



## Volunteer deemed 'worker' under Anti-Bullying laws

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### Case Review - Benjamin Legge v Barnardos Australia

Benjamin Legge, a foster carer under arrangements with Barnardos Australia (**'Barnardos'**), contends that he has been subjected to workplace bullying by case managers and other managers at Barnardos Australia. He filed an application in the Fair Work Commission (FWC) seeking orders to stop the bullying.

Barnardos denied the allegations and subsequently raised a jurisdictional objection regarding whether Mr Legge was able to bring a stop-bullying application as he was not a "worker".

This case required Commissioner Hampton to determine whether Mr Legge was "a worker" for Barnardos Australia and whether he was able to bring a stop-bullying application under the *Fair Work Act 2009* (**'FW Act'**).

## Definition of 'a worker' for the purposes of a stop-bullying application

To bring a stop-bullying application under the FW Act, a person must be a worker as defined under s7 of the *Work Health and Safety Act 2011* (**'WHS Act'**). the WHS Act defines a worker as follows:

### 7 Meaning of worker

(1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:

1. an employee; or
2. a contractor or subcontractor; or
3. an employee of a contractor or subcontractor; or
4. an employee of a labour-hire company who has been assigned to work in the person's business or undertaking; or
5. an outworker; or
6. an apprentice or trainee; or
7. a student gaining work experience; or
8. a volunteer; or
9. a person of a prescribed class.

Commissioner Hampton referred to the case of "[Bibawi v Stepping Stone Clubhouse Inc t/a Stepping Stone & Others](#)" which identified two elements:

1. the person must carry out work; and
2. the work must be carried out for a person conducting a business or undertaking ('PCBU').

## The applicant arguments

Mr Legge contended that he is a worker in the form of a volunteer or alternatively, in the form of a subcontractor or outworker.

He highlighted the key differences between foster caring and parenting which included attending case management meetings, reporting to Barnardos, mandatory engagement with the foster care agency and departmental specialists, and transporting children to be in contact with birth parents.

Features of a working relationship between Mr Legge and Barnardos were also highlighted by showing that work was performed for Barnardos and that Mr Legge was:

- recruited, assessed, trained and supervised by Barnardos;
- required to act in accordance with the Carer Handbook issued by Barnardos;
- subjected to annual reviews;
- obligated to communicate travel plans, permitting Barnardos to see the children at all times, and seek approval for ear piercing (of the child); and
- subjected to further requirements such as a ban on smoking.

Mr Legge further outlined matters which indicated an employment relationship, including:

- an application and assessment process;
- undertaking investigations;
- allowing entry to their home to conduct home visits;
- payment of an allowance per child and reimbursements;
- seeking permission to travel with the children; and
- a ban on smoking which is likened to a smoke-free workplace policy.

Mr Legge concluded his arguments by indicating that there was a 'symbiotic relationship' between Barnardos and himself. This was because Barnardos could not operate at its current capacity without foster carers to perform the work.

## The respondent arguments

Barnardos contended that Mr Legge was neither a volunteer nor an outworker or subcontractor that performed work for Barnardos. The authority for Mr Legge to be a foster carer was provided by the Director-General of the Community Services Directorate of the ACT Government ('D-G') and not by Barnardos.

Barnardos argued that there was no employment contract between the parties as the elements of 'intention to create legal relations' and 'consideration' could not be established.

In relation to the first element ('intention to create legal relations'), it was argued that Barnardos' involvement with Mr Legge 'is properly understood as part of a statutory context under *the Children and Young Persons Act 2008* (ACT) ('CYP Act') and not as a contractual context'.

In relation to the second element ('consideration'), it was argued that no consideration was provided in exchange for the work performed by Mr Legge.

## Considerations when determining if Mr Legge was 'a worker'

The application and process including interviews, background checks, training and reviews are all conducted by Barnardos.

A Foster Carer Agreement ('FC Agreement') was entered into between the parties and was described as being 'a working agreement for the provision of foster care services for children and young people placed with Foster Carer (sic)'. The FC Agreement included an internal appeal/complaints process.

Various dealings with the staff engaged by Barnardos occurred.

Requirements were in place in addition to those approved by the D-G. This was a reference to a smoking ban.

Barnardos established and applied some criteria for approval and operational requirements beyond those expressly required by the CYP Act. This provided some important additional context in which the work was performed.

Barnardos had the power to decide the nature of the care that the children were to be provided, including determining which foster carer was to be utilised.

Mr Legge was covered by the public liability policy of Barnardos.

## Determination of Commissioner Hampton

Commissioner Hampton, in the context of Mr Legge and his relationship with Barnardos, held that:

1. Mr Legge was performing work in his capacity as a volunteer for Barnardos in its role as a PCBU;
2. Mr Legge is a worker within the meaning of s 7(1) of the WHS Act and as a result, is a worker for the purposes of s 789FC(2) of the FW Act; and
3. the matter was to be allocated to a locally-based member of the Fair Work Commission to deal with on the merits, either by way of conciliation or determination.

## Conclusion

Stop bullying applications can be complex as a number of issues need to be considered. If you're [experiencing bullying in the workplace and require advice or assistance, please get in touch with the Hall Payne employment law team](#).

This article was written by [Principle in employment law, Luke Forsyth](#) and Research Clerk, [Kelvin Lee](#).

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