

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.



Anthony Walsh [2024] FWC 1514

Fair Work Commission, Commissioner Simpson, 11 June 2024

Whether the Fair Work Commission had jurisdiction to hear a bullying complaint by a volunteer in a volunteer association.

Key words: Volunteer, Australia, Bullying, Jurisdiction, Business or Undertaking

1. Radio Logan Incorporated (the Station) is a volunteer community broadcasting station. Some parties were engaged on a contractual basis to perform paid work for the Station under separate ABNs, and were paid superannuation.
2. Anthony Walsh (Walsh) was a member and volunteer at the Station, presenting a weekly radio program. He applied to the Fair Work Commission (the Commission) pursuant to s.789FC of the [Fair Work Act 2009](#) (the FW Act) for an order to stop bullying in relation to several persons. He alleged his employer was the Station.
3. It was agreed that Walsh was a volunteer within the meaning of the FW Act and the definition set out in the [Work Health and Safety Act 2011](#) (WHS Act). Under s.789FC(2) of the FW Act, a worker must be a worker within the meaning of the WHS Act for a worker to be eligible.
4. It was contested whether the Station was a person conducting a business or undertaking for the purposes of the WHS Act, specifically whether the Station was a volunteer association which was precluded from being a person conducting a business or undertaking.
5. The WHS Act s.5(7)-(8) provides:

Meaning of person conducting business or undertaking

...

(7) A volunteer association does not conduct a business or undertaking for the purposes of this Act.

(8) In this section, volunteer association means a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.
6. It was argued that the Station was a volunteer association and did not employ workers. Clauses in the Station's constitution prohibited any management committee member from receiving any pecuniary gain or income, and the property of the association was not to be distributed in any way to its members, but only used to achieve its objectives.

7. Walsh argued that the Station qualified as a person conducting a business or undertaking based on its organisation, such as structure, operations, and financial transactions. He pointed to constitutional rules that permitted the engagement of employees, and fees paid to contractors and others for bookkeeping, cleaning, repairs, and maintenance.

8. The Commission found (at [17]):

... that the Station is a volunteer association as defined in section 5 of the WHS Act. The submissions of the Station taken together with the audited accounts satisfy me that it is sufficiently clear that the Station is made up of group of volunteers working together for one or more community purposes, and it has no employees of its own. The fact that the Station engages others on a contract does not make the Station a PCBU. (A person conducting a business or undertaking)

9. The matter was dismissed as the Commission did not have jurisdiction.

COMMENT



Under the FW Act bullying happens at work when:

- a person or group of people repeatedly behave unreasonably towards another worker or group of workers; and
- the behaviour creates a risk to health and safety.

Examples of bullying include:

- behaving aggressively towards others;
- teasing or playing practical jokes;
- pressuring someone to behave inappropriately;
- excluding someone from work-related events;
- unreasonable work demands.

Even if an organisation does not fall within the WHS Act, there may be common law duties to provide persons with a safe workplace. All employers have a duty to take reasonable care to avoid exposing persons to reasonably foreseeable risks of injury.

Legislation Change

Legislative changes have been introduced as a result of the Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024, which amends the Fair Work Act. The Amendments passed on 12 February 2024 and received Royal Assent on 26 February 2024, and various provisions will commence on 26 August 2024.

One provision commencing on 26 August 2024 is a new “ordinary meaning” definition of employee and employer included in section 15AA of the Fair Work Act. The meaning of an employee and employer will be determined by

assessing the “real substance, practical reality and true nature of the working relationship, by considering the ‘totality’ of the relationship”. This means consideration must be given to the terms of the contract and how the contract is performed in practice. This amendment supersedes and replaces the High Court decisions of [CFMMEU v Personnel Contracting Pty Ltd](#) [2022] HCA 1 and [ZG Operations Australia Pty Ltd v Jamsek](#) [2022] HCA 2 whereby consideration was given to the terms of the written contract to establish whether an individual was a contractor or employee at law.

The new legislative change intends to return to the multi-factorial assessment that courts and tribunals used to apply to assist them in determining whether an individual was a contractor or employee.

The new provisions may have the effect of allowing contractors to satisfy the definition of an employee depending on the particular circumstances.

Therefore, voluntary organisations that previously had no employees may now have employees under the Fair Work Act, so becoming a PCBU. The effect of this will be that all "workers" of that association, including volunteers (and contractors), will be eligible to make an application to the FWC in order to stop bullying.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWC/2024/1514.html>

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