

# VOLUNTEERS V EMPLOYEES

**The difference between an employee and a volunteer is an important one. Employees have a number of rights that a volunteer does not, not least the right to a minimum wage and the right to not be unfairly dismissed. Whilst there is no suggestion that it is good practice to discriminate against volunteers or treat them unfairly, it is important from a risk management perspective to ensure that volunteers and employees are kept in two distinct groups.**

Charities are vulnerable to claims from their volunteers. Since, however, many charities rely on their volunteers, there is a reluctance to be confrontational with them. It also appears that the sector attracts litigious individuals who are keen to exercise their perceived rights perhaps because they feel that as they give their time freely, they deserve extra consideration in return. Periodically the rights and status of volunteers are tested by the Tribunals and claimants are becoming increasingly creative.

The mere fact that the charity may label an individual as a “volunteer” will not necessarily make it so in law. The tribunal will look at the relationship between the parties and how it operated in practice.

What can a charity do to try and protect itself?

## OBLIGATIONS

- A charity should avoid creating any obligation to provide work for a volunteer and should ensure that a volunteer is not under any obligation to perform any work provided. Many charities set out an expectation of a minimum commitment from a volunteer, or a requirement that a volunteer give notice should they no longer wish to assist the charity. Whilst an expectation is not the same as an obligation, the charity needs to ensure that any policy documentation carefully spells out that there is no element of compulsion and there should be no consequences if a volunteer does not behave in the way expected.

If there is any sense of obligation, then there is a risk that a volunteer may be perceived as an employee.

In *South East Sheffield CAB v Grayson*, The CAB had a volunteer agreement which referred to a minimum commitment of six hours but there was no sanction for a volunteer who did not meet this commitment. The agreement was drafted in terms of the CAB’s hopes. The Employment Appeal Tribunal found this was not a contractual relationship.

## EXPENSES

- The charity should reimburse expenses actually incurred rather than a daily rate or flat fee which might be viewed as wages or consideration. The charity should not extend any benefits to volunteers that might be seen as more appropriate to an employment relationship e.g. sick pay or free accommodation. Provision of basic benefits e.g. tea, coffee and meal allowances whilst the volunteers are performing services should not be an issue.

In *Migrant Advisory Services v Chaudhri*, Mrs C claimed that she was an employee although she was described by MAS as a volunteer. Mrs C was paid a flat rate of expenses per week even though they had no relationship to her actual expenses. It was held that she was in fact employed under a contract of employment.



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From Chambers UK - A Client's Guide to the Legal Profession

## TRAINING

- Any training provided should be relevant to the role that a volunteer undertakes. It should not be expressed as being provided in return for a volunteer undertaking to carry out particular work. Careful thought needs to be given in requiring volunteers to repay the cost of training in the event that they leave.

## VOLUNTEERS DISTINGUISHED

- The charity should try and maintain a sufficient distinction between its actual employees and its volunteers so that an outside observer looking at the two groups of individuals would see a difference between how the two groups were treated.

The importance of the distinction should not be underestimated as demonstrated in the very recent case of:

*X v Mid Sussex Citizens Advice Bureau*. Here the Employment Appeal Tribunal upheld an employment judge's decision that a voluntary worker, whose volunteer arrangement with the CAB was non-contractual, could not pursue employment claims against that organisation under the Disability Discrimination Act 1995. The rationale behind this decision can be extended to other areas of discrimination such as race and sex. This case should not however be seen as the last word on the matter. In the Scottish case of *Masih v Awaz FM* the issue of whether religious discrimination laws should apply to the case of a volunteer was referred to the European Court of Justice to see if the European Framework Directive under which domestic anti discrimination law is derived, applied to volunteers. In the Mid Sussex CAB case, the judge indicated that the outcome might have been different had the relationship been contractual. Voluntary workers who have a contract with those to whom they supply their services, by which they contract personally to do any work, are likely to be protected under anti-discrimination legislation, because the definition of 'employment' is wider.

### CONCLUSION

When faced with potentially difficult volunteers charities should consider taking legal advice if they are threatened or think it likely they will be threatened with employment type claims.

This briefing offers general guidance only. It reflects the law as at November 2009. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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