



Floats like an intern, stings like an employee

The legality of unpaid internships

I don't get paid, yet the firm still charges me out at \$150/hour. The firm is gaining a considerable financial advantage from me being there... I will be disappointed if this placement doesn't increase my employability. — Anonymous Intern¹

The issue of unpaid internships, both in the legal sector and elsewhere, can be polarising. A 2012 survey found that 50 per cent of law student respondents had undertaken unpaid work experience, with responses ranging from 'slavery' to 'valuable learning experience'.²

In both Australia and the United States of America, the 'intern economy' is flourishing.³ Yet on both sides of the Pacific, the legalities of offering workplace experience without remuneration are uncertain. In the US, several high-profile entertainment and publishing companies have faced law suits for failing to pay interns,⁴ while one such case was recently decided by the Australian Federal Circuit Court in *Fair Work Ombudsman v Crocmedia Pty Ltd*.⁵

This question has particular importance for both law firms and employment lawyers. As demonstrated by the Fair Work Ombudsman-commissioned survey, unpaid internships and work experience in the legal industry are commonplace. Although the specific circumstances will be paramount to determining the legality of such arrangements, unwary firms could find themselves prosecuted by the Ombudsman. For practitioners of employment law, the relevant law is complex and jurisprudence on this topic is still developing. If the litigious trend in the US finds its way to Australian shores, disgruntled interns could fire a barrage of legal action at unsuspecting employers.

Moral Dilemma

The internship issue is, as Riethmuller J acknowledged in *Crocmedia*, 'a difficult topic'.⁶ When interns actively apply for these unpaid roles, and employers act "charitably" by allowing them the opportunity to gain essential experience, it is difficult to feel sympathetic. This is particularly so when it is the intern primarily benefiting from the arrangement — perhaps in an observational role where they are not producing any substantive work for the employer.

Yet as the boundary between internship and employment blurs, broader moral issues arise. In a 2013 report for the Fair Work Ombudsman, respected employment law academics Andrew Stewart and Rosemary Owens considered this dilemma, observing:

An intelligent and articulate graduate from a wealthy family who opts to do months of unpaid work in order to break into their chosen profession may not seem very vulnerable. They may not seem to be a "victim" of exploitation. But the point of... taking action is not necessarily to protect them as an individual. It is to assert a principle — a fair day's pay for a fair day's work — that underpins our system of minimum labour standards.⁷

While this "moralising" of the issue may not sit comfortably with everyone, Stewart and Owens' approach has helped inform the Ombudsman's response to the growing intern economy in Australia. Their decision to prosecute in *Crocmedia* despite the employer's cooperation speaks volumes as to the organisation's determination to pursue the 'strong public interest in deterring employers from significantly underpaying young workers' entitlements through unpaid work arrangements',⁸ and recent success will only encourage further litigation.

Accordingly, employers of all shapes and sizes would be well advised to think carefully before entering into an unpaid internship or work experience arrangement. Characterised properly and undertaken in a legally-compliant manner, such arrangements can be mutually beneficial: offering much-needed experience for the individual and giving the employer an opportunity to train and assess a potential future employee. Yet following *Crocmedia*, the risks attaching to a cavalier approach have significantly increased.

An Employee?

As the *Fair Work Act 2009* (Cth) predominantly provides protection to 'employees',⁹ the first step in determining the legality of an unpaid internship is to ascertain whether an employment relationship exists. Terminology in this area is apt to mislead: "unpaid internship", "paid internship" and "work experience" all allude to something that is less than "full employee" status, but with little further indication as to their content.¹⁰ These descriptors, though, are not legal terms of art — they have no statutory or common law definition. Instead, it is better to understand the situation as involving three relevant categories: (1) *employees*, (2) *individuals undertaking vocational placements* and (3) *volunteers*.¹¹

Where an employment relationship exists, the *Fair Work Act* provides that an employee is entitled to the minimum wage and conditions as set out in the National Employment Standards and any relevant award or enterprise agreement. Thus if, from an objective assessment of all the circumstances, an individual formally labelled as an 'intern' is, in fact, found to be an employee, the employer could be at risk of claims brought either by the individual or the Ombudsman.

Determining whether someone is an employee is a nebulous common law concept unadulterated by the *Fair Work Act*. As first year contract students will recall, there must be, among other things,¹² the requisite intention to create legal relations, sufficient but not necessarily adequate consideration,¹³ and the contract must be *of service* (employment) as opposed to *for services*: not, therefore, an independent contractor relationship.¹⁴

Intention to Create Legal Relations

The first step, as Rowland J identified in *Pacesetter Homes*, 'should be to find whether there was an intention to create legal relations.'¹⁵ This involves 'a voluntary assumption of a legally enforceable duty' by both parties,¹⁶ ascertained objectively by taking into account 'the subject-matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances.'¹⁷ In the High Court's formative judgment of *Ermogenous*, for example, it was held that the necessary intention was evident in the relationship between an archbishop and his church, notwithstanding arguments to the contrary by the putative employer.¹⁸

In the internship context, locating an intention to create legal relations may prove difficult in short-term arrangements lacking any specific obligation on either party. However, more longstanding arrangements may give rise to the necessary intention. While in *Pacesetter Homes* the lengthy work experience undertaken by the original plaintiff did not give rise to an employment contract, Rowland J nevertheless observed:

In cases where the length of work experience is longer and where more work is required to be undertaken than when the period that the work experience person is able to observe the teacher is of a short duration, and where the tuition is in fact scant, then the real intention may be that a person is an employee and a contract of employment may be found, notwithstanding that the label "work experience" is applied to the arrangement.¹⁹

Employers taking on unpaid interns may therefore wish to create a document detailing the relevant particulars, stating in clear language 'that the parties did not intend for the arrangement to be [legally] binding' and signed by both parties.²⁰ However, such evidence will not be determinative,²¹ and the test is, ultimately, one of objective reality rather than subjective intentions.

Consideration

Consideration is an essential element of any contract.²² In the employment relationship context, Mark Irving suggests that an employee's usual consideration will be 'the promise to serve the employer for the duration of the contract in accordance with the obligations imposed by the contract', while an employer will promise to both 'provide remuneration for that service' and 'employ the employee for the duration of that contract.'²³ Accordingly, it is often said that '[t]he element of consideration which is essential to a contract of employment is the promise by the presumptive employer to pay for service as and when the service is rendered.'²⁴

A problem therefore arises for unpaid interns attempting to establish the necessary conditions of an employment relationship: what is the consideration? While some cases have held that a contract can exist even 'in the absence of wages,'²⁵ it is unclear what form consideration would take in the traditional internship situation. In *Edmonds v Lawson*, the English Court of Appeal held that training and education received by a 'pupil barrister' (what we might call a reader) from members of chambers could in the appropriate circumstances constitute consideration.²⁶ Thus perhaps the knowledge gained whilst undertaking an internship may be sufficient to fulfil this key requirement.

While case law from industrial relations tribunals is 'inconclusive,'²⁷ Stewart and Owens note that 'there is no reason in principle why the requirement for consideration in an employment contract could not be satisfied by the provision of training or experience, or an opportunity to make contacts or to practise skills, in return for the performance of whatever kind of work or service the employer may bargain to obtain.'²⁸ Without judicial direction to the contrary, this view seems sound, albeit not entirely persuasive.

'Mutuality of Obligation'

Another factor informing the above analysis, particularly the question of consideration,²⁹ is whether there exists a 'mutuality of obligation,'³⁰ which the High Court identified in *Dietrich v Dare* as 'essential to the formation' of a contract of service due to its 'bilateral nature.'³¹ While that case was peculiar and turned on its facts,³² *Dare* nevertheless suggests that where there is no minimum level

of obligation on the intern to attend the workplace, it may be difficult to find that a contract exists.

In sum, notwithstanding that 'it is extremely unclear whether most intern relationships will be classified as employment relationships,'³³ several contract law indicia will govern whether or not such a relationship is objectively considered to be on foot. There no doubt exists an ill-defined continuum between undeniable employment relationships on one hand and situations which lack one or more of the essential contractual requirements on the other, and individual cases will very much turn on their specific circumstances.

In the final analysis, determination will likely hinge on the extent to which 'the arrangement involves productive work rather than just meaningful learning, training and skill development.'³⁴ While work experience cannot act 'as a smokescreen for genuine employment,'³⁵ nor can some degree of training 'alter the underlying nature of the relationship,'³⁶ internships that are genuinely educational and involve no more production of substantive work than necessary to further such education will likely be legal. However, where interns are undertaking activities indistinguishable to that of employees — such as, for example, the anonymous law firm intern quoted above — a court may consider an employment relationship to exist, with a variety of ensuing consequences.

Vocational Placement Exception

Amongst the maelstrom of confusing case law, the *Fair Work Act* provides a seemingly simple exception to this problem. Section 13 excludes from the meaning of 'national system employee' an 'individual ... on a vocational placement', defined elsewhere in the *Act* as a placement that is:

- » undertaken with an employer for which a person is not entitled to be paid any remuneration; and
- » undertaken as a requirement of an education or training course; and
- » authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.³⁷

Unfortunately, even this exception 'is a complex one and, with respect, not particularly well drafted.'³⁸ There is a

scarcity of applicable case law, and the few relevant decisions have provided little element-by-element analysis.³⁹ What, for example, does it mean for a placement to be authorised under a law or administrative arrangement?⁴⁰

Regardless of these difficulties, it is relatively evident that internships organised through schools, universities or TAFEs as part of a course of study will be covered by this exception. Similarly, law firm placements undertaken towards the completion of a Graduate Diploma of Legal Practice or equivalent appear to satisfy the definition,⁴¹ provided the placement is unpaid. A prudent employer might therefore consider aligning their internship program with a local educational institution to minimise risk.

Volunteers

Finally, what of volunteers? Particularly, what prevents an employer labelling an intern as a volunteer and thereby attempting to avoid the possible liability identified above?

Case law distinguishing between volunteers and employees, comparative to that regarding independent contractors and employees, is underdeveloped. In their report for the Ombudsman, Stewart and Owens defined volunteering as ‘unpaid work that is performed with the primary purpose of benefiting someone else or furthering a particular belief’, such as assisting at charities, churches, sporting clubs etc.⁴² While they admitted that the ‘line can become blurred’,⁴³ cases such as *Teen Ranch* appear to utilise the concept of altruism as a determinative factor in ascertaining who is and is not a volunteer.⁴⁴

In that dispute, the New South Wales Court of Appeal held that the relationship between a religious holiday camp and an individual was voluntary rather than contractual in nature. Mahoney JA noted that ‘[a]ltruism was a substantial motive’,⁴⁵ and accordingly ‘[t]he obligations upon the parties lay in the moral rather than the contractual sphere’. The individual was unpaid, but received food and accommodation in return for their service. Nevertheless, there was ‘no obligation to attend at any particular time or at all’,⁴⁶ and these various factors contributed to a conclusion that no contract was on foot between the parties.

While altruism may be a somewhat amorphous test, it seems unlikely that a court would find an unpaid intern at a for-profit commercial entity to be assisting for altruistic reasons. Thus labelling an intern as a volunteer, and perhaps even asking them to sign a statement or declaration to that effect, will seemingly fail if it is merely an attempt to disguise the proper nature of the relationship. To echo the oft-cited words of Gray J in *Re Porter*,⁴⁷ if it has all the features of a rooster, the employer cannot insist it is in fact a duck and demand everyone recognises it as such. Gray J’s wisdom ultimately extends to the majority of issues discussed in this article: courts are unlikely to be more by the ‘elaborate protestations’ of feigned documentary evidence, but will instead consider the practical reality of the situation.⁴⁸

Other Potential Liability

To briefly step out from the *Fair Work* umbrella (which, at this point, seems to be letting it rain), it is important to remember that potential liability may exist in a workplace situation regardless of an individual’s exact employment status. The *Work Health and Safety Act 2011* (ACT), for example, extends to any person who ‘carries out work in any capacity’,⁴⁹ inclusive of ‘a student gaining work experience’ or ‘a volunteer’. The *Discrimination Act 1991* (ACT), meanwhile, defines employment as including ‘work as an unpaid worker’.

Accordingly, employers are not immune from such obligations to non-paid workers, regardless of their formal classification. It follows that usual processes — safety inductions, proper investigative procedures in the case of an incident — should be adhered to, particularly because the paucity of other accessible options for aggrieved non-employees might mean these avenues are pursued with more vigour than otherwise.

Crocmedia

Several of the internship-related issues identified above were raised (albeit cursorily) by the Federal Circuit Court in January, following action taken by the Fair Work Ombudsman against Victorian sports media company Crocmedia. There, two university students performed unpaid work experience for three weeks, after which they were kept on for an extended period to undertake a range of radio-

related activities: sourcing interviews, cutting audio, delivering programming and monitoring social media. They regularly worked weekend shifts starting around midnight and finishing at dawn, sometimes working up to seven days out of ten.⁵⁰ For this work they received payments between \$75 and \$120 classified as ‘reimbursement for expenses’.⁵¹ One stayed for six months, the other for 15.

Because the respondent admitted that their actions constituted a failure to pay employees in accordance with the applicable award, and hence a breach of the *Fair Work Act*, the judgment did not consider at length the various legal questions involved. Instead, it centred on the requisite penalty, with Riethmuller J ultimately ordering Crocmedia to pay \$24,000 for four different groupings of offences. This penalty reflected ‘the earlier rectification, remorse and full cooperation, genuine corrective action and lack of any previous breaches’.⁵²

Conclusion

In the wake of *Crocmedia* and a landmark 2013 report, it appears the Fair Work Ombudsman is “getting tough” on unpaid internships. Further legal action initiated by the Ombudsman and, if the American trend is followed, aggrieved former interns would not be unexpected. As a result, employers should be highly cautious about engaging workers on anything less than an award-compliant basis. Brief periods of observatory work experience or legitimate vocational placements should survive scrutiny, but utilising unpaid interns to produce valuable work over a lengthy period is likely to fly close to the sun.

In the final sentence of his *Crocmedia* judgment, Riethmuller J sounded an ominous warning to companies engaged in this type of conduct.⁵³ He cautioned that the relevant penalties ‘are likely to increase significantly over time as public exposure of the issues in the press will result in respondents not being in the position of being able to claim that a genuine error of categorisation was made’.⁵⁴

Ignorance, it seems, is no longer bliss.

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Endnotes

- 1 Quoted in Andrew Stewart and Rosemary Owens, 'Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia' (Report for the Fair Work Ombudsman, January 2013) appendix E, 7.
- 2 Ibid 7–10.
- 3 Eric Fink, 'No Money, Mo' Problems: Why Unpaid Law Firm Internships are Illegal and Unethical' (2013) 47 *University of San Francisco Law Review* 435, 435.
- 4 See, eg, Alan Yuhas, 'Condé Nast pays interns \$5.8m to settle low-pay lawsuit', *The Guardian* (online), 15 November 2014.
- 5 [2015] FCCA 140 (29 January 2015) ('*Crocmedia*').
- 6 Ibid [45].
- 7 Stewart and Owens, above n 1, 254.
- 8 Fair Work Ombudsman, 'Company fined \$24,000 over unpaid work scheme' (Media Release, 29 January 2015).
- 9 See, eg, s 15.
- 10 Stewart and Owens, above n 1, 20.
- 11 Clara Jordan-Baird, 'Experience Essential, Remuneration: None — The Legal Status of Internships (Working Paper No 13, Centre for Employment and Labour Relations Law, University of Melbourne, June 2013) 3–9.
- 12 See generally *Pacesetter Homes Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1994) 57 IR 449, 453 ('*Pacesetter Homes*').
- 13 Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 111.
- 14 *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308, 310 (Handley JA).
- 15 *Pacesetter Homes* (1994) 57 IR 449, 454.
- 16 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 105 [24] (Gaudron, McHugh, Hayne and Callinan JJ), quoting *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 457 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).
- 17 (2002) 209 CLR 95.
- 18 Ibid.
- 19 (1994) 57 IR 449, 455.
- 20 Irving, above n 13, 119.
- 21 Ibid.
- 22 Ibid 105.
- 23 Ibid 106–7.
- 24 *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 114; *Forstaff v Chief Commissioner of State Revenue* (2004) 144 IR 1 [91] (McDougall J).
- 25 Stewart and Owens, above n 1, 131.
- 26 [2000] 2 WLR 1091.
- 27 Jordan-Baird, above n 11, 7.
- 28 Stewart and Owens, above n 1, 132.
- 29 Irving, above n 13, 107.
- 30 *Dietrich v Dare* (1980) 30 ALR 407, 411 (Gibbs, Mason and Wilson JJ); Stewart and Owens, above n 1, 134.
- 31 (1980) 30 ALR 407, 411.
- 32 Stewart and Owens, above n 1, 137.
- 33 Jordan-Baird, above n 11, 8; see also Stewart and Owens, above n 1, 152.
- 34 Fair Work Ombudsman, 'Unpaid Work' (Fact Sheet, February 2014) 1–2.
- 35 Jordan-Baird, above n 11, 8.
- 36 *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 (12 December 2014) [101] (White J).
- 37 Section 12.
- 38 Stewart and Owens, above n 1, 77.
- 39 *Corner v SkyCity Adelaide Pty Ltd* [2010] FWA 9259 (7 December 2010); *Sharp v JS Plumbing Ltd* [2011] FWA 7076 (21 October 2011).
- 40 Stewart and Owens, above n 1, 78–9.
- 41 Ibid 80.
- 42 Ibid 5.
- 43 Ibid.
- 44 (1995) 87 IR 308.
- 45 Ibid 308 (Mahoney JA).
- 46 Ibid 309 (Handley JA).
- 47 *Re Porter; ex parte Transport Workers Union of Australia* (1989) 34 IR 179, 184.
- 48 *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046 (13 October 2009) [104] (Sedley LJ); Stewart and Owens, above n 1, 120.
- 49 Section 7 (emphasis added).
- 50 Michelle Innis, 'Australia challenges unpaid internships', *Sydney Morning Herald* (online), 10 November 2014.
- 51 *Crocmedia* [2015] FCCA 140 (29 January 2015) [13].
- 52 Ibid [42].
- 53 Ibid [27], [46].
- 54 Ibid [46].

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