These conclusions are sufficient by themselves to demonstrate that Ms Quirke has not made a valid request under s 65(1). We also observe that, in addition, we would have difficulty in being satisfied, on the evidence before us, that Ms Quirke has a disability such as to satisfy the first requirement for a valid request under s 65(1). Because this is the first matter of its type to be considered by a Full Bench, we consider it useful to set out our reasons for this observation notwithstanding that it is not necessary to do so for the purpose of determining this matter.

[39] The term 'disability' is not defined in the FW Act. Section 12 contains a definition of the expression 'employee with a disability', but that expression is not used in s 65(1A) and is specific to the wage-fixing functions of the Commission.[5] In those circumstances, we consider that 'disability' should be given its ordinary meaning (and should not be given the definition found in s 4 of the *Disability Discrimination Act 1992* (Cth) with respect to a different statutory scheme). This conclusion is consistent with that part of the 2013 EM quoted in paragraph [17] above. It is also consistent with judicial consideration of the phrase 'physical or mental disability' in the context of s 351(1) of the FW Act. In *Hodkinson v The Commonwealth*,[6] the Federal Magistrates Court (Cameron FM) said:

> [144] The applicant's allegation of disability discrimination also raises the question of the proper interpretation of the word "disability" where it appears in s.351(1). If a term is used in different statutes in different contexts, then the definition of that term in one statute is unlikely to assist in interpreting that term in the other: *M Collins & Son Ltd v Bankstown Municipal Council* (1958) 3 LGRA 216 per Sugerman J at 220. However, if the two statutes deal with related concepts then a definition in one may assist in the interpretation of the other although it will not

> fix the meaning of the term in the second statute: *R v Scott* (1990) 20 NSWLR 72 per Gleeson CJ at 77.
>
> [145] Disability is defined in s.4 of the *Disability Discrimination Act* in the terms quoted above at [15]. That definition appears to reflect the particular objects of the *Disability Discrimination Act*. By contrast, nothing about the way the word "disability" is used in s.351(1) suggests that it should be understood other than according to its ordinary meaning or that it should have the extended meaning which it is given in the *Disability Discrimination Act*. To the extent that the *Disability Discrimination Act* defines "disability" in terms consonant with the ordinary meaning of that word, it can assist in its interpretation where it appears in s.351(1). However, it is by reference to that ordinary meaning that it should be understood. In that regard, the *Macquarie Dictionary* (5th ed.) relevantly defines "disability" as:
>
> > 1. *lack of competent power, strength, or physical or mental ability; incapacity.*
> > 2. *a particular physical or mental weakness or incapacity.*
>
> Further, the Shorter Oxford English Dictionary (6th ed.) relevantly defines "disability" as:
>
> > 3. *An instance of lacking ability; now spec. a physical or mental condition (usu. permanent) that limits a person's movements, activities, or senses.*
>
> [146] Where it is used in s.351(1), I conclude that the word "disability" should be understood to refer to a particular physical or mental weakness or incapacity and to include a condition which limits a person's movements, activities or senses. Examples can be found in the definition of disability in the *Disability Discrimination Act*. Importantly, however, while physical or mental limitations may be a disability or an aspect of a disability, their practical consequences, such as absence from work, are not. This distinction is significant when a party is required to identify the disability said to be the reason of adverse action alleged to have been taken against them.

[40] The above approach has generally been followed, with the proviso that the term 'disability' in s 351(1) has been considered to encompass not only the underlying diagnosed medical or physiological or psychological condition but also the symptoms or manifestations of the disability, perhaps contrary to the last two sentences in the above passage.[7]

[41] A diagnosed anxiety-related mental disorder may constitute a 'disability' within the ordinary meaning of that term.[8] However, this is to be distinguished from anxiety as a normal emotional reaction to stress. As the Federal Court of Australia (Perry J) said in *RailPro Services Pty Ltd v Flavel*:

> … a disability "*does not include ordinary human responses to particular circumstances, such as nervousness*", and knowledge by a lay person that a person feels nauseous and has other feelings typically related to nervousness in a stressful situation like an assessment is likely to fall short of amounting to knowledge of a disability.[9]

[42] The material before us indicates that Ms Quirke *believes* she suffers from a disability. As earlier set out, her submission refers to her having a 'psychosocial disability', which we understand to be a term of wide import which refers to the barriers a person with a mental health condition may encounter when interacting with a social environment.[10] It is not a diagnosis as such.[11] Ms Quirke did not explain why she considers she has a psychosocial disability. In her attempt to obtain an appointment with a clinical psychologist in March 2023, Ms Quirke said,

in answer to a question as to whether she had been diagnosed with a mental health condition, that she had 'Anxiety/Depression', but she provided no medical evidence of such a diagnosis. Such medical evidence as she did provide post-dated this and did not contain a diagnosis of this nature.

[43] The assessment contained in the Mental Health Plan prepared by Ms Quirke's GP, Dr Isbel, appears to have been carried out using the K10 'outcome tool'. The K10 tool (or Kessler Psychological Distress Scale-10) is a simple measure of non-specific psychological distress in the anxiety-depression spectrum over the short term.[12] It does not produce a diagnosis as such but is a screening tool used to assess the need for further medical support.[13] The Mental Health Plan refers to a 'Main Problem/Diagnosis' of 'anxiety', but it is not clear that this is based on anything other than the outcome of the K10 tool.

[44] Dr Isbel's letter of 9 September 2023 refers to Ms Quirke experiencing anxiety and having been the subject of a consultation about this on at least two earlier occasions. The reference to the consultation on 23 March 2023 appears to be the origin of Ms Quirke's request to change her working hours. Dr Isbel says that he 'identified her shift roster as the cause of her insomnia and contributing to her anxiety', but he does not give any diagnosis of an anxiety-related disorder nor does he identify that Ms Quirke's anxiety 'limits [her] movements, activities or senses'.

[45] The evidence is therefore unsatisfactory. While it may be inferred that there is a real possibility that Ms Quirke suffers from a disability, it is difficult to conclude on the balance of probabilities that she has a disability in the absence of clear evidence of a medical diagnosis. However, beyond this, it is not necessary to express a definitive conclusion concerning this issue.

[46] Because Ms Quirke has not made a request under s 65(1), there can be no dispute about such a request that is capable of being arbitrated by the Commission under s 65B(4)(b). Accordingly, it is not necessary for us to consider BSR's submissions as to the reasonableness of its business grounds for refusing Ms Quirk's request for altered working hours.

Conclusion

[47] Ms Quirke's application is dismissed.

PRESIDENT

Appearances:

P Harris, solicitor, for Jordan Quirke.
J McKinnon and *C Dennis* for the respondent.

Hearing details:

2023.

Brisbane:
November 2.

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[1] Notwithstanding the date of lodgment, the application was dated 2 September 2023.

[2] Working from office.

[3] Working from home.

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

[5] FW Act, ss 139(1)(a), 284(1)(e) and (3)(a).

[6] [2011] FMCA 171, 207 IR 129.

[7] *RailPro Services Pty Ltd v Flavel* [2015] FCA 504, 242 FCR 424 at [124]; *Stephens v Australian Postal Corporation* [2011] FMCA 448, 207 IR 405 at [87]-[89].

[8] See, eg. *Perez v Northern Territory Dept of Correctional Services* [2017] FCCA 1499 at [127].

[9] [2014] FCA 504, 242 FCR 424 at [126].

[10] NSW Health, 'What Is a Psychosocial Disability?', *Mental Health and Psychosocial Disability* (Web Page, 6 February 2023) <https://www.health.nsw.gov.au/mentalhealth/psychosocial/foundations/Pages/psychosocial-whatis.aspx>.

[11] Ibid.

[12] 'Kessler Psychological Distress Scale-10 (K10)', *Australian Bureau of Statistics* (Web Page, 31 August 2017) <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4363.0~2014-15~Main%20Features~Kessler%20Psychological%20Distress%20Scale-10%20(K10)~35>.

[13] 'Anxiety and Depression Test (K10)', *Beyond Blue* (Web Page) <https://www.beyondblue.org.au/mental-health/check-your-mental-health/k10#:~:text=This%20test%20can't%20diagnose,you%20can%20get%20tailored%20support>.