

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

**Matter Number:** 2804/19  
**Applicant:** Olivia Bell Guilbert  
**Respondent:** Glenworth Valley Horse Riding Pty Ltd  
**Date of Determination:** 6 August 2019  
**Citation:** [2019] NSWGCC 268

The Commission determines:

1. The applicant was not a “worker” in the employ of the respondent within the meaning of section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* as at 9 April 2010.

The Commission orders:

2. There will be an award for the respondent.
3. No order as to costs.

A brief statement is attached to this determination setting out the Commission’s reasons for the determination.

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

Abu Sufian  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Olivia Bell Guilbert (the applicant) is 27 years old and was allegedly employed by Glenworth Valley Horse Riding Pty Ltd (the respondent).
2. There is no dispute that the applicant sustained injury to her thoracic spine when she was dismounting a horse that reared and bolted on 9 April 2010. She was incapacitated and has required medical treatment as a consequence of her injury.
3. On 2 November 2014, the applicant completed a claim form alleging that she suffered fractures in her thoracic spine as she was dismounting from a horse that reared and bolted on 9 April 2010. She alleged that she employed by the respondent for 30 hours per week during school holidays on Saturdays and Sundays from 7.00 am to 5.00 pm. She indicated that she did horse riding, cleaning and washing.
4. On 16 March 2015, QBE Workers Compensation (NSW) Ltd (the insurer) issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant was a “deemed worker” of the respondent. Curiously, it cited s 4 of the 1998 Act instead of cl 2 of Sch 1 of the 1998 Act.
5. On 31 May 2017, the applicant’s solicitor served a notice of claim on the insurer in respect of lump sum compensation.
6. On 17 August 2017, the insurer issued a further notice pursuant to s 74 of the 1998 Act, disputing that the applicant was a “worker” in the employ of the respondent in accordance with s 4 of the 1998 Act. It denied that the applicant was entitled to lump sum compensation and disputed that medical treatment was reasonably necessary.
7. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 6 June 2019, the applicant claims lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) due to injury sustained to her thoracic spine on 9 April 2010.

### PROCEDURE BEFORE THE COMMISSION

8. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied.
9. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

### ISSUES FOR DETERMINATION

10. The parties agreed that the following issues remain in dispute:
  - (a) whether the applicant was a “worker” in the employ of the respondent on 9 April 2010 - s 4 of the 1998 Act, and
  - (b) quantification of the applicant’s entitlement to lump sum compensation - s 66 of the 1987 Act.

11. The parties agreed that in the event that the applicant succeeded in the dispute, her claim for lump sum compensation should be referred to an Approved Medical Specialist (AMS).

## **EVIDENCE**

### **Documentary Evidence**

12. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application and attached documents;
  - (b) Reply and attached documents, and
  - (c) Application to Admit Late Documents received on 9 July 2019.

### **Oral Evidence**

13. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

## **REVIEW OF EVIDENCE**

### **Applicant's statement**

14. The applicant provided a statement on 6 June 2019. She indicated that she had an interest in horses when she was a teenager and she volunteered to help with the horses from year 7 to year 9 when she lived on the Central Coast, and then during holidays when she was attending boarding school in Bathurst. This enabled her to engage in her interest in horse riding and be involved in horse riding activities. She was able to be around horses and have free horse rides and horse riding lessons.
15. The applicant conceded that she may have had to sign a form as a volunteer, but she could not recall what the form said as she was only 13 years old. She did not know whether her parents had signed any forms and she confirmed that she was not asked to sign any documents when she turned 18 years old.
16. The applicant stated that there was no induction when she first attended. She could not recall attending any meetings to discuss safety issues or to explain her duties. Sometimes there were informal briefings for the day when the volunteers were advised about the number of customers attending and other information.
17. The applicant stated that they were expected to be in attendance at 7.00 am each day. Late comers were reprimanded and depending on the number of volunteers, they might not have been allowed to do any work that day. There was no guarantee that volunteers would be engaged and it was necessary to book to be a volunteer a few days in advance.
18. The applicant indicated that she was initially told to wear a red shirt, comfortable trousers and boots, but she was later required to purchase a green shirt. She conceded that she did not receive any wages but received the benefit of free trail rides and horse riding lessons.
19. The applicant advised that her duties included saddling the horses in preparation for trail rides, going on trail rides with guests, feeding horses, cleaning bird cages and toilets, washing saddle blankets, cleaning riding helmets, helping in the café, restocking the drink machine and assisting staff members.
20. The applicant stated that the yard manager would direct what work had to be done. There were usually six volunteers on duty, or ten volunteers if there was a tourist bus coming. They had to report to the yard manager after completing jobs.

21. The applicant stated that volunteers were expected to work until 5.30 pm and anyone who left early would usually not be allowed to come back. She recalled being yelled at when she was not busy.
22. The applicant indicated that on occasions, she would be directed to participate in lessons as if she was a customer. Customers paid about \$50 for an hour lesson. She could not choose to do this job and she would often be involved all day in six or so lessons.
23. The applicant stated that on most occasions, she was allowed to go on trail rides for free. This was her reward for undertaking work and if these benefits were not available, she would not have done the volunteer work. There was an expectation that she could have free lessons and trail rides in exchange for performing the work tasks as directed by the yard manager.
24. The applicant stated that on 9 April 2010, she was assigned to help with a trail ride. The manager and his manager spoke to the group and then they set out. After 30 minutes, she stopped to adjust the girth strap of her saddle when the horse suddenly turned and bolted. She fell backwards, landed heavily on her upper back and felt significant pain.
25. The applicant stated that the guide reassured her that she was okay and told her to resume the ride, but she declined because she was in extreme pain. They waited for 20 minutes until the next group arrived and the guide radioed for assistance. She was driven back to the office and her mother came to pick her up.
26. The applicant stated that she was diagnosed with fractures in her thoracic spine. She was off school for five weeks. She completed her HSC and enrolled in a physical education degree at Charles Sturt University. She had permanent lifting restrictions and was unable to ride horses or play a full range of sports. She was unable to play touch football and she had problems playing soccer. She had not ridden her own horse since her injury. She was not receiving any treatment as she could not afford the cost.
27. The applicant's description of the incident was confirmed in the incident report completed by the guide, Lara Fitzgerald, on 9 April 2010.

#### **Report and clinical notes of Dr Lee and Dr Jamieson**

28. Dr Lee reported on 7 September 2015. He confirmed that he saw the applicant on 9 April 2010, when she complained of pain in her thoracic spine. X-rays confirmed that she had suffered fractures at three levels. On 1 July 2010, Dr Wee recorded that she was pain-free and she was cleared to play soccer.
29. Dr Lee stated that the applicant would have been incapacitated for at least six weeks and there were no restrictions in respect to fulltime employment.
30. The clinical notes of the Erina Medical Centre commence on 14 August 2002 and conclude on 12 May 2014. They are consistent with Dr Lee's report.

#### **Report of Dr Jamieson**

31. Dr Jamieson reported on 17 September 2015. He confirmed that he initially saw the applicant on 16 August 2011, when she complained of on-going pain in her upper back following the fall from a horse in 2010. She was still playing regular soccer and touch football, but her pain was impacting on her ability to undertake the training required for her university course.
32. Dr Jamieson diagnosed a compression fracture of T7 and T8 as a result of the horse riding incident. He stated that her on-going pain had impacted on her ability to participate in her full activities and he recommended further assessment by a specialist.

33. A CT scan dated 18 August 2011 confirmed that the applicant had partly healed fractures of the T7 and T8 vertebrae.

#### **Reports of Chiropractic Health and Wellness Centre and Hahnemann Homeopathic Medicine Centre**

34. The applicant initially attended the Chiropractic Health and Wellness Centre on 16 September 2013. It was noted that the applicant worked as a gymnastics coach for the university and she had been troubled by thoracic, neck and lumbar pain for three years since her horse riding accident.
35. The applicant received treatment from George Dimitriades of the Hahnemann Homeopathic Medicine Centre from February 2015 to August 2015. In his report dated 15 October 2015, Mr Dimitriades confirmed that he had treated the applicant for her thoracic pain, headaches and insomnia. He noted that her condition had improved.

#### **Report of Dr O'Keefe**

36. Dr O'Keefe reported on 22 February 2017. He recorded that the applicant had worked as a volunteer for four or five years. She was thrown from the back of a horse onto her back and neck and had since been troubled by problems with her hips, knees and ankles, together with pain in her thoracic spine radiating to her neck. X-rays had confirmed fractures of the T5, T6 and T7 vertebrae. She had completed her university degree and she was working as a casual teacher in Bathurst. She was still able to ride a horse that she owned.
37. Dr O'Keefe diagnosed three crush fractures as a result of the work injury and he assessed 15% whole person impairment of the applicant's thoracic spine.

#### **Report of Associate Professor Miniter**

38. Associate Professor Miniter reported on 17 July 2017. He recorded a consistent history and noted that the applicant had continued to experience pain in her thoracic spine, upper part of her lumbar spine and in the root of her neck. She was unable to perform any heavy lifting and she felt that she could not work in her usual occupation as a PE teacher. She was not involved in any significant exercise.
39. Associate Professor Miniter diagnosed a fracture of the thoracic spine involving two levels as a result of the horse riding incident. Although he had not seen the actual CT scan, the Associate Professor assessed 5% whole person impairment of the applicant's thoracic spine.

#### **Statement of Jay Vandescheur**

40. Jay Vandescheur, a yard manager at the respondent, provided a statement on 27 July 2017. He advised that there were usually four managers to whom the volunteers reported. He stated that the respondent had a programme that allowed six to eight volunteers, aged from 12 years to adults, to come and work on the property. The applicant and other volunteers reported to him or staff members and were told what duties they were required to perform.
41. Mr Vandescheur stated that the volunteers usually attended on weekends and during school holidays. There was no guarantee that they would ride a horse every day and there were other duties that they carried out. They encouraged the volunteers to have riding lessons if their ability was minimal, and the respondent tried to get all of the volunteers a ride at least once per day on a suitable horse, depending on the availability of the horses. Those who did not have much experience were allocated other jobs.

42. Mr Vandescheur indicated that the volunteers' duties involved leading the horses out of the yards and giving them to the customers, greeting customers, shovelling and removing manure from the yards, assisting staff on guided rides, filling drink machines, greasing saddles, filling feed bags, brushing girths, repairing bridles, cleaning helmets, gardening, seeping, mopping and cleaning windows and furniture.
43. Mr Vandescheur stated that the managers supervised the volunteers to a certain degree to make sure that the jobs were done, but they did not tell them how to do things or watch them whilst they worked. The managers or other experienced volunteers would show the volunteers how to do the tasks if they had not done them before.
44. Mr Vandescheur stated that the volunteers usually worked from 7.30 am to 5.00 pm on Saturdays and Sundays, and from 8.00 am to 5.00 pm during school holidays. They had a break for lunch between rides and sometimes they did back to back rides. The staff did not get lunch breaks. Most of them worked their full shifts. They were not reprimanded if they arrived late or wanted to leave early.
45. Mr Vandescheur stated that the volunteers did not provide their own tools or equipment. Riding helmets were supplied if they did not own one. The volunteers were not paid any wages and the respondent did not offer lessons or rides as a payment or a reward for volunteering. The volunteers only went on rides if their assistance was required. The managers tried to send a volunteer out on every ride to help the guides, subject to the availability of horses. Some of the more regular volunteers were allowed to participate in gymkhanas held every four months as a reward for their services.
46. Mr Vandescheur indicated that to the best of his knowledge, the applicant did not receive riding lessons in lieu of wages, although she may have had such an arrangement with the previous yard manager, Rose Roberts.
47. Mr Vandescheur stated that the staff wore blue Chambray shirts with the respondent's logo and dark blue polo shirts on weekends. Volunteers were encouraged to purchase red polo shirts from the respondent. The colour later changed to dark green with a yellow or white logo. The applicant wore these shirts.
48. Mr Vandescheur stated that he knew little about the horse riding incident, but he recalled seeing the applicant as a customer in 2012 or 2013. She told him that she was at university and that she was playing soccer.

### **Statement of Karen Papadatos**

49. Karen Papadatos, office manager, provided a statement on 27 July 2017. She confirmed much of the information provided by Mr Vandescheur. She stated that the volunteers performed unpaid duties and tasks. They were required to sign a Volunteer Permission Form and those under 18 years of age required a signed parental or guardian consent.
50. Ms Papadatos stated that volunteers did not need to be experienced, but those who had little or no experience were encouraged to undertake riding lessons. The volunteers had the opportunity to ride suitable horses, if available, but this depended on the number of customers in attendance on any day. There was no guarantee that they would ride a horse every day. They were given tasks around the yard as described in the Volunteer Job Roster.
51. Ms Papadatos stated that the applicant had to perform her duties within set hours as set out in the information sheet. The staff members relied on the eight volunteers who attended each day and if they were late or left early, the staff would be left short-handed. This would disadvantage other volunteers, who would have been able to attend and do an entire shift. She agreed that volunteers would have been reprimanded if they left early or arrived late.

52. Ms Papadatos stated that the volunteers were supervised by the horse riding managers, such as Mr Vandescheur and his predecessor, Rose Roberts, and senior staff members. She denied that the applicant received free horse riding lessons on quieter days in lieu of wages, but conceded that volunteers might help the instructor during lessons. On guided rides, comprising eight to ten customers, volunteers were under the supervision of the guides. She confirmed that the most reliable volunteers were rewarded with the opportunity to ride in gymkhanas and the applicant had done this.
53. Ms Papadatos stated that it was compulsory for volunteers to wear a polo shirt bearing the respondent's logo and the word "volunteer". Her knowledge of the incident was based on information provided to her by other staff members.

#### **Statements of Barton Lawler**

54. Barton Lawler, the general manager, provided signed statements on 22 August 2017 and 5 July 2019. His statements echo those of Mr Vandescheur and Ms Papadatos. He confirmed that the volunteers performed basic tasks and assisted on rides in return for being around horses and gaining knowledge and experience.
55. Mr Lawler stated that interested participants would be sent forms and they were required to sign a horse riding disclaimer. He indicated that the applicant and her parents would have been required to sign one of these forms. He did not have access to this signed form, but he was sure that this document was in the respondent's archives. All customers were obliged to sign the disclaimer before being allowed to ride on a horse.
56. Mr Lawler stated that volunteers were given tasks appropriate to their ages, abilities and experience. It was his recollection that the applicant attended on a regular basis, more so during the school holidays. There was no payment of any wages to volunteers, but the reward or consideration that they received for performing their tasks was in horse rides.
57. Mr Lawler indicated that there was no guarantee, but it was rare that they would not ride a horse every day. The volunteers, who had contributed the most or had been around the longest, were allowed to participate in gymkhanas. They were provided with horses at no cost as some acknowledgment of payment for their services. They were also invited to Christmas parties and rides.
58. Mr Lawler stated that riding the horses was something that the volunteers particularly enjoyed, but some tasks, such as the morning saddle up, were not as enjoyable. The respondent took the view that volunteers could not pick and choose the tasks. He agreed with the applicant's allegation that she received free horse riding lessons in lieu of wages on quieter days was correct and he felt that this was fair.
59. Mr Lawler advised that volunteers had to book in advance to secure a position because there were many applications. They worked quite hard for set hours from 7.30 am to 5.00 pm on Saturdays and Sundays and from 8.00 am to 5.00 pm during school holidays. They would have a lunch break for 30 minutes unless the respondent was very busy.
60. Mr Lawler stated that volunteers could arrive late or leave early and they would not get into trouble for doing so. He felt that the applicant's suggestion that she was reprimanded was a "bit of an exaggeration" and he denied that volunteers were yelled at.
61. Mr Lawler indicated that the respondent was flexible if volunteers started late or finished early. Repeated offenders would be asked why they were late and why they could not be on time, because there were plenty of other volunteers who were prepared to come in on time and do the less enjoyable tasks. They would also be questioned if they were not doing the tasks that they did not like.

62. Mr Lawler stated that the applicant would have reported to and been supervised by the yard manager, who would have directed her to perform certain tasks. She would have been supervised by the guide on trail rides. It was left to the yard manager to determine which volunteers were allowed to ride the horses and this depended on the nature of the rides and the dynamics of the customers. It was compulsory for volunteers to purchase a shirt bearing the respondent's logo that identified them as volunteers.
63. Mr Lawler stated that some volunteers preferred to join group lessons rather than go on a trail ride. It was useful to have volunteers go on rides as they could be used to demonstrate or lead the group. Volunteers were generally asked to assist on rides and there was no expectation of assistance. The managers felt that the volunteers were doing them a favour and they were doing them a favour in return.
64. Mr Lawler stated that some volunteers attended for social reasons, some because their families could not afford a horse and some attended so that they had supervision whilst their parents were at work. Volunteers usually attended on weekends and during school holidays, but sometimes there were no volunteers. The business could still operate without volunteers.

### **Volunteer Job Roster**

65. The Volunteer Job Roster provided a description of the daily and other tasks to be performed by the volunteers. The daily tasks included stocking racks with brochures and forms, sweeping the office, verandah, recreation room and shed, preparing the lorikeet food, watering the gardens, brushing the horses' girths and cleaning up manure.
66. Other tasks undertaken by the volunteers included cleaning away cobwebs, greasing saddles, cleaning windows and polishing furniture, trimming plants and weeding the gardens, washing the girths of the horses, cutting rein ties and fixing bridles, filling drink machines, cleaning and maintaining helmets, scooping out the feed bin and feeding skinny horses.

### **Volunteer Requirements and Conditions**

67. The Information for Volunteers – Requirements and Conditions set out the conditions for acceptance as a volunteer and included a disclaimer that had to be signed by the volunteers or their parents, if they were under 18 years of age. The document warned that horse riding was a dangerous activity and volunteering to work with horses was also dangerous and at the volunteer's risk. The respondent advised that it was unable to supervise volunteers and that volunteers or their parents accepted this.
68. The document welcomed the participants and acknowledged that they attended on a voluntary basis. It set out how to become a volunteer and the conditions upon which they were accepted as volunteers. It explained the need to have an approved helmet and that no formal training would be provided.
69. The document identified the need to book two weeks in advance to be a volunteer. It specified that there was a maximum of five volunteers each day and volunteers would only be accepted for a maximum of two consecutive days per week during school holidays.
70. According to the document, volunteers were expected to follow the requests of staff members and poor behaviour would not be tolerated. They would be obliged to undertake a variety of tasks, some of which were not horse-related. The description of the tasks is similar to that contained in Mr Vandescheur's statement, including assisting staff on guided rides.
71. The document specified that volunteers would not be guaranteed a horse ride. This was at the yard manager's discretion and depended on the availability of horses. Volunteers were not permitted to discuss any issues relating to the business with customers, horse behaviour, accidents or any other information pertaining to the business, and at no time were they give the impression to customers that they were employed by the respondent.



72. According to the document, staff did not have the time to constantly supervise volunteers, so volunteers had to follow all directions given by staff members. If requested to assist on a horse ride, volunteers had to follow the directions given by the guide.
73. The document referred to the set hours of 7.30 am to 5.00 pm on Saturdays and Sundays and from 8.00 am to 5.00 pm during school holidays. Volunteers were expected to wear a particular uniform including red polo shirts, which were available for purchase. They had to supply their own food and drink, and they were permitted to camp in the camping area overnight.

## APPLICANT'S SUBMISSIONS

74. The applicant's counsel, Mr Young, submits that there was a clear intention to create a legal relationship, and if that was the case, the nature of the relationship was consistent with that of a "worker" in accordance with the principles in *Stevens v Brodribb Sawmilling Co Pty Ltd*<sup>1</sup>.
75. Mr Young submits that the legal relationship requires an offer and acceptance. There was an offer of the position with the respondent to assist with the duties and an acceptance by the applicant. The question was really whether there was any consideration.
76. Mr Young submits that the respondent was a commercial entity that provided some horse riding trails, lessons and other incidentals. The applicant provided services over a number of years which were of commercial value to the respondent. In return for these services, the applicant received rewards of monetary value in the form of trail rides and lessons.
77. Mr Young submits that the applicant was required to perform a number of wide-ranging and non-glamorous tasks in exchange for that consideration and reward. This distinguished the present matter from *Teen Ranch Pty Ltd v Brown*<sup>2</sup>, where the volunteer was driven by religious commitment and moral obligations. He received accommodation which was incidental to his involvement, but this was not his motivation. In this matter, the applicant's motivation was to receive rides and lessons and according to Mr Lawler, the consideration was free trail rides and lessons.
78. Mr Young submits that in her statement, the applicant indicated that she volunteered to work at the respondent so that she would be able to have the benefit of free horse riding lessons and trail rides. This represents consideration.
79. Mr Young submits that the applicant was required to wear a uniform and work for set hours. If she was late, she was reprimanded. There was pressure on volunteers to attend otherwise the position would be offered to others. These factors constitute evidence of control. The fact that the respondent asked volunteers why they were late or were unable to attend was suggestive of control consistent with the principles discussed in *Articulate Restorations & Developments Pty Ltd v Crawford*<sup>3</sup>.
80. Mr Young submits that according to Mr Lawler, volunteers were not able to pick and choose their tasks, as there were other volunteers who would do the job. This was evidence of control. Mr Lawler agreed with the applicant's statement that the volunteers were not paid wages, but they had the benefit of free trail rides and lessons. He also referred to the benefit provided to the business by the good volunteers such as the applicant.

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<sup>1</sup> [1986] HCA 1; 160 CLR 16 (*Stevens v Brodribb*).

<sup>2</sup> (1995) 11 NSWCCR 197 (*Teen Ranch*).

<sup>3</sup> (1994) 10 NSWCCR 751; 57 IR 371 (*Crawford*).

81. Counsel submits that the applicant's work was of value and she was paid consideration. If she was yelled at, this was evidence of control. Mr Lawler agreed that the applicant was directed to do the work by the yard manager and his comments regarding the lessons were consistent with the applicant's evidence. Customers paid about \$50 per lesson, so there was a monetary reward or consideration for the applicant.
82. Mr Young submits that the applicant indicated that she would not have been a volunteer if she did not receive the free rides and lessons, so there was an expectation on her part in return for doing the tasks. Mr Lawler largely agreed with the applicant's statement regarding this arrangement.
83. Mr Young submits that Mr Lawler acknowledged that the volunteers did hard work and some of the jobs were mundane. He conceded that "the consideration that the volunteers received for performing their tasks was in horse rides". They were provided with horses to ride at gymkhanas at no cost as an acknowledgment for payment for their services and they were rewarded with invitations to Christmas parties.
84. Mr Young submits that Mr Lawler agreed that the applicant received free horse riding lessons in lieu of wages and this was fair. This is evidence of consideration. Mr Lawler was the general manager and he corroborates the applicant's evidence. This was different to the situation in *Teen Ranch*, where there was a moral or religious motivation.
85. Mr Young submits that Mr Vandescheur confirmed that the applicant was subject to his supervision and direction, and she was required to wear a uniform. These facts are evidence of control. He indicated that there was no guarantee that volunteers would be riding, but they tried to get all of the volunteers on a horse at least once per day. This contrasts with the evidence of Mr Lawler, who indicated that volunteers would ride on most days and were supervised if they were not riding. The applicant had an expectation to ride in exchange for her services.
86. Mr Young submits that Mr Vandescheur disputed that the applicant received riding lessons in lieu of wages, but he conceded that she might have had an arrangement with Ms Roberts.
87. Mr Young submits that less weight should be given to the evidence of Ms Papadatos as she worked in the office. She agreed that volunteers were able to ride horses, if available, and they had to undertake various tasks. There were set hours and the staff relied on the volunteers to be on time. Other volunteers were disadvantaged when they were late or left early. This shows an element of control.
88. Mr Young submits that Ms Papadatos disputed that the applicant received free lessons in lieu of wages, but this contrasts with the statement of Mr Lawler, whose evidence should carry more weight. Her evidence regarding the uniform, availability of rides, the gymkhanas and Christmas party invitations was consistent with that of Mr Lawler and Mr Vandescheur. There was evidence of a legal relationship and the indicia of employment.

## **RESPONDENT'S SUBMISSIONS**

89. The respondent's counsel, Ms Warren, submits that the applicant was a volunteer and not a worker. The issue in this matter relates to whether there was any consideration and an intention to create a legal relationship.
90. Ms Warren submits that although Mr Lawler referred to the term "consideration" in his statements, there was no intention to create a legal relationship. There was no payment of any money and the issue was whether the provision of trail rides and lessons constituted consideration for the tasks that the applicant performed.

91. Ms Warren submits that the applicant referred to herself as volunteer in her claim form. According to Mr Vandescheur and Ms Papadatos, the applicant was required to wear a shirt for identification purposes so that customers could distinguish the staff members from the volunteers.
92. Ms Warren submits that the Information for Volunteers – Requirements and Conditions document set out the requirements and procedures for becoming a volunteer. There were only set hours for volunteers who rang up and booked a position. This was consistent with the applicant's evidence. Therefore, the volunteer controlled the situation. The element of control by the respondent was to allocate available positions, but this did not constitute an employment relationship.
93. Ms Warren submits that volunteers were expected to gain valuable experience whilst assisting staff and there was no guarantee that they would be able to ride a horse. Assisting staff on guided rides was not in consideration for doing the other tasks. Volunteers were not to give customers the impression that they were employed by the respondent.
94. Ms Warren submits that according to the disclaimer document, there were safety concerns. Direction and supervision of volunteers was undertaken as a safety measure. Although there is no signed copy of this document in evidence, according to Ms Papadatos, who had worked for the respondent since 2003, the document was given to all volunteers to be signed before they were accepted as volunteers. There was no expectation that volunteers could go on trail rides and there was no reference to free lessons on the document, so this was not part of the arrangement between the parties.
95. Ms Warren submits that according to the applicant, she became a volunteer as a means of engaging in her interest in horses. She stated that she wanted to be around horses and get the benefit of free lessons and trail rides. This was why the volunteers were there. There was a high demand for positions, so keeping to the set hours was important. It was reasonable to ask volunteers why they were late because of the high demand and the need for the rides to proceed. This was not evidence of control and the facts can be distinguished from those in *Crawford*.
96. Ms Warren submits that the applicant described the various tasks that she performed and she did not class these as a reward. She went on trail rides to assist staff and this was not suggestive of employment. She was also directed to participate in lessons, but this was part of her role as a volunteer.
97. Ms Warren submits that Mr Vandescheur advised that volunteers were not guaranteed a ride and there were other duties. The volunteers had to report to him and he would tell them what tasks they had to perform. He monitored what they were doing and ensured that the tasks were done. There were safety considerations that warranted a level of supervision.
98. Ms Warren submits that Mr Vandescheur stated that there was no drama if volunteers arrived late or left early. He was the person who dealt with the volunteers and he denied that volunteers were reprimanded. He indicated that volunteers only assisted guides if they were required and this was not a payment method.
99. Ms Warren submits that Ms Papadatos performed general managerial duties and interacted with the applicant, so she would have been aware of the arrangement with the volunteers. There was a high demand for positions and this was why there was a structured process. She provided the daily roster and confirmed that there was no guarantee that volunteers would ride horses. This was discretionary and depended upon on the availability of horses. She disputed that the applicant was given free lessons as a payment for the jobs she did.

100. Ms Warren submits that Mr Lawler was not the applicant's immediate supervisor. He advised that volunteers were another set of eyes at the rear on trail rides. This was part of a volunteer's role and was not consideration. He indicated that volunteers loved the arrangement and it enabled them to engage with adults in workplace-type setting. It was not in exchange just for free rides and lessons. The fact that the respondent was a commercial entity was irrelevant. There was no intention to create legal relations consistent with principles discussed in *Birkett v Tubbo Estate Co Pty Ltd*<sup>4</sup>.
101. Ms Warren submits that Mr Lawler disputed that the applicant was reprimanded. He stated that volunteers were questioned about being late because of the high demand for positions as volunteers. Guides supervised and oversaw their conduct on trail rides as well as that of customers and the yard manager had a discretion to decide who would be able to ride a horse.
102. Ms Warren submits that Mr Lawler indicated that some volunteers preferred to join a group lesson rather than assist on a trail ride, which was part of the volunteer's role. This was not a reward. The volunteers attended for different reasons and each gained something different. These benefits did not represent a separate reward.
103. Ms Warren submits that Mr Lawler stated that the business could operate without the assistance of volunteers. Even if the received the rides and lessons in exchange for the tasks that they performed, there were numerous cases such as *Teen Ranch* that supported the respondent's argument that the applicant was not a worker.
104. Ms Warren submits that the fact that *Teen Ranch* concerned a non-profit organisation and the respondent was a commercial business does not mean that the applicant was receiving a benefit. The applicant volunteered not only to have free rides and lessons, but because of her desire to interact and be around horses and horse riding activities.
105. Ms Warren submits that this matter can be distinguished from the facts in *Harris v Cudgegong Soaring Pty Ltd*<sup>5</sup>, because in that matter, there was an exchange of consideration between both parties and there was an intention to enter into legal relations, whereas here, the applicant had no guarantee of a position and she had to book ahead.
106. Ms Warren submits that it was established in *Secretary, Department of Family and Community Services v Bee*<sup>6</sup>, that one needs to look at the overall relationship to determine whether there was an intention to create a legal relationship. The respondent disputes that there was any intention to create a legal relationship. It was not an arrangement where the applicant received goods in return for her services, as was the case in *Skales v Blue Anchor Line Ltd*<sup>7</sup>, or there was "a voluntary assumption of a legally enforceable duty"<sup>8</sup>. The employment contract had to be entered into with the intention of being bound.
107. Ms Warren submits that there was no legal obligation on the applicant to undertake the duties or continue to attend as a volunteer. In *Teen Ranch*, there was a moral but no legal obligation. The use of the term "volunteer" showed the intention of the parties, and just because the applicant received a benefit and she thought that this was consideration, did not mean that there was an employment relationship.

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<sup>4</sup> [1997] NSWCC12; (1997) 14 NSWCCR 369 (*Birkett*).

<sup>5</sup> [1995] NSWCC 18; (1995) 11 NSWCCR 678 (*Harris*).

<sup>6</sup> [2014] NSWCCPD 66 (*Bee*).

<sup>7</sup> [1911] 1 KB 360; (1910) 4 BWCC 16.

<sup>8</sup> *Australian Woollen Mills Pty Ltd v Commonwealth* [1954] HCA 20; 92 CLR 424.

## APPLICANT'S SUBMISSIONS IN REPLY

108. Mr Young submits that if the respondent's case was accepted, the arrangement was akin to a reform school, which is not the case. The Volunteer Job Roster did not refer to horse rides and lessons as part of the volunteers' tasks.
109. Mr Young submits that the applicant had no recollection of signing the disclaimer and she did not know if her parents had done so. In any event, she was not asked to sign the form once she turned 18 years of age. One can accept that there was no current document. Little weight can be given to the document because it is directed to underage volunteers.
110. Mr Young submits that the applicant saw the provision of free rides and lessons as "quid pro quo" for the tasks that she performed. Mr Lawler described this as her reward in lieu of wages and stated that this was fair. The respondent's evidence corroborates that there was consideration and an intention to create a legal relationship.
111. Mr Young submits that there was evidence of control as shown by the requirement to wear a uniform, whether for safety or otherwise, set hours, the possibility of being reprimanded, as confirmed by Ms Papadatos, and the need to report to the yard manager of senior staff. This matter can be distinguished from *Birkett*, where the claimant, who was provided with meals, accommodation and travel expenses, was undertaking work experience as part of a course.
112. Mr Young submits that according to the Volunteer Job Roster, the "villies" were to be kept busy. The applicant confirmed that once she had completed a job, she would report back and was given more jobs. The yard manager had a discretion to allocate trail rides to those who were busy as a reward. This represented consideration and this was confirmed by Mr Lawler.

## REASONS

### Was the applicant a "worker" within the meaning of the 1998 Act?

113. Section 4 of the 1998 Act defines a worker as follows:

"In this Act-

**worker** means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing) ...".

114. Therefore, for the applicant to be considered a "worker", there needs to be in existence a contract of employment between the applicant and the respondent.
115. Deputy President Roche discussed the principles regarding a contract of employment in *Drive Recruit Pty Ltd v Back*<sup>9</sup>. He stated:

"There are four essential features of a contract of employment (*The Modern Contract of Employment*, Ian Neil SC and David Chin, 2012, Lawbook Co, (Neil and Chin)). Those features are discussed in detail at pages 1–3 in Neil and Chin and may be summarised as follows:

- (a) there can be no employment without a contract (*Lister v Romford Ice & Cold Storage Co Ltd* [1956] UKHL 6; [1957] AC 555 AT 587);

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<sup>9</sup> [2013] NSWCCPD 32, (*Back*).

- (b) the contract must involve work done by a person in performance of a contractual obligation to a second person (*Abdalla v Viewdaze* (2003) 122 IR 215 at [23]). That is because the essence of a contract of service is the supply of the work and skill of the worker (*Humberstone v Northern Timber Mills*; (1949) 79 CLR 389 at 404–405);
- (c) there must be a wage or other remuneration, otherwise there will be no consideration (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515), and
- (d) there must be an obligation on one party to provide, and on the other party to undertake, work. The obligation required to constitute a contract of employment is that:

‘the putative employer be obliged to pay the putative employee in accordance with the terms of the contract for services reasonably demanded under it, and that the putative employee be obliged to perform such services. That is as much so where the service consists of standing and waiting as where it is active’ (*Forstaff Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWSC 573; (2004) 144 IR 1 at [91]; see also *Wilton v Coal & Allied Operations Pty Ltd* [2007] FCA 725; (2007) 161 FCR 300 at [162]).”<sup>10</sup>

116. For a contract to exist, there must be an intention to create legal relations between a worker and an employer. In *Bee*, Deputy President Roche considered this concept and stated:

“The authorities are clear that the question of an intention to create legal (contractual) relations requires an objective assessment of the state of affairs between the parties (*Ermogenous* at [25]). ‘Intention’ describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened (*Ermogenous* at [25]). (Though *Ermogenous* refers to the ‘intention to create contractual relations’, this expression is clearly interchangeable with the phrase ‘intention to create legal relations’.)

This approach is consistent with the following statement by Windeyer J in *South Australia v The Commonwealth* [1962] HCA 10; 108 CLR 130 at 154, referred to at [24] (with apparent approval) in *Ermogenous*:

‘An agreement deliberately entered into and by which both parties intend themselves to be bound may yet not be an agreement that the courts will enforce. The circumstances may show that they did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts. The status of the parties, their relationship to one another, the topics with which the agreement deals, the extent to which it is expressed to be finally definitive of their concurrence, the way in which it came into existence, these, or any one or more of them taken in the circumstances, may put the matter outside the realm of contract law’.”<sup>11</sup>

<sup>10</sup> *Back*, [24].

<sup>11</sup> *Bee*, [42] – [43].

117. The Deputy President also discussed the requirement of consideration as follows:

“As explained in the unanimous decision of the High Court in *Australian Woollen Mills* ‘[i]t is of the essence of a contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty’. To be legally enforceable, there must be, among other things, real consideration ‘for the agreement’ (*Ermogenous* at [24]).

To prove a contract, it must be established that the ‘statement or announcement which is relied on as a promise was really offered as consideration for doing the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement’ (*Australian Woollen Mills* at 456). In other words, there must be a *quid pro quo* (‘one thing in exchange for another; something in exchange’ Butterworths Concise Australian Legal Dictionary, 3rd ed).

The above propositions are the very essence of a contract. The principles are well summarised in Carter, at 6–07 (footnotes omitted):

‘When the existence or validity of a propounded consideration is in question, what was in fact the agreement of the parties must first be determined. It is only necessary to determine its effectiveness as consideration if what the plaintiff propounds as consideration did indeed form part of the parties’ bargain. Conversely, a promise is not rendered binding by the fact that there was at hand some ‘price’ which would have served as a good consideration, if in fact this was not the agreed price as indicated by the parties’ agreement. ...

Consideration may be and often is itself a promise (or a bundle of promises), but it is always *for* the other party’s undertaking (or undertakings) and it is not strictly accurate to speak of consideration *for a contract*.’ (emphasis included in original)<sup>12</sup>

118. There are a number of authorities where claimants have been determined to be volunteers because the alleged employer was a voluntary association or social group, there was a lack of consideration, and there was a lack of evidence of any intention to create legal relationships<sup>13</sup>.
119. In *Teen Ranch*, the claimant had a moral obligation to assist at camps run by a non-profit Christian organisation. He was provided with accommodation, meals and use of the facilities, but it was held that there was no intention to enter into a legal relationship.
120. In *Bee*, the claimant failed to establish the existence of a contract and an intention to enter in a legal relationship. Ms Bee was not paid for looking after foster children. She received an allowance as a foster parent and it was stipulated that this payment would be used for the care of the foster children. It was held that this was “not in any sense the consideration for a bargain”<sup>14</sup>.
121. The facts in the present case bear some similarity to those in *Harris*, however, in that matter, there was evidence of consideration passing between the parties.

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<sup>12</sup> *Bee*, [91] – [93].

<sup>13</sup> *Cameron v Hogan* [1934] HCA 24; (1934) 51 CLR 358; *Dickinson v The Tropical Fruits Incorporated* [2006] NSWCCPD 331.

<sup>14</sup> *Bee*, [97].

122. Mr Harris sustained injury when he was testing a glider. He was allowed to reside on the airfield of his alleged employer in return for acting as a caretaker. Neilson CCJ was satisfied that there was consideration and he distinguished the matter from *Teen Ranch*, because Mr Harris' work was not of a "spiritual nature" and was "not done to do something of a practical Christian nature", but it was undertaken to secure a necessity of life, namely shelter, in return for working as the caretaker.
123. In this matter, there is no written agreement or contract in evidence. There is no dispute that the applicant, as a volunteer, was obliged to and in fact performed a variety of tasks, consistent with the requirements set out in the Information for Volunteers – Requirements and Conditions document and the jobs identified in the Volunteers Job Roster. The applicant's evidence regarding the performance of these tasks has been confirmed by Ms Papadatos, Mr Vandescheur and Mr Lawler. She claims that in return for undertaking the tasks, she received free horse rides and lessons. This could represent an offer and acceptance, with some consideration passing between the parties.
124. The applicant indicated that she volunteered to assist at the respondent so that she could engage in her interest in horse riding, be around horses, be involved in horse riding activities and have free horse rides and lessons. This was her motivation. However, there was no induction or training that would usually be undertaken in a true employer/employee situation.
125. The applicant performed various duties for the respondent, some of which had no connection with the horses and were somewhat menial in nature. The applicant had an expectation that she would receive free rides and lessons. There was undoubtedly a benefit received by the applicant for these activities, which came at a cost for customers.
126. There is certainly some evidence of control by the respondent over the applicant's activities and in her dealings with the customers which is consistent with the principles of the employer/employee relationship discussed in *Stevens v Brodribb*.
127. The applicant was required to attend for set hours and wear a shirt with a logo and identification as a "volunteer". She was required to undertake a variety of tasks specified in the disclaimer document and in the Volunteer Job Roster at the direction of the yard manager and other staff members. However, there was no guarantee that the applicant would ride a horse each day, although the respondent did its best to accommodate her and the other volunteers.
128. It is true that the volunteers were subject to direction, organisation and supervision, but according to the witnesses' statements and the disclaimer form, this was for reasons of safety. The respondent catered for all levels of experience, so a degree of supervision, direction and guidance would have been vital to a successful volunteer programme. It also ensured that there was a full complement of volunteers, because the few available positions were highly sought after. This is a logical and reasonable explanation.
129. The applicant stated that if she had not been allowed to have the lessons and go on trail rides, she would not have been a volunteer. It has been submitted by Mr Young that this arrangement was in lieu of wages, but this has been disputed by the respondent.
130. Although Mr Young submits that there was a clear intention to create a legal relationship, I have some concerns that this was in fact the case. The applicant conceded that there may have been a document to sign, but she could not recall signing one and she did not know if her parents had done so. One would have thought that this could have been easily clarified in statements provided by her parents.



131. Mr Lawler stated that the volunteers or their parents were obliged to sign the disclaimer before being allowed to ride a horse. This was also confirmed by Ms Papadatos. Given this evidence and the dangerous nature of horse riding, it is highly likely that the document would have been signed by the applicant's parents on her behalf and they would have been aware of the requirements and conditions associated with being a volunteer. Mr Lawler indicated that the business could operate without volunteers, so they were not a necessary requirement.
132. It is clear from the Information for Volunteers – Requirements and Conditions that the respondent was offering positions as “volunteers”, rather than as employees. It stressed that the participants were attending on a voluntary basis. There was repeated use of the term “volunteer” and a warning regarding the respondent's inability to provide supervision. Even the applicant referred to herself as a “volunteer” in her statement. Her mandatory shirt, which was of a different colour to the shirts worn by the staff members, also referred to her as a “volunteer”. The use of this term would seem to suggest a lack of intention by the respondent to create a legal relationship.
133. Significantly, according to the disclaimer document, volunteers were forbidden from giving customers the impression that they were employed by the respondent. This requirement in my view shows a lack of any intention by the respondent to create a legal relationship.
134. A description of the various duties to be undertaken by the volunteers was identified in the disclaimer form. There was reference to volunteers assisting staff on guided rides, but there was no mention of free lessons. Therefore, it seems that participating in trail rides formed part of the volunteers' usual tasks. It would seem from the contents of this document that the respondent's intention was to allow teenagers to participate in the activities on the property in a purely voluntary capacity and there was no intention to create a legal relationship.
135. Mr Vandescheur confirmed that volunteers were not guaranteed a ride due to customer numbers, but they tried to accommodate them each day. The respondent also encouraged the volunteers to have riding lessons to improve their skills. He confirmed that the volunteers performed a variety of duties that were not associated with horse riding and the managers tried to send a volunteer out on every ride to help the guides.
136. The evidence of Ms Papadatos is similar to that of Mr Vandescheur. She confirmed that less experienced volunteers were encouraged to take lessons and at times they assisted during lessons. There were no guarantees of a ride and the volunteers' access to rides depended on the availability of horses.
137. Ms Papadatos denied that the applicant received free horse riding lessons in lieu of wages, whilst Mr Vandescheur doubted that this was the case, but he was unsure whether the applicant had a prior arrangement with his predecessor. Of course, the applicant does not suggest that she had any special arrangement with Ms Roberts.
138. The evidence of Mr Lawler confirmed that there was no payment of wages to volunteers, but he also indicated that they were allowed to ride horses as “consideration” or as their “reward” for undertaking the various basic tasks. Whilst there was no guarantee of a ride, it was rare that a volunteer would not ride a horse every day. The better volunteers were also provided with a horse to ride in gymkhanas as payment for their services.
139. It is true, as submitted by Mr Young, that Mr Lawler agreed with the applicant's suggestion that she received free horse riding lessons in lieu of wages, but this concession seems to be based on grounds of fairness, in order to reward the volunteers for doing the more mundane tasks, rather than concession of the existence of an employer/employee relationship.

140. In my view, Mr Lawler's reference to the term "consideration" was merely incidental. The horse rides and lessons were certainly a benefit provided by the respondent, but these were not guaranteed. Therefore, the respondent's evidence is not consistent with an intention to create a legal relationship with the applicant.
141. According to *Bee*, one has to objectively look at what was conveyed by the statements and actions of the parties and the circumstances in which they occurred in order to assess whether there was an intention to create a legal relationship. These factors may show that the parties did not intend that there be a legally enforceable duty. The decision also confirms that a party must be shown to have relied upon a promise offered as consideration for undertaking an act and the act was done in response to that promise.
142. Whilst there is evidence which suggests suggested that there was a promise of free lessons offered by the respondent as consideration for undertaking the tasks and the applicant performed the tasks in response to that promise, when one looks objectively at the circumstances in which the promise was made, it is difficult to conclude that there was any intention to create a legally enforceable duty.
143. The applicant indicated that she was not prepared to undertake the duties of as a volunteer, if she did not have access to the free rides and lessons. This seems to suggest a lack of an intention to create a legal relationship on her part, and she was under no legally enforceable duty to work as a volunteer. She indicated amongst other things that she just wanted to be around horses.
144. The repeated use of the term "volunteer" in the Information for Volunteers – Requirements and Conditions, the Volunteer Job Roster and on the different coloured shirts in my view shows that the respondent at no stage intended to create a legal relationship with the applicant. These facts distinguish this matter from the various authorities identified by Counsel.
145. The allocation of a position as a volunteer was at the discretion of the respondent following contact by the applicant. If the applicant failed to contact the respondent, she would not be allocated a position. If she was not allocated a free ride or lesson when she attended, she could have easily turned around and gone home. She was equally in control of the situation.
146. There was no obligation on the applicant to apply for a volunteer's position. It was at her own discretion and within her control, although any request had to be made two weeks in advance. Similarly, the respondent was under no legally enforceable duty to allocate a position to the applicant. The applicant had no remedy to force it to do so.
147. In the circumstances, having regard to the totality of the evidence and the authorities, particularly *Bee*, I am not satisfied that the applicant was a "worker" in the employ of the respondent as at 9 April 2010. Accordingly, there will be an award for the respondent.

### **Costs**

148. There will be no order as to costs.

### **FINDINGS**

149. The applicant was a not a "worker" in the employ of the respondent within the meaning of s 4 of the 1998 Act as at 9 April 2010.

### **ORDERS**

150. There will be an award for the respondent.

151. No order as to costs.

