

Article Information

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The Fair Work Commission confirms its anti-bullying jurisdiction does not extend to workers who are not employees

In the application of McDonald [2016] FWC 300 on 15 January 2016, Commissioner Hampton dismissed an application for an order to stop bullying under the Fair Work Act (Cth) (Act). Commission Hampton held that the applicant was not a “worker”.

The Commission concluded that the applicant was a volunteer and not an employee of the entity identified in the application, and that the entity itself was not a Person Conducting a Business or Undertaking (PCBU). For an applicant to successfully obtain anti-bullying orders, both of these conditions are required to be satisfied in relation to the definition of a “worker”.

Ms McDonald had sought an anti-bullying order in respect of alleged behaviour over a period of five years which had culminated in her exclusion from the Cooktown School of Art Society Inc. and its gallery. During that period she had worked with the Society as a volunteer.

The Society and those members named in the application objected to the application on the grounds that the Fair Work Commission (FWC) did not have jurisdiction. They argued that Ms McDonald was not a “worker” for the purposes of section 789FC of the Act, and that the society was also not a constitutionally - covered business for the purposes of the Act.

After receiving written submissions, the Commissioner considered the wording of section 789FC of the Act and its importation of the definition of “worker” from the Work Health and Safety Act 2011. It was noted that a volunteer is not included in the definition of “worker” where they are volunteering to a wholly volunteer organisation with no paid employees.

Further, section 789FD of the Act limited the definition of “bullied at work” (and as a result the FWC’s jurisdiction) to circumstances occurring while a worker is at work in a constitutionally-covered business. In order to be a *constitutionally-covered business*, the business needed to be a constitutional corporation or a body corporate incorporated in a Territory (neither of which the Society was).

While it was accepted that Mrs McDonald was a volunteer, there was some indication that volunteers received a benefit (reduced commission charges). Ms McDonald argued that members of the Society received “in kind” benefits, such as free memberships for committee members and that this amounted to a “payment”. The Commissioner was not swayed by these matters and still regarded the nature of the relationship to fundamentally remain that of a volunteer and not an employee.

Ms McDonald’s work for the society (and that of other committee members and volunteers) was not induced by or predicated on the receipt of any such benefit. The benefits were best categorised as one off “honorariums” -one off payments or discounts and not ongoing arrangements tied to the continued provision of services. As for the commission incentives, these were not payments made by the Society - they were an incentive to membership, without any link to volunteering services actually being provided (i.e. you could be a paid-up member without having volunteered any time or service to the Society simply to secure the discount).

On that basis that the applicant was a volunteer in a society that was a purely volunteer organisation, it was not a PCBU for the purposes of the Work Health and Safety Act 2011 (Qld); .

In light of the above, Commissioner Hampton determined that the FWC had no jurisdiction to determine the application and accordingly dismissed it, on account of the applicant not being a “worker”. The FWC had no reason to come to any

conclusion on the other potential jurisdictional matters of whether the Society was a constitutional corporation or whether there was any likelihood of ongoing bullying of Ms McDonald (in the capacity of a worker); but noted that both issues looked likely to be problematic for her.