

# Footy coach's 'unfair dismissal' gets the boot

Is a paid volunteer an employee?



According to the latest census, 19.4% of Australians are involved in formal volunteering and another 11.9% in informal volunteering, such as providing care for a person with a disability, long-term illness or age-related health issues.<sup>1</sup>

As a general rule, volunteers are not paid for their time or services and are not employees for the purposes of the *Fair Work Act 2009* (Cth) (FW Act). This means volunteers are prevented from making claims for unfair dismissal, adverse action and employment entitlements among other things.

The position is less clear if a volunteer is paid an honorarium and the volunteering arrangement has the characteristics of an employment relationship, as was the case in *Adam Grinholz v Football Federation Victoria Inc.* [2016] 7976.

## Background

Mr Grinholz was the head coach of a girls' soccer team for Football Federation Victoria Inc. (the club) during the 2015 and 2016 seasons. For both seasons, Mr Grinholz signed a "voluntary services agreement" with the club, which required that he attend a number of training sessions, matches and competitions during the season as well as liaise with the club's full-time coaches and administrators. Mr Grinholz received a \$4000 honorarium under the 2015 agreement that was increased to \$6000 under the 2016 agreement. The honorarium was paid in two equal instalments – half at the beginning of the season and half at the end of the season.

On 9 October 2016, the club ended Mr Grinholz's coaching role and did not pay him the second instalment of the 2016 honorarium, on the grounds that he had forfeited a game without appropriate approval.

Mr Grinholz made an unfair dismissal application to the Fair Work Commission under s394 of the FW Act. The club objected to the application on the grounds that Mr Grinholz was a volunteer and therefore was not entitled to an unfair dismissal remedy under the FW Act.

## Indicia to be considered an employee

The issue in contention was whether or not the essential character of the relationship was one of an employee-employer relationship.

Commissioner Roe considered the employee indicia as identified in *Abdalla v Viewdaze Pty Ltd t/a Malta Travel*<sup>2</sup> and subsequently in *Jiang Shen Cai t/a French Accent v Do Rozario*.<sup>3</sup>

The relevant criteria to be considered are whether the:

- employer exercises, or has the right to exercise, control over the manner in which work is performed, the location and hours of work etc.

If a paid volunteer is sacked, can they be considered an employee for the purposes of an unfair dismissal action? Report by **Sara McRostie** and **Matthew Giles**.



- employee works solely for the employer
- employer advertises the goods or services of its business
- employer provides and maintains significant tools or equipment
- employer can determine what work can be delegated or sub-contracted out and to whom
- employer has the right to suspend or dismiss the worker
- employer provides a uniform or business cards
- employer deducts income tax from remuneration paid
- employee is paid by periodic wage or salary
- employer provides paid holidays or sick leave to employees
- work does not involve a profession, trade or distinct calling on the part of the employee
- work of the employee creates goodwill or saleable assets for the employer's business
- employee does not spend a significant portion of their pay on business expenses.

#### Factors indicating Mr Grinholz was an employee

The commission found the club exercised control over the manner, location and hours of work performed by Mr Grinholz. It also required that he promote the club, wear its uniform, participate in personal development, meet the club's performance criteria, and comply with its code of conduct and other employment policies.

#### Factors indicating Mr Grinholz was a volunteer

The commissioner found that Mr Grinholz did not receive a periodic wage and the payment to him of an honorarium for expenses was reasonably proportionate to his likely out-of-pocket expenses. Further, no income tax was deducted and payment to Mr Grinholz was by invoice, with his Australian Business Number and goods and services tax not deducted.

Mr Grinholz also did not receive paid annual or personal leave during the engagement.

#### The essential character of the relationship

Commissioner Roe concluded that Mr Grinholz's circumstances could "point both ways" and did not "yield a clear result".

Given the circumstances, he said the focus should be on whether the essential character of the arrangement is more like that of an employee or volunteer.

In this instance, Commissioner Roe was satisfied the mutual intention of the parties in the signed contracts was clearly to establish a volunteer relationship and not an employee relationship. The level of control over the work performed by Mr Grinholz was not inconsistent with a volunteer relationship and the contract had other legitimate purposes, including protecting the coaching standard, the reputation of the club and the interests of the young people participating in sporting activities.

Had the honorarium been an amount of \$20,000 or more, Commissioner Roe said he could not be satisfied that the honorarium was purely to cover expenses. Consequently, Commissioner Roe held Mr Grinholz was a volunteer and dismissed the application.

#### Lessons learned

The decision reinforces the importance of having a written agreement in clear and certain terms, which sets out the character of the working arrangement. For not-for-profit organisations, this judgment confirms that a strong level of control over the work to be performed and the standard of that work is not necessarily inconsistent with a volunteer relationship, and that the amount of an honorarium should be reasonably proportionate to the volunteer's costs of performing the role.

Sara McRostie is a partner and Matthew Giles is a lawyer at Sparke Helmore Lawyers.  
Image credit: ©iStock.com/Halfpoint

#### Notes

<sup>1</sup> Volunteering Australia. 2015. 'Key facts and statistics about volunteering in Australia', [volunteeringaustralia.org](http://volunteeringaustralia.org) > Research and advocacy > Volunteering facts.

<sup>2</sup> (2003) 122 IR 215, [34].

<sup>3</sup> (2011) 215 IR 235, [30].

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