

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Ms Kay Schafer v The Nest Community Inc. [2024] FWC 1557

Fair Work Commission, Commissioner P Ryan, 14 June 2024

A volunteer sought redress from the Fair Work Commission for dismissal because she exercised a workplace right.

Key words: Volunteer, Australia, Employee, Dismissal, Jurisdiction

1. Ms Kay Schafer (Ms Shafer) made an application for the Fair Work Commission (Commission) to deal with a dismissal dispute under section 365 of the [Fair Work Act 2009](#) (Cth) (FW Act).
2. Nest Community Inc. argued that Ms Shafer was not an employee and that, consequently, section 365 FW Act did not apply.
3. Ms Shafer acknowledged that she was a volunteer, and that volunteers were not eligible to make a dismissal claim, but she did not want to withdraw the application.
4. The Commission noted that it was well established that a person not in an employment relationship cannot be dismissed within the meaning of section 386 of the FW Act.
5. The application was dismissed.

COMMENT



The [Unfair Dismissals Benchbook of the Fairwork Commission](#) states:

Volunteers

Contains issues that may form the basis of a jurisdictional issue

A volunteer is ‘someone who enters into any service of their own free will, or who offers to perform a service or undertaking for no financial gain’.[1]

The Fair Work Commission considers volunteerism as an arrangement generally motivated by altruism, rather than for remuneration or private gain. Therefore, the commitments shared between the parties

are usually considered moral in nature, rather than legal.[2] Payment unrelated to hours of work or the actual performance of work does not of itself imply that a worker is an employee.[3] In these circumstances, the payment can more aptly be described as an 'honorarium' or gift.[4]

For example, a worker may receive board and lodgings[5] or reimbursements for expenses[6] and still be considered a volunteer. In other situations, a worker who performs work for non-monetary benefits, such as rent free accommodation, can be considered to be an employee rather than a volunteer.[7]

Case examples

Volunteer

Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club [2011] FWA 1143 (Steel C, 21 February 2011).

The applicant acted as a bingo caller in a club and was paid \$50 per week. She was found not to be an employee of the club since there was no mutual intention of the parties to enter into a legally enforceable arrangement or contract.

Employee – NOT volunteer

Daniels v Bentleigh Calisthenics Incorporated, Print N9259 (AIRC, Whelan C, 4 March 1997).

The applicant performed work as an instructor for a non-profit voluntary sporting association. The association submitted that the applicant was a volunteer, and the payments to her were an honorarium. The applicant was held to be an employee of the association, being paid \$15 per hour at the time of dismissal.

References

[1] The Macquarie Dictionary Online.

[2] *Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [2011] FWA 1143 (Steel C, 21 February 2011) at para. 42.

[3] See *Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [2011] FWA 1143 (Steel C, 21 February 2011) at para. 43.

[4] *ibid.*

[5] *Teen Ranch v Brown* (1995) 11 NSWCCR 197, (1995) 87 IR 308, pp 310–311.

[6] *Frattini v Mission Imports* [2000] SAIRComm 20 (16 May 2000) .

[7] *Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [2011] FWA 1143 (Steel C, 21 February 2011) at para. 34; referring to *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWC/2024/1557.html>

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Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

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