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Employment Status Guide 2016

Published by Charity Finance Group and Hempsons

First published 2016

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1.ABOUT THIS GUIDE

What is this guide for?

This guide explains the fundamental principles behind employment status, the employment relationship, and the issues you should consider when dealing with employees. However, it also goes further than that. Not everyone you might deal with in a working context will be an employee. This guide also covers those people who fall within a special category of 'worker', and those who might not see themselves as being in an employment relationship at all, such as volunteers, trustees, non-executive directors, and consultants. This is particularly pertinent in the voluntary sector. The guide also covers key principles on employment status and contracts of employment, and minimising the risks associated with working relationships.

Who is this guide for?

This guide is intended to assist anyone with responsibility for HR issues in a charitable organisation in managing their staff and volunteers, identifying potential risks and deciding on the best way of dealing with them.

How should this guide be used?

The aim of the guide is to help you understand the demands placed on your charity by employment law, taking into account the different working relationships people may have with your organisation. The guide is divided into three sections.

The first sets out the general principles of employment status, and introduces the three main categories: employee, worker and self-employed. It explains what factors the courts of tribunals may take into account when hearing an employment claim, and what might be done to ensure that both parties understand what their status is. This section then deals with the different types of workers that many charities will have, such as trustees, volunteers and interns. We also look at two specific legal protections for part-time workers and fixed-term employees.

The second section sets out the issues surrounding the written agreements, policies and procedures that might govern the working relationship.

The third section deals with the most common problems that relate to employment status, how to avoid them, and what to do when they arise.

Where can I find more information?

ACAS (the Advisory, Conciliatory and Arbitration Service, www.acas.org.uk) is an independent body which provides free and impartial advice to employers and employees. In addition to its helpline, it provides written materials (although some of it is written specifically for employees rather than employers). Some examples are:

- Statutory Codes of Practice (for example on disciplinary and grievance procedures and flexible working). These provide authoritative advice, which courts and tribunals are legally obliged to consider. Failing to follow a Code will not necessarily give rise to a potential claim but it must be taken into account by a tribunal when it considers a claim.
- Guidance. This constitutes 'best practice' and does not have the same weight as a Code. ACAS often provides helpful template letters and policies, and advice on a range of situations.

The Charity Commission has also produced guidance, 'Charity Staff: How to Employ Paid Workers' (10 May 2013):

www.gov.uk/guidance/charity-staff-how-to-employ-paid-workers

2.UNDERSTANDING THE BASICS

What is 'employment status'?

'Employment status' is the legal category of the relationship between an individual and their employer. One of the first difficulties with employment status is the lack of certainty surrounding it. Many key concepts are not specifically defined. There is, for example, no precise definition of a 'contract of employment'. Whilst there are certain factors that might suggest than an individual is an employee or a worker, this may still be a question of interpretation.

Employment law gives special rights and protections to two types of working relationships:

- Employees
- Workers

In general terms, all other types of staff are treated as being self-employed: those who are essentially trading in business on their own account. They are also known as 'independent contractors'. There are those who do not fall neatly into these categories but will still carry out work of some kind, such as office-holders, trustees, volunteers and interns.

Note: Decisions on employment status can be made by a court or Employment Tribunal. If a party is unhappy with the Employment Tribunal's decision, they may appeal to the Employment Appeal Tribunal (or 'EAT'). For the sake of convenience, we will refer to 'tribunal' throughout this Guide but the same principles will apply before a court.

"The consequences of failing to properly understand employment status can be significant"

Why is employment status important?

When a dispute arises the individual will often try to bring themselves within the category of employee or worker in order to benefit from the associated rights and protections.

An individual's employment status determines a number of matters:

- Their entitlement to various rights and protections in the workplace.
- The extent to which their employer is responsible for the employees' actions (vicarious liability).
- The extent to which various statutory obligations, such as health and safety, apply.

The consequences of failing to properly understand employment status can be significant. It could lead to disruption in the workplace (including grievances) and claims of unfair treatment or discrimination in a court or employment tribunal. Claims can lead to reputational damage and can impact on the relationship between the charity and its service users.

How can I tell what an individual's employment status is?

The short answer is often that you cannot be absolutely sure. It is not a choice. It is a question of fact and law, and a court or tribunal may decide that an individual falls into a different category from the one the worker and their employer might have thought, even if their status is stated in their contract. A court or tribunal would look at the following factors:

- Any agreement between the parties (whether or not in writing, even if unsigned).
- Any other relevant documents or correspondence, particularly if they have been signed, or sent from one party to another).
- How the parties have behaved in the past.
- What the parties actually do and how the work is organised.

Tip: Your documents are important evidence; make sure you keep them safe. This includes recruitment documents such as application letters/forms, CVs, offer letters, and any agreement or policies you produce at the start of the arrangement. You should also keep documents from the interview process (such as questions, score sheets and handwritten notes) in case an unsuccessful candidate complains.

Is a written contract binding?

A court or tribunal will look at all the circumstances including any written contract between the parties but also what happens in practice. This means that a written agreement – even a signed one – may not be definitive. In each case, the court or tribunal will look at the facts and decide what the employment status of an individual is based on what they do, how they do it, and the arrangements in place.

Tip: Just because a contract is not definitive does not mean you should not have one in place. It is far more likely that your view of an individual's employment status will be accepted if you have an agreement that reflects this.

DO NOT be tempted to put in place agreements that deliberately distort the reality of the situation! A tribunal will look at the whole relationship, and will be wary of sham arrangements, such as 'bogus self-employed' contracts.

How does this relate to tax?

For the purposes of tax liability, an individual is either employed or self-employed. There is no status of 'worker' for tax purposes.

Tip: You should not rely too much on an individual's tax arrangements as an indication of their employment status; employment status for employment law purposes is defined differently.

This is not a guide to tax, and specialist advice should be sought.

"Your documents are important evidence; make sure you keep them safe"

SECTION I EMPLOYMENT STATUS

3.EMPLOYEES

What is an employee?

There is no precise definition of 'employee'. Section 230(1) of the Employment Rights Act 1996 defines an employee as:

"an individual who has entered into or works under… a contract of employment."

A contract of employment is in turn defined by section 230(2) as:

"a 'contract of service' or apprenticeship whether express or implied, and (if it is express) whether oral or in writing".

This raises the question of what is a 'contract of service'. This is not defined by the statute. The traditional view is that under a contract ***of*** service, the employee *serves* the employer. A contract ***for*** services is a commercial contract, and the self-employed person works on their own account.

How do you recognise an employee?

There are three factors to look for (which have been referred to as the *irreducible minimum* of the employment relationship):

- Personal service
- Control
- Mutuality of obligation

Personal service

An employee will usually carry out the work personally. A self-employed or independent contractor may send someone in their place.

Tip: If the contract allows for the worker to send a substitute, then it is less likely to be an employment relationship. If you include a 'substitution clause' in a contract, you must make sure that power is exercised. If a substitute is never used, even if the contract allows for it, a tribunal may decide that there is nevertheless an employment relationship.

Control

The employer exercises control over the employee's work to a greater extent than it does over a self-employed contractor. In reality, it may be hard to distinguish the difference in control between an employee and a worker.

Mutuality of obligation

The employer is obliged to provide work and pay, and in return the employee is obliged to perform it.

How can I tell if an individual is an employee?

The most important feature is **'mutuality of obligation'**. If the individual only attends work as and when required, and is entitled to turn down the offer of work, or if they do not work a minimum number of hours each week, they are less likely to be an employee.

As well as those factors, a tribunal will also consider the intention of the parties (and any written agreement that reflects it), and who provides tools or equipment.

As noted above, under Section 230 of the Employment Rights Act 1996, an apprentice will be an employee. Apprenticeships are dealt with in more detail below.

What rights do employees have?

It is essential to know whether an individual who works for you qualifies as an employee; if they do, they will be entitled to certain rights because of their status (many of which other types of workers will not have).

Tip: You must give an employee a written statement which sets out a number of important features of the employment relationship within two months of starting employment. For more information see 'Section 1 Statements' (below).

"If the individual only attends work as and when required, and is entitled to turn down the offer of work, or if they do not work a minimum number of hours each week, they are less likely to be an employee"

Some of these rights apply as soon as the employment relationship begins, and are known as **'day one rights'**. Others are only gained when the employee has sufficient **'continuous employment'** (which is dealt with below).

Examples of 'day one rights' include:

- Statutory minimum periods of notice (see below).
- The right to be accompanied at disciplinary and grievance hearings.
- Protection from unlawful deductions from their wages (see below).
- Maternity leave (and other forms of family leave).
- Certain legal protections on the transfer of a business or organisation.
- Statutory Sick Pay.
- National Minimum Wage.
- Various limits on working time and rights to annual leave (see below).
- Protection from discrimination and in relation to whistleblowing.

Rights which require a period of continuous employment include:

- The right to bring a claim of unfair dismissal.
- The right to a redundancy payment.
- The right to request flexible working (see below).

Tip: In practice, the most significant difference between an employee and any other type of worker, certainly when the relationship is rocky, is the right to bring a claim for unfair dismissal. If you are having difficulties with a member of staff and you feel they might resign or you might have to sack them, consider whether they might be an employee, and if they have been employed long enough to bring an unfair dismissal claim (currently two years).

Apprentices

There are several different types of apprenticeship:

- The traditional common law contract of apprenticeship which has developed over centuries.
- Apprenticeship Agreements, which apply to arrangements up to 26 May 2015 in England, and continue to apply in Wales.
- Approved English Apprenticeships.

Whichever arrangements apply, an apprentice will be an employee. However, there are a few key points to bear in mind.

Tip: Make sure you have all the proper formalities of the modern style of agreement in place. If not, the agreement could instead be the old common law contract of apprenticeship, which can have serious consequences.

Under a common law contract of apprenticeship, the main purpose is to train the apprentice. As such, it cannot be treated in the same way as an ordinary employment relationship. The factors to consider are:

- It is far harder to dismiss an apprentice on grounds of redundancy, since they are there to be trained and a downturn in demand for their work does not affect that.
- It is also more difficult to dismiss an apprentice on grounds of capability (the quality of their work) because it should be expected that their performance will need to improve.
- It is harder to dismiss an apprentice on grounds of misconduct. The conduct must be so serious as to make the training difficult to deliver.
- If an apprentice is dismissed, their claim for loss of earnings is based on what they would have been earning if they had been fully trained, rather than what they could earn as a partly qualified worker.

4.WORKERS

What is a worker?

The definition of a 'worker' is much more straightforward than 'employee'. Section 230(3) of the Employment Rights Act 1996 defines a worker as:

"an individual who has entered into or works under…:

(a) a contract of employment, or

(b) any other contract whether express or implied… whereby the individual undertakes to do or perform personally any work or services for another party to the contract… [except where the other party to the contract is] … a client or customer of any profession or business undertaking carried on by the individual."

All employees are workers but not all workers will be employees.

The definition of a worker is wider than that of an employee. The second part of the definition (paragraph (b)) will cover individuals who carry out their work personally, as long as they are not providing their services to the client of a profession or a customer of a business. This is meant to exclude the genuinely self-employed.

Workers, discrimination and whistle-blowing

The definitions used for 'worker' are slightly different for protection in respect of discrimination and whistleblowing:

- **Discrimination –** the definition is extended to include those working under 'a contract personally to do work', but without the exception for clients and customers. This might catch those who would otherwise be considered self-employed.
- **Whistleblowing –** the definition is specifically extended to include agency workers, homeworkers, trainees and those on work experience (as well as various types of self-employed or student NHS workers).

How can I tell a worker from an employee?

Since workers, like employees, must also carry out the work personally, the most important distinction between an employee and a worker is the concept of 'mutuality of obligation', which is unique to the employment relationship.

What rights do workers have?

Workers are entitled to the following:

- The right to be accompanied at disciplinary and grievance hearings.
- Protection from unlawful deductions from their wages (see below).
- National Minimum Wage.
- Various limits on working time and rights to annual leave (see below).
- Protection from discrimination and in relation to whistleblowing.

Unlike employees, workers are not entitled to bring claims of unfair dismissal, and they are not entitled to minimum periods of notice.

Is a worker entitled to Statutory Sick Pay?

Possibly. The definition of 'employee' for the purposes of statutory sick pay is slightly wider than the usual definition of employee. It includes a person who is 'gainfully employed' under a contract of service or in an office with general earnings. This will include some workers.

5.CASUAL WORKERS AND ZERO HOURS CONTRACTS

What is a 'casual worker'?

There is no statutory definition of 'casual worker' but it normally refers to an individual who is engaged *'as and when required'*. An employer is not obliged to offer work to the worker and the worker is not obliged to accept it. Alternatively, there may be a minimum number of shifts or hours of work which will be offered and accepted.

Tip: Since a casual worker cannot be compelled to accept an assignment, you need to consider what action you will take if they decline. If you were to treat this in the same way as you would with an employee (for example, as a disciplinary issue), it is more likely that a tribunal would deem them to be an employee.

A casual worker may be engaged on an 'overarching', 'global' or 'umbrella contract' (either written or verbal) which governs the relationship between the employer and the casual worker *between* assignments even when they are not necessarily at work.

The contract with a casual worker is directly with the employer; no third party is involved, unlike agency workers (see below).

What rights do casual workers have?

A casual worker may be an employee, a worker or self-employed. Their rights and protections will depend on their status. Even if they are classed as self-employed, they will still have rights under their contract with you.

Is a 'casual worker' an employee?

This is possible, but unlikely. The deciding factor will be the issue of 'mutuality of obligation' – in general, whether the employer is obliged to offer shifts to the worker, and the worker obliged to accept. A casual worker is far more likely to be an employee *during* an assignment but it is possible that they would be deemed to be an employee even in the breaks between assignments. If they continue working long enough, their status will not necessarily change but they may qualify for certain employment rights due to their continuity of employment (see below).

Tip: You should be careful that you do not place too many obligations upon casual workers to accept assignments, or they may become employees. In order to avoid this, consider the following:

- *Make sure your agreement is clear that the worker is only offered assignments 'as and when required'. Keep a track of the assignments they work (and those they turn down), so that you have evidence that they are not obliged to accept assignments.*
- *Consider making a break between assignments, with each break lasting at least a week (measured from midnight on Saturday to the following Sunday) in order to break continuity of employment.*
- *Make sure that each assignment does not last so long as to give an employee enough service to qualify for certain rights – two years (for unfair dismissal) is a particularly significant landmark.*

ZERO HOURS CONTRACTS

Case Study – Cornwall County Council v Prater (2006)

Mrs Prater was engaged by the council as a home tutor to teach pupils who could not attend school between 1988 and 1998. Some children were out of school for a few months, but for others it was several years. The council was not obliged to offer her work, and she was not obliged to accept it but, having accepted a new pupil, she was contractually obliged to teach that pupil for as long as necessary. In the course of ten years she did not refuse a pupil and there were no periods when she didn't have at least one pupil on her books. She then became a permanent employee of the Council by agreement in 1998. The Court of Appeal upheld the tribunal's decision that each individual contract was a contract of employment, so that she was an employee before 1998 when she worked as a home tutor, whenever each contract was in place.

Is a 'casual worker' a worker?

Usually. It is more likely that a casual worker will be a worker during an assignment than between them, due to the lack of mutuality obligation. However, depending on the agreement and the working arrangements, they may also be a worker between assignments as well.

What is a 'Zero Hours Contract'?

A 'zero hours contract' is a type of casual worker arrangement. It is defined by Section 27A(1) of the Employment Rights Act 1996 as:-

"A contract of employment or other worker's contract under which

(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and

(b) there is no certainty that any such work or services will be made available to the worker."

Zero Hours Contracts and Employment Status

An individual on a zero hours contract could be an employee or a worker. Normally, that fact that there is no obligation on the employer to provide work means that it is unlikely that the individual will be an employee.

Case Study – Pulse Healthcare v Carewatch Care Services Ltd (2012)

A group of carers provided round-the-clock services to an individual in the community. They worked under what the company called a 'zero hours contract agreement' which made several references to 'employment'. The tribunal found that there was mutuality of obligation. The Employment Appeal Tribunal (or 'EAT') upheld the tribunal's decision that the zero hours contracts did not necessarily reflect the reality of the arrangement, and that there was in fact an 'umbrella' contract, particularly as the high level of care required continuity of service. As a result, they were employees.

CASUAL WORKERS AND ZERO HOURS CONTRACTS – PROBLEM AREAS

What rights do Zero Hours Contract workers have?

Like a casual worker, someone on a zero hours contract might be an employee, a worker or self-employed, so their rights and protections will depend on which status they have.

Special protection is provided for individuals on zero hours contracts in relation to 'exclusivity clauses' which seek to prevent someone from working for any other employer. These are no longer enforceable. Workers on zero hours contract are protected from being subjected to a detriment on the grounds that they have breached an exclusivity clause. An employee on a zero hours contract is also protected from being dismissed for the same reason.

Tip: You should consider what will happen if work is cancelled at short notice – will the worker receive a sum to reflect the inconvenience or compensation for any expenses (such as childcare) which they have incurred?

How is sick pay calculated?

A casual worker or an individual on a zero hours contract may not qualify for Statutory Sick Pay unless they are an employee (but note that the definition used for SSP is slightly wider than the normal definition of employee).

Their entitlement to sick pay may be set out in their contract, which should provide a way for working out how much should be paid. If appropriate, this would need to take into account the fact that pay may vary considerably from week to week. You are not obliged to offer any contractual sick pay.

How is holiday entitlement calculated?

If an individual on a zero hours contract is a worker they will be entitled to annual leave under the Working Time Regulations. Unless their contract provides otherwise, their holiday entitlement must be calculated based on their average working time over the previous 12 weeks.

Tip: You will need to have an accurate record of the hours actually worked in order to calculate holiday entitlement for a casual worker or those on a zero hours contract.

Case Study – Greenfield v The Care Bureau Ltd (2015)

The Claimant's working hours and days varied from week to week. At a time when she was working one day a week, she took seven days' paid leave (the equivalent of seven weeks' leave for a full-timer). She then increased her hours to 12 days on, two days off each fortnight. After her employment ended, she claimed a payment for accrued but untaken annual leave. Her employers argued that her seven days' off had used up her entitlement.

According to the European Court of Justice, an employer must calculate the leave that accumulates in each period separately – a reduction from full-time to part-time working should lead to no reduction in the amount of leave a worker has already accumulated. By the same token, an increase in hours should lead to an increase in the amount of holiday they will accrue.

"Make sure your part-time workers are treated no less favourably than comparable full-timers"

Part-Time Casual Workers

Casual workers and those on zero hours contracts may have difficulty seeking protection as a part-time worker (see below). In order to bring a claim of less favourable treatment, a part-time worker has to be compared to a full-time worker employed under the *same type of contract* and doing *broadly similar work*. Since full-time workers are in general required to work a fixed or regular number of hours in return for fixed pay whereas casual workers are not and casual workers may turn down the offer of work, this would not be an appropriate comparison.

Tip: Make sure your part-time workers are treated no less favourably than comparable full-timers. Full-time employees may be treated differently.

Terminating the Relationship

You should consider how you will bring the agreement to an end. An employee is entitled to minimum notice to terminate their employment, and a worker's contract may provide for notice.

For a casual worker, their agreement may say nothing about serving notice. Since you can just stop offering assignments to a casual worker, the relationship may come to an end without a clear or definite break, but this may lead to uncertainty. It may be better to write to the worker and inform them that they will not be offered any more assignments, and the working relationship is at an end.

Further Information

Guidance on zero hours contracts is available from the Department for Business, Innovation and Skills (BIS):

www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers

6.AGENCY WORKERS

Introduction

Agency workers are usually provided to a business (the hirer, client or end-user) by an agency (the temporary work agency or employment business). This tripartite relationship may cause difficulties for employers. If you use agency workers, you will need to be careful that they do not gain employment status with your charity.

What is an 'agency worker'?

Agency workers are given specific protection by the Agency Worker Regulations 2010. The key terms in the Regulations are:

- **Agency Worker:** *"an individual who is… supplied by a Temporary Work Agency to work temporarily for and under the supervision and direction of a Hirer; and has a contract with the Temporary Work Agency which is… a contract of employment with the agency, or… any other contract with the agency to perform work or services personally."* (Regulation 3).
- **Hirer:** the business or organisation to whom agency workers are supplied.
- **Temporary Work Agency:** the business or organisation who supplies agency workers to hirers, even if this is arranged through an intermediary (for example, a service company).

Agency Workers and Employment Status

The definition of agency worker for the purposes of the Regulations makes it clear that the agency worker has to have a contract with the agency. This will either be a contract of employment or a contract to perform the work personally. This will make them either an employee or a worker of the agency, but not of the hirer.

Tip: A tribunal is far less likely to imply a contractual relationship between you (as hirer) and the agency worker if there is a contract in place between the agency and the worker. If feasible, ask for a copy of the contract, or failing that, for confirmation that there is such a contract. If you have entered into a formal agreement with the agency, you could ask for an indemnity making the agency liable for any costs or claims should the worker become your responsibility or if they bring claims against you.

What are agency workers entitled to?

From the first day of the assignment, agency workers are entitled to be:

- Treated no less favourably than comparable workers in relation to the hirer's collective facilities and amenities (for example, canteen, childcare facilities or transport services).
- Informed by the hirer of any relevant vacant posts, which have to be clearly advertised, and to be given the same opportunity as a comparable worker to find permanent employment with the hirer.

Only the hirer is responsible for these matters.

Tip: If, for any reason, you cannot offer the same facilities to agency workers as you would to your own staff, consider what alternative arrangements you could make. Make sure any vacant posts are advertised in the workplace and information on them is circulated to agency staff as well.

What are the basic working and employment conditions?

After 12 weeks on the assignment, agency workers are entitled to the same **basic working and employment conditions** as they would have had if they had been recruited directly by the hirer. The basic working conditions include:

- Pay
- Working time
- Night work
- Rest periods
- Rest breaks
- Annual leave

Both the hirer and the temporary work agency are responsible for these matters.

Tip: Keep track of the start dates and weeks worked by any agency workers in order to monitor when they reach the 12 week point.

Who is the comparison made with?

For these purposes, a comparison is made with a comparable employee (not an agency worker) who works under the supervision and direction of the hirer, and is engaged in the same or broadly similar work.

In order to qualify as 12 weeks' service, the agency worker must have been working in the same role, even if it has been on more than one assignment.

Beware: anti-avoidance provisions

Hirers and temporary work agencies should not structure the assignments in a way that is designed to prevent an agency worker from gaining 12 weeks' service in the same role, for example by rotating them into different roles. If the most likely explanation for the arrangements is to prevent the agency worker from gaining their rights, then they will still be entitled to them after 12 weeks even if the roles are not the same.

If an agency worker brings a successful claim that one of their rights under the Regulations has been infringed, they may be awarded an additional sum (on top of their compensation) of up to £5,000 if the assignments had been structured to avoid the Regulations.

Tip: You should not keep someone in an unsuitable post just because you do not want to move them within 12 weeks. If you have a sound business reason for reassigning an agency worker, make sure it is properly documented (so that you can produce evidence if necessary).

Pay between assignments

If an agency worker has a permanent contract with a temporary work agency which provides for them to be paid when they are not on an assignment then they may not be entitled to the same level of pay as a comparable worker.

Protection from detriment and unfair dismissal

Although workers are not entitled to bring unfair dismissal claims, they are protected from being subjected to a detriment if the reason for the treatment relates to one of the matters which are designed to protect agency workers' rights, including where they have:

- Alleged that their employer has infringed their rights.
- Refused to forego their rights.
- Brought proceedings or given evidence in relation to their rights under the Regulations.

"After 12 weeks on the assignment, agency workers are entitled to the same basic working and employment conditions as they would have had if they had been recruited directly by the hirer"

Tip: Be very careful when you deal with a worker who has already complained about their rights under the Regulations. The tribunal will take a dim view of any poor treatment they receive so if you do need to tackle a problem worker, make sure that the reason for your actions are clearly communicated and documented, and that they are unrelated to the complaints.

Employees are entitled to bring unfair dismissal claims, as long as they have sufficient continuous employment (currently two years). In addition, it would also be automatically unfair to dismiss an employee if the reason for the dismissal related to the matters (set out above) which are designed to protect agency workers. There is no requirement for a period of continuous employment for these claims.

What remedies could the agency worker ask for?

A tribunal upholding a worker's claim has a number of options:

- Make a declaration.
- Order the employer to pay compensation. This will be an amount that is just and equitable in the circumstances and would normally be at least two weeks' pay.
- Recommend actions the employer should take to reduce the impact of the conditions or arrangements on the agency worker.

Protection from discrimination and whistle-blowing

An agency worker will be protected if they fall within the wider definition of employment that is used in discrimination. Under Section 83(2) of the Equality Act 2010, employment includes:

"employment under… a contract personally to do work."

Since the usual exception for professional clients and business customers does not apply here, agency workers should be covered.

In addition, the scope of discrimination protection is specifically extended to cover **'contract workers'**. This is slightly different from the definition of agency workers. However, it places obligations on the principal, which is the agency rather than the hirer. This definition might also be wide enough to cover employees on secondment.

Agency workers are specifically within the category of worker protected for whistleblowing claims.

Further Information

'Guidance on the Agency Worker Regulations' was produced by BIS in May 2011:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

7.SELF-EMPLOYED, CONSULTANTS AND FREELANCERS

What is self-employment?

If an individual is not an employee or a worker, then they will be described as 'self-employed' or as an 'independent contractor'. This includes contractors, consultants, freelance workers, and (usually) partners.

The self-employed have far fewer employment rights and protections, and there are very few employment claims they could bring. The definition of worker is designed to exclude individuals who are in business on their own account, but occasionally the definition is wide enough to cover them as well, for example in discrimination.

What rights do the self-employed have?

An individual does not have to be an employee or a worker to benefit from protection against discrimination. The legislation extends protection beyond the usual employment relationship, including the provision of services to the public, or in relation to premises.

Protection from discrimination is extended beyond employees and workers to include partners (and members of Limited Liability Partnerships), barristers, office holders (including police officers) and some public and local authority positions.

The relationship between a contractor and an employer will often be a commercial relationship, governed by a contract. The contractor can bring claims for breach of contract based on the agreement between the parties, whether that it is written or verbal, for example for:

- Failure to provide sufficient notice to terminate the agreement.
- Failure to make payments due under the contract.

Service companies

As noted above, courts and tribunals will look at the reality of the working relationship even if the contractual documents suggest that the arrangements are somewhat different. One example of this is the approach to service companies (also called 'personal service companies'). Many workers provide their services through a limited company, often for tax purposes. This can be the case for managers or executives with local authorities, NHS bodies, and charities. They may be treated as self-employed whilst working alongside (and in a way that is indistinguishable from) permanent employees.

A worker who provides their services through a service company may be entitled to bring a discrimination claim in the same way as an employee.

Case Study: EAD Solicitors LLP and others v Abrams (2015)

The Claimant was a partner (or member) of a Limited Liability Partnership. He was due to retire aged 62. For tax purposes, he set up a limited company of which he was the sole director and principal shareholder, and the limited company became a member of the LLP in his place. When he reached 62, and the Partnership wanted the company to 'retire', he brought a claim of age discrimination in his name and also in the name of his company. The EAT allowed both claims to proceed, noting that:

- ***A discriminator can be a company, rather than an individual***
- ***An individual does not necessarily have to have the 'protected characteristic' in order to bring a claim***

Documenting the relationship

Although someone who is neither an employee nor a worker has no specific rights in employment law, it is always worthwhile considering a written agreement. This will certainly clarify many of the contractual rights the individual will have.

Consultancy and freelancer contracts

In many ways, consultants and freelancers fall outside the scope of employment law. If they are genuinely self-employed, and do not qualify as employees or workers, then the contract between a charity and the consultant will be governed by the same principles as any commercial contract. You do not have to have a written agreement in place but it is highly advisable to have one (and can prove particularly useful when a dispute arises).

- **Duties**
  It is essential to set out the scope of a consultant's duties. It can be harder to work out what is expected from the working relationship compared to an employee, where the relationship is usually more stable and enduring. When setting out the duties, make sure there is no suggestion that the consultant is in fact a worker or an employee.
- **Status**
  You can expressly state in the agreement that it is not intended to create an employment relationship.
- **Tax**
  Consultants should be responsible for their own tax, rather than being dealt with under PAYE.
- **Substitution**
  If it is appropriate, allow the consultant the opportunity of sending a suitably qualified substitute to minimise the risk of them being deemed to have employee or worker status.
- **Plant and equipment**
  Consultants and the genuinely self-employed would normally have their own tools and equipment, so the contract should reflect that.
- **Confidentiality**
  In an employment relationship, there is an implied duty of confidentiality, but there is no such implied duty in a commercial agreement. The contract should set out any information security and data protection requirements.
- **Insurance and indemnity**
  Whilst you must have employer's liability insurance for your employees, this would not cover consultants. The consultant should confirm that they have any relevant insurance in place for their work, such as public liability and professional indemnity insurance. You should also consider adding indemnities into the agreement to cover any losses or claims relating to the services they provide, any claims that they are in fact a worker or employee, and any tax liability that might result from that.
- **Service Companies**
  If the consultant is providing their services through a service company, you should make sure that any contractual arrangement reflects that.

Professional fundraisers

Ordinarily, you would not have to have a written contract in place with any independent contractor who provides a service. However, as a charity, you must have a written agreement if the individual is providing professional fundraising services. It is unlawful under Section 59 (1) of the Charities Act 1992 not to do so. Given the serious consequences of failing to comply with this (it would be a criminal offence), you should seek professional advice on these agreements.

A professional fundraiser is defined in Section 58(1) of the Charities Act 1992 as:

"(a) any person (apart from a charitable institution or a company connected with such an institution) who carries on a fund-raising business, or

(b) any other person [with certain exceptions] who for reward solicits money or other property for the benefit of a charitable institution…"

If you do engage a professional fundraiser then you must have a written agreement. Regulation 2 of the Charitable Institutions (Fund-Raising) Regulations 1994 stipulates that it must set out the following matters:

- The names and addresses of all the parties.
- The date on which the agreement was signed by or on behalf of each party.
- The period the agreement is to last.
- Any terms dealing with early termination.
- Any terms dealing with variation.
- A statement of its principal objectives and the methods to be used in pursuit of those objectives.
- If more than one charity is involved, how any funds raised will be shared between them.
- The amount which the professional fundraiser is to be entitled to receive in payment or as expenses.

Further information

The Institute of Fundraising has published a 'Code of Fundraising Practice' which covers all issues of fundraising, as well as the use of professional fundraisers:

www.institute-of-fundraising.org.uk/code-of-fundraising-practice/what-is-the-code-of-fundraising-practice

"As a charity you must have a written agreement if the individual is providing professional fundraising services"

8.FIXED-TERM EMPLOYEES

Introduction

The law provides specific protection to those who work under fixed-term contracts.

A fixed-term contract is a contract that will end on:

- The expiry of a fixed term (whether that is a specific date or a period of time).
- The completion of a particular task.
- The occurrence of a particular event.

A contract will still be a fixed-term contract, even if it has a notice clause, as long as it will expire automatically at the end of the term.

Fixed-Term Employees Regulations

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 give certain protections to fixed-term employees.

The Regulations only apply to employees (not to workers, apprentices or agency workers).

A contract will *not* be a fixed-term contract for the purposes of the Regulations if it:

- Does not expire automatically on a particular date, term or event but depends on either party giving notice.
- Has an initial period during which notice cannot be served but after that the contract continues indefinitely.
- Renews automatically after a fixed-term, for another fixed-term, unless either party gives notice.

It is very unusual to have fixed-term contracts without a notice clause because it can otherwise be very expensive to bring them to an end. If a contract has a notice clause, the employer may serve notice. If the employer does not but dismisses the employee without notice, the employee may be entitled to their pay in lieu of notice but this will be no more than their normal pay throughout the contractual notice period. However, if the contract does not have a notice clause, the employee might be entitled to claim their pay throughout the remainder of the fixed-term contract.

Tip: You should only use fixed-term contracts when they are necessary. If you use a fixed-term contract, it is essential to have a clause allowing you to terminate the agreement on notice. If you do not, the employee may be entitled to be paid until the contract expires.

"As long as a fixed-term employee has sufficient service, they may be eligible to bring an unfair dismissal claim in the same way as a permanent employee"

Protection from discrimination

Under the Regulations, employees on fixed-term contracts must not be treated less favourably than permanent employees on the grounds of their fixed-term status:

- in relation to the terms of their contracts.
- by being subjected to a detriment (or being treated unfavourably) by their employer.
- in relation to any conditions which require a period of service in order to qualify for:
- The opportunity to receive training.
- The opportunity to secure a permanent position.

It is presumed that a fixed-term employee has been treated less favourably if the 'pro rata principle' has not been applied. In other words, fixed-term employees should receive a fair proportion of the contractual benefits their permanent colleagues receive based on their fixed-term status and contract.

An employer may be entitled to defend their actions on the basis that it is justified on objective grounds. This will be possible if the fixed-term employee's terms and conditions are, taken as a whole, compare favourably with a comparable permanent employee.

Tip: The test for whether or not something is justified on objective grounds is quite strict. If you do have fixed-term employees, you should give serious thought to ensuring either that they are treated in the same way (as far as possible) as permanent staff, or that your reasons for treating them differently are robust.

Protection from unfair dismissal

As long as a fixed-term employee has sufficient service, they may be eligible to bring an unfair dismissal claim in the same way as a permanent employee. They may also be entitled to redundancy pay.

In addition, if an employee is employed under a succession of fixed-term contracts which are renewed, they will become a permanent employee once they have four years' continuous employment (below).

Tip: It is always worth considering an employee's situation before they are entitled to bring an unfair dismissal claim (with two years' continuous service), and the same is true of a fixed-term employee approaching four years' service. Make sure these dates are properly tracked.

It would also be automatically unfair to dismiss an employee if the reason for the dismissal related to a number of matters which are designed to protect fixed-term employees' rights under the Regulations, including where they have:

- alleged that their employer has infringed their rights.
- refused to forego their rights.
- brought proceedings or given evidence in relation to their rights.

Written statements

A fixed-term employee is entitled to a written statement from their employer in response to an allegation that they have:

- been treated less favourably, or
- become a permanent employee. The statement from their employer must confirm whether they are permanent or not, and if not, give the reason(s).

This statement must be provided within 21 days of the request and will be admissible as evidence in tribunal proceedings. The tribunal could also take into account whether the employer refused to provide a statement, or if the contents were evasive or equivocal.

Tip: Treat any request for a written statement seriously. It may be used as evidence before a tribunal so it is also a good opportunity to put your case forward, and even persuade an employee that they have not been treated less favourably.

"Fixed-term employees should receive a fair proportion of the contractual benefits their permanent colleagues receive based on their fixed-term status and contract"

9.PART-TIME WORKERS

Introduction

The law provides specific protection to those who work part-time. Part-time workers might also bring claims of sex discrimination on the basis that historically more women than men have worked part-time, and whilst a rule may appear to treat men and women equally, it may have a greater impact on part-time workers. Part-time workers may also be entitled to bring claims relating to equal pay for the same reason.

Part-Time Workers Regulations

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 give certain protections to part-time workers.

The Regulations apply to workers as well as employees.

Essentially, a part-time worker is someone who works fewer hours than a full-time worker. A full-time worker is paid wholly (or in part) by reference to the time they work and is identifiable as a full-time worker having regard to the employer's custom and practice. Therefore, the definition of 'full-time' will depend on the working arrangements and hours of work for an employer's workforce; not just on the written contracts of employment but also actual working practices.

Protection from discrimination

Under the Regulations, part-time workers must not be treated less favourably than full-time comparators, on the grounds of their part-time status:

- in relation to the terms of their contracts, or
- by being subjected to a detriment (or being treated unfavourably) by their employer.

An employer has a defence if the treatment was justified on objective grounds.

For the purposes of a claim, the worker must compare themselves with a full-time worker of the same type, employed by the same employer and carrying out the same or broadly similar work, who falls into one of the following categories:

- Employee
- Apprentice
- Worker
- Any other description of worker that it is reasonable to treat differently.

So, for example, a part-time worker could be compared to a full-time worker but not to a full-time employee for the purposes of a claim.

Protection from unfair dismissal

Employees are entitled to bring unfair dismissal claims, as long as they have sufficient continuous employment. In addition, it would be automatically unfair to dismiss an employee if the reason for the dismissal related to a number of matters which are designed to protect part-time workers' rights under the Regulations, including where they have:

- alleged that their employer has infringed their rights.
- refused to forego their rights.
- brought proceedings or given evidence (or done anything) in relation to their rights under the Regulations.

Workers are protected from being subjected to a detriment if the reason for the detriment related to those matters (set out above). Although workers are not entitled to bring unfair dismissal claims they may seek to argue that the detriment may include the decision to bring their contract to an end, or not to renew or extend their contract.

The 'pro rata' principle

In order to determine whether a part-time worker has been treated less favourably, the court or tribunal will apply the pro rata principle unless it is not appropriate. A part-time worker should receive the same pay and benefits as a full-time worker in proportion to their working hours. This can of course cause difficulties to employers where it is difficult to divide up the cost of the benefit, for example, private health insurance.

Written statement

A part-time worker is entitled to a written statement from their employer in response to an allegation that they have been treated less favourably. This statement must be provided within 21 days of the request and will be admissible as evidence in tribunal proceedings. The tribunal could also take into account whether the employer refused to provide a statement, or if the contents were evasive or equivocal.

Employees also have a right to a written statement of the reason for their dismissal if they have sufficient continuous employment to bring a claim of unfair dismissal (and in other limited circumstance). Workers are not entitled to request a written statement of the reasons for dismissal.

Overtime

It would not be discriminatory to expect part-time workers to work the same number of hours as their full-time equivalents before being entitled to any enhanced rates of pay for working overtime. So, for example, if a full-time worker works 40 hours at normal pay but then receives time-and-a-half after that, it would be fair to expect a part-time worker who works 20 hours to work up to 40 hours at normal pay before being paid time-and-a-half for any work after that.

This is not necessarily the case with unpaid overtime, where the position is complex. If an employer has a threshold of a certain number of hours the employees must work as unpaid overtime before they receive overtime pay, it may be unfair under the Regulations and it may also amount to sex discrimination.

Holidays

Part-time workers are entitled to holidays on a pro rata basis.

There will be obvious difficulties in calculating a worker's holiday entitlement if they have moved from full-time to part-time hours, or if their hours of work vary from week to week.

Public or bank holidays may be a particular problem for part-time workers, and often cause difficulties in the workplace. The Working Time Regulations grant employees four weeks' annual leave plus 1.6 weeks' leave in respect of bank holidays (although there is no requirement to use this period of leave on bank holidays). Part-time workers should therefore still accrue holiday leave for bank holidays even if they fall on a day they do not normally work.

Although part-time workers will be entitled to holidays on a pro rata basis, this may mean that a part-time worker has not accrued sufficient leave from their 'bank holiday' entitlement (the 1.6 weeks' leave) to cover the bank holidays they must take. In order to cover this absence, they may be required to use time from their 'statutory' entitlement (the four weeks' leave). This may cause resentment as they have fewer holidays where they can choose when to take it, but since the 1.6 weeks' leave is not fixed to bank holidays, they are unlikely to be unable to bring a claim.

"Do not assume that because a person works part-time that they would not be prepared to change, particularly if their job is at stake"

Redundancy

As only employees are entitled redundancy pay, the part-timer would have to be an employee rather than a worker to qualify. If they do qualify, their redundancy pay would be calculated based on their normal pay and the actual hours worked, even if they had only recently moved from full-time to part-time.

If you are selecting the group of people who might be at risk of redundancy, you will need to include all full-time and part-time employees in the same pool. This is because the definition of redundancy refers to employees carrying out work of a particular kind; the terms and conditions on which they do that work is irrelevant.

Tip: Do not assume that because a person works part-time that they would not be prepared to change, particularly if their job is at stake. So, for example, if you have one full-time and one part-time employee, and you wish to reduce that to one full-time role, you should consider putting both employees at risk of redundancy. If the part-time employee cannot work full-time, and you have good reasons for keeping a full-time role, then they could not take on the new role but they should be offered the opportunity to do so.

Sex discrimination and equal pay

A part-time worker may be able to claim indirect discrimination on the grounds of sex if they can establish that:

- The employer has a 'provision, criterion or practice' ('PCP') which applies equally to both sexes.
- The PCP puts women at a particular disadvantage when compared to men (or vice versa).
- The PCP puts the worker at that disadvantage.
- The PCP is not a proportionate means of achieving a legitimate aim.

The fact that part-time workers are more likely to be women also means that the shift patterns or times of work may have a discriminatory impact rather than just the number of hours worked, since more women than men have childcare commitments.

A part-time worker may also be able to bring an equal pay claim if a full-time worker of the opposite sex receives better pay or benefits (on a pro rata basis).

10.VOLUNTEERS, INTERNS AND WORK PLACEMENTS

What is a volunteer?

A volunteer usually provides their services to a charity or voluntary organisation without the expectation of being paid in return, except for limited expenses. They would not normally fall within the categories of employee or worker. Two important areas need to be considered in order to ensure that a volunteer is unable to claim worker or employee status. Firstly, it is important to avoid too many formalities and obligations in the relationship. Secondly, it is important to pay volunteers only out-of-pocket expenses rather than anything that could be seen as pay or salary.

Tip: Although you should try to avoid too many formalities, a volunteer agreement is an ideal way of setting out the arrangements and clarifying that the position is entirely voluntary.

Volunteer agreements

Although increased formalities and obligations would tend to make it more likely that a person was a worker or employee rather than a volunteer, a volunteer agreement is a very effective way of demonstrating that a person is a volunteer.

KEY POINTS

- *There is no legal obligation to provide a volunteer agreement.*
- *It can be described as 'not legally binding' or 'binding in honour only' or both. The purpose of the agreement is to record what the parties will do or expect of each other, so a binding and legally enforceable agreement is not essential.*
- *You should avoid clear obligations or requirements, and concentrate instead on expectations or intentions. In particular, it is important to stress that the organisation is not obliged to offer work to the volunteer and the volunteer is not obliged to undertake it, or be paid for it.*
- *The agreement should set out that the volunteer is only entitled to the reimbursement of their genuine and reasonable expenses (or a sum that has been carefully set to reflect their anticipated expenses), and nothing that might be seen as a retainer or wage.*
- *If the organisation provides training this could be covered in the agreement, especially if it this might go beyond what required for the volunteer to carry out their role.*
- *There is no need for the organisation's disciplinary and grievance procedures to apply. However, it may be useful to create a separate mechanism to give volunteers the opportunity of raising concerns, or for the organisation to address their performance concerns, including the details of the manager or supervisor.*
- *Similarly, there is no need for a notice period. The organisation can simply inform the volunteer that they are no longer required.*
- *Volunteers may still be subject to an organisation's rules on data protection and confidentiality (even after the volunteering relationship has come to an end), and the agreement should reinforce this.*

"It is vital not to pay a volunteer anything that could be construed as wages or salary"

Case Study – South East Sheffield CAB v Grayson (2004)

The CAB's volunteer advisors had volunteer agreements. This gave a "usual minimum weekly commitment" of six hours but there was no sanction if the volunteer failed to turn up. It went on to say, "We will be flexible about when you work within the constraints of drawing up the rota." As for expenses, the agreement said, "Our policy is that you will be paid on the basis of not being out of pocket." The tribunal held that the volunteers were employees. This was overturned by the EAT, who were satisfied that neither party was expected to sign the agreement, and that the minimum hourly commitment was not a binding contract but allowed the CAB to organise the delivery of its services. It was also persuaded that there was no mutuality of obligation.

Is a volunteer an employee or worker?

Probably neither. A truly voluntary arrangement will lack many of the features expected in an employment relationship, in particular 'mutuality of obligation'. An organisation is not usually obliged to offer a volunteer work, and the volunteer is not obliged to carry it out when offered. In addition, the voluntary organisation is not obliged to pay the volunteer for their services.

Tip: It is vital not to pay a volunteer anything that could be construed as wages or salary. If you treat an individual as if they were your employee (by paying them, for instance), then it is more likely that a tribunal will also consider them to be an employee.

You are obliged to pay your employees or workers, so in order for a volunteer to claim that they are an employee or worker, they will have to show that they have been offered something of value (even if it was not wages). The offer or possibility of paid employment after a period of voluntary work, or training courses or experience above and beyond the voluntary services themselves, could count as pay.

Tip: It is absolutely vital that there is no guarantee of either paid employment in the future or specialised training, in order to avoid volunteers becoming employees or workers.

Case Study – Chaudri v Migrant Advisory Service (1997)

Ms Chaudri worked at an advisory centre for three hours in the morning, four days a week. She was paid £25 a week, which was later increased to £40. The payments were described as 'voluntary expenses'. The sum bore no relation to her actual expenses. She was also paid when she was off sick or on holiday. The tribunal decided that she was not a volunteer and the EAT agreed.

Interns and Employment Status

There is no specific definition of intern, and the role has no legal status. An internship is a form of work experience or work placement, and therefore although it is possible that an intern may be an employee it is far more likely that they will be a worker.

Protection from unfair dismissal

If the arrangements are not voluntary, and in fact the individual can qualify as an employee, then they will be eligible to bring a claim of unfair dismissal. This is unlikely but it may happen if the volunteer's arrangements become regular or rigid, or if they are offered pay separate from their out-of-pocket expenses.

Case Study – Melhuish v Redbridge CAB (2005)

Mr Melhuish volunteered at the CAB one or two days a week. He was paid his travelling expenses but no holiday or sick pay and had no contract of employment. When his work came to an end, Mr Melhuish brought a claim for unfair dismissal. The tribunal decided that he was not entitled to do this, as he was not an employee (and the EAT agreed). He was expected to work two days a week, but this did not always happen, as the CAB was not obliged to provide work and he was not obliged to do it. There was no 'mutuality of obligation'.

Protection from discrimination

There are two possible routes for a volunteer to bring a discrimination claim:

- As above, if they can bring themselves within the wider definition of workers protected by discrimination law, they would be entitled to bring a claim. Since individuals are protected from discrimination by an employer or prospective employer in the arrangements made to recruit staff (or the arrangements they make for deciding to whom they offer employment), if a period of voluntary service may lead to a paid position, these arrangements may come within the scope of discrimination law.
- As a member of the public or service user, a volunteer may be eligible to bring a discrimination claim based upon the provision of services to the public, or in relation to the premises involved. Claims of this type are not limited to employees or workers.

Not only will the voluntary organisation owe a duty to the public and the volunteer, but the volunteer will also owe duties to the public.

The voluntary organisation might be vicariously liable for the actions of volunteers in relation to the public or services users, and to other volunteers and employees. Just as an employer will be liable for the actions of its employees, it may also be liable for the actions of its volunteers if they have acted on their authority as an agent (even if the particular act in question was done without their knowledge or approval).

There are also special provisions for instructing or aiding others to carry out discrimination.

Case Study – X v Mid-Sussex CAB (2012)

X worked for the CAB. When she was asked not to attend, she brought a claim of disability discrimination. The tribunal decided that she could not bring a claim, as she did not fall within the definition of 'employee' for the purpose of discrimination claims. She had signed a volunteer agreement which stated that it was, "…binding in honour only… and not a contract of employment or legally binding". She did not attend for 25-30% of the days she was expected to, and no objection was taken to this. The tribunal found that she was not obliged to work. X argued that the training and volunteering led to paid employment, and so fell within the scope of anti-discrimination legislation, but the tribunal held that volunteering experience was not a necessary step to a substantive appointment.

"Volunteers are specifically excluded from the National Minimum Wage"

Pay and expenses

As noted above, paying a volunteer runs the risk that they will be treated as an employee. They should normally be paid their out-of-pocket expenses, such as travel or food. If they are paid a fixed amount, which is stated to be in respect of their anticipated expenses, this should be a reasonable sum to cover these costs. A fixed retainer that far exceeds their normal expenses is more likely to be seen as a wage, and lead to the volunteer gaining employment status.

Case Study – Breakell v West Midlands Reserve Forces (2010)

Mr Breakell was an adult instructor for the Army Cadet Force. He was entitled to at least 28 paid training days a year, but not to holiday or sick pay. These payments were discretionary, and they were meant to cover compensation for lost earnings. As there was no mutuality of obligation, Mr Breakell was not an employee, and the tribunal decided that he could not bring a claim of disability discrimination.

National Minimum Wage: volunteers

Volunteers are specifically excluded from the National Minimum Wage. Again, the payment of expenses is important in this respect. The exclusion applies to:

- A worker employed by a charity, voluntary organisation, associated fundraising body, or a statutory body.
- A worker who receives no monetary payments of any description, or no monetary payments except in respect of expenses actually incurred in the performance of their duties or reasonably estimated as likely to be or have been incurred.
- A worker who receives no benefits in kind of any description.

If a worker is offered further training beyond that which would relate to their normal voluntary work, that could be seen as a benefit in kind.

Those who are not entitled to the National Minimum Wage are not entitled to the National Living Wage. This will include volunteers.

National Minimum Wage: interns

The position with interns, and those on work placements, is slightly different. If interns have a regular working pattern, and are paid more than their out-of-pocket expenses, they may be classed as workers or employees in which case they would be eligible for the National Minimum Wage.

Case Study – Vetta v London Dreams Motion Pictures (2008)

Ms Vetta accepted a four week "expenses only" position with a film production company. There was no written agreement between Ms Vetta and the Production Designer who interviewed and appointed her, who was engaged by the film company as a self-employed contractor. Despite these contractual arrangements, the tribunal examined the correspondence between all the parties and decided that Ms Vetta was a worker, and so entitled to the National Minimum Wage and holiday pay.

There are specific exceptions though. The following are not entitled to the National Minimum Wage:

- Students undertaking an internship lasting less than one year as part of a course in further or higher education.
- Students below the compulsory school age (16) carrying out work experience.
- Work-shadowing, where the intern is observing rather than carrying out any work.

Employing those who volunteer elsewhere

An employee does not have the right to take time off from work to carry out voluntary work elsewhere. However, an employee who takes unpaid time off work in order to carry out certain responsibilities, such as justice of the peace or member of a local authority or as trustee of an occupational health scheme or employee representative may have some protection from unfair dismissal or being subjected to a detriment in these circumstances.

Further Information

BIS has produced guidance: 'National Minimum Wage: Work Experience and Internships' (May 2013).

The Government website also has information on volunteers:

www.gov.uk/contract-types-and-employer-responsibilities/employing-family-young-people-and-volunteers

NCVO has issued guidance, 'Volunteer Interns in the Voluntary Sector':

https://knowhownonprofit.org/people/volunteers-and-your-organisation/ncvoguidancevolunteerinternshipsvoluntarysector.pdf/view

11.HOMEWORKERS AND MOBILE WORKERS

What is a homeworker?

A homeworker is a person who regularly spends some or all of their working time from home. This does not include 'incidental homeworking', when a person who normally works at the employer's workplace leaves early or occasionally does some work from home. It usually refers to:

- Workers who are predominantly based at home and make occasional visits to the office for meetings.
- Workers who regularly split their working time between the home and the office, for example, someone who works from home one day a week.
- Mobile workers who have no usual office-base.

There is no set definition of 'homeworker' and different names have developed. 'Outworkers' usually refers to traditional homeworking, such as working in the clothing industry or filling envelopes. The terms 'teleworkers' or 'telecommuters' refers to those workers who would have been office-based but can, due to developments in information technology, work from home or remotely.

What is a mobile worker?

A mobile worker, or peripatetic worker, is someone who travels as part of their role and may have no base or workspace at their employer's premises. They may use their home as their workplace, but most of their work is carried out at the customer's premises.

Homeworkers and employment status

Whether an individual works from home for some or all of their time should not necessarily have an impact on their employment status, which will be determined in the usual way. However, it may have an impact on the degree of control the employer can exercise over the way in which the work is carried out. Similarly, the change from office-based to home-based (or the opposite) will not necessarily affect a worker's employment status, but other changes made at the same time might. In practice, many homeworkers are all also part-time workers.

Case Study – Airfix Footwear Ltd v Cope (1978)

Mrs Cope worked five days a week making heels for shoes, for seven years. She had been trained, and supplied with equipment and materials by the company. She was paid on a 'piecework' basis. She was not entitled to holiday pay or sick pay and the company considered her to be self-employed. It made no deductions from her 'wages' for tax. A tribunal held that she was an employee and so was entitled to bring a claim of unfair dismissal.

What to watch for

There are a number of important issues to be considered in dealing with homeworkers:

- *Managing and supervising remote workers, including human resources issues, training, and career development.*
- *Maintaining data protection, confidentiality and information security, and at the same time respecting an individual's privacy.*
- *Ensuring the working arrangements meet health and safety requirements, and also comply with the duty to make reasonable adjustments (where appropriate).*
- *Considering the financial implications, including tax and insurance, but also expenses and pay enhancements, and access to other work-related benefits.*
- *Communicating with workers, especially where this is a legal requirement, for example when collective consultation is required.*

In order to address these concerns, you may wish to have a homeworking agreement or policy, particularly if these issues are not set out in the written contract.

Flexible working

Often, a worker may see the opportunity to work from home as a perk or privilege which they are already entitled to. This is not the case. No worker has the right to work from home. It is for the employer to decide where the work should be carried out.

Tip: If a worker wishes to work from home, you could suggest that they make a flexible working request.

If they do work from home, a worker can still be required to attend the office as and when required. The refusal to do so could amount to a refusal to obey a reasonable management instruction, which as a breach of the employer's disciplinary rules may justify disciplinary action.

Documenting the relationship

You may already have a written agreement between your organisation and the homeworker, whether they are an employee, a worker, or neither.

Tip: Don't forget that the duty to provide an employee with a 'Section 1 Statement' still applies to homeworkers. One of the matters this must cover is:

"The place of work, or if the employee is required or permitted to work at various places, an indication of that."

Tip: If the working arrangements have changed, either from office-based to homeworking or vice versa, you may need to issue a Section 4 Statement in order to confirm the changes.

A homeworking agreement or policy

If your written agreement or Section 1 Statement does not cover the homeworking arrangements adequately, you may wish to have a separate homeworking agreement, and this could be supported by a homeworking policy. This could cover:

- **Working time, hours of work and rest periods –** How these will be recorded and verified, if necessary. The same principles apply with holiday leave, sickness absence, and other forms of family leave. You will also need to ensure that the homeworker is devoting their time and attention to their work during normal working times.
- **Salary and contractual benefits –** This could include access to on-site facilities, such as a workplace crèche or gym, or other benefits such as subsidised parking, car allowance or season ticket loans which the homeworker might no longer need.

- **Expenses –** You may choose to pay an allowance to cover the costs associated with homeworking (such as telephone and internet charges, office equipment, heating and lighting, and insurance) and travel and subsistence when attending the office or customer sites. However, you are not obliged to, particularly if it is the employee's choice to work from home and they will save on travel and commuting costs. If the arrangement is related to a worker's health however, you should consider whether the change amounts to a reasonable adjustment on the grounds of their disability. If so, the costs should not be met by the worker.
- **Confidentiality, information security and data protection –** Whilst you can insist that the same duties apply in the same way wherever the homeworker is, different arrangements may need to be put in place.
- **Health and Safety –** You will still remain responsible for the employee's health and safety, and this remains true with homeworkers. You should carry out a **risk assessment** to cover the usual matters relating to a worker's workspace, as well as those risks which arise from their homeworking such as isolation and lone-working, or increased travel. You will also be responsible for any equipment you provide for them to work from home.
- **Workplace –** You may also need to consider the impact of homeworking on the employee's home insurance, mortgage or rental arrangements, and planning permission. The homeworking agreement could also allow you to enter the homeworker's property to service and maintain or collect equipment, if necessary.
- **Tax –** Both you and the homeworker should understand the implications of homeworking on their tax liability, including business rates.
- **Changes to the Arrangements –** such as applying for homeworking, bringing the arrangements to an end, and also what should be done if the homeworker moves house. Unless the homeworking arrangement is permanent, you have the right to revoke it but this is something that should be included in the agreement.

Tip: Exercise care here. Ensure that any change is reasonable in order to avoid a possible breach of contract, which might lead to a constructive dismissal claim.

Protection from discrimination

As far as the law on discrimination is concerned, there is no difference between homeworkers and office workers. However, there are two potential problem areas to watch for:

- Women are more likely than men to make flexible working requests, and they are more likely to have the primary childcare responsibilities. They are also more likely to be homeworkers. In addition, homeworkers are more likely to be part-time workers, and part-time workers are more likely to be women.

Tip: A part-time worker may claim that they have been treated differently because of their part-time status (see below).

- If the homeworking arrangement relates to a person's health, there may be issues of disability discrimination to consider. An employer has a duty to make reasonable adjustments to a worker's terms and conditions and working arrangements in order to avoid putting them at a disadvantage.

Tip: You may consider a trial period in order to see whether the new arrangements might work.

Homeworkers are specifically within the category of worker protected for whistleblowing claims.

"As far as the law on discrimination is concerned, there is no difference between homeworkers and office workers"

What is a 'mobility clause'?

You must inform an employee what their place of work is (or where they are required to work). A 'mobility clause' sets out the geographical area in which a worker is expected to travel as part of their duties, whether they have a base or usual place of work or not.

Mobile workers

One particular issue for mobile workers is their travel time. Commuting from work to home (or vice versa) is not seen as working time. Travelling between assignments is almost certainly working time.

Case Study – Federacion de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security SL ('Tyco') (2015)

The Claimant was an engineer who installed and serviced security systems. Their employer sent them instructions as to where they had to go at the start of the day, and they travelled to their assignments directly. They only visited a depot for parts and equipment when needed. The European Court of Justice held that time spent travelling from home to the first assignment of the day was working time (for which the workers were entitled to be paid), as was the last journey home.

One significant factor was the fact that Tyco previously had local depots, which the engineers used to visit at the start of each working day before setting off to the first site. The local depots had been closed. As a result of the change in circumstances, although this case is helpful, it is not absolutely certain that the first and last journeys will always be seen as working time.

Further Information

ACAS has produced Guidance, 'Homeworking – A Guide for Employers and Employees' (May 2014):

www.acas.org.uk/index.aspx?articleid=4853

The DTI (now BIS) published Guidance, 'Telework Guidance', as agreed by the CBI, TUC and CEEP UK (2006). This has not been updated and parts of it, particularly in relation to flexible working and discrimination, are no longer current:

http://webarchive.nationalarchives.gov.uk/20031220235245/http://dti.gov.uk/er/individual/telework.pdf

The Health & Safety Executive has produced guidance, 'Homeworkers – Guidance for Employers on Health and Safety':

www.hse.gov.uk/pubns/indg226.pdf

12.OFFICEHOLDERS AND TRUSTEES

What is an officeholder?

An officeholder is a traditional position which carries with it certain rights and obligations defined by the office held. An 'office' is any position which has an existence independent of the person who holds it and it may be filled by successive holders. They usually serve for a term even if they can be removed during this period. Within the charity sector, the two most important (and common) types of officeholder are company directors and trustees, and these will be the focus of this Guide.

Is an officeholder an employee?

An officeholder will not be an employee simply because they are an officeholder, but they may also be an employee depending on their role. There are five categories of officeholder:

- An individual who is purely an officeholder (and neither an employee nor a worker), such as a police officer.
- An individual who is in fact an employee (only) even though they are described as an officeholder.
- An individual who is in fact a worker (only) even though they are described as an officeholder.
- An individual who is both an employee and officeholder, such as a company director.
- An individual who is both a worker and an officeholder.

In deciding whether or not an officeholder is also an employee or worker, a tribunal will consider the usual issues concerning employment status.

Pay and tax

An officeholder is not paid wages or a salary for their work. Rather they are paid a fee, an 'honorarium', that goes with the particular office and compensates them for their service.

If an officeholder receives a regular income that appears to be wages, that may tend to suggest they are in fact an employee.

Tip: If the position of trustee in your organisation is meant to be voluntary, be aware of the rules on paying fixed fees or expenses to volunteers.

Even though an officeholder is not usually an employee or worker, they may be an employed earner for the purposes of tax and national insurance.

"An officeholder will not be an employee simply because they are an officeholder, but they may also be an employee depending on their role"

Company directors

A company director is an officeholder. This includes the directors of charities, companies limited by guarantee or Community Interest Companies. As such, the director will owe a number of legal duties to the company.

A company director is not automatically an employee of the company. They may have a service agreement or contract of employment but this is not essential.

A company secretary will almost always be an employee of the company as well.

Documenting the relationship – directors

If it is not intended that the director should be an employee, for example a non-executive director, then a written agreement could set out the role, the responsibilities and the term of office. The agreement could set out the parties' intentions and expectations, particularly in regard to the director's employment status.

For executive directors, it is standard practice to provide a lengthy and detailed 'service agreement', which contains many of the features of a contract of employment but also recognises the fact that the director is an officeholder. This could fulfil the requirements of a Section 1 Statement.

The agreement should also specify what will happen if the director is removed from their office as a director – specifically whether that will lead to them being dismissed as an employee, so that both relationships come to an end at the same time. It should also give the employer the power to remove the director if there has been a breakdown in the relationship.

Trustees

The role and responsibilities of a trustee are derived from the trust deed or governing document. They may also have a separate agreement setting out their role as a trustee.

In general, trustees should not benefit from their position as trustee. For that reason, most trustees will be volunteers, rather than employees. As a volunteer, a trustee is only entitled to the reimbursement of their out-of-pocket expenses.

In exceptional cases, a trustee may also be an employee. This may be authorised by the Trust's governing document (a 'remuneration clause' allowing the trustee to be paid), or by the court or Charity Commission. It would need to be in the best interests of the trust. If it is not authorised, the trustee should not be considered as an employee when carrying out the normal duties of a trustee.

"There are strict rules in place regarding payments made to trustees"

What if a trustee also provides services to the charity?

A trustee may, in certain circumstances, provide services to the trust above and beyond their normal duties as a trustee. This is often in a self-employed capacity. There are strict rules in place regarding the payments made to trustees for the provision of services above and beyond their normal duties as a trustee under the Charities Act 2006. Four conditions need to be met:

- **Condition A –** the amount (or maximum amount) of remuneration is set out in writing, in the agreement between the trust and the trustee to provide the services, and it is a reasonable amount for those services.
- **Condition B –** the trustees were satisfied that it was in the best interests of the charity.
- **Condition C –** only a minority of trustees enter into such an agreement.
- **Condition D –** there is nothing in the governing document to prevent the payment of remuneration.

These rules also apply to a person connected to a trustee and their close relatives including spouse/partner, siblings, brother or sister-in-law, parents, and business partners.

A trust may need to seek permission from the Charity Commission before employing a trustee or a connected person, particularly if it is not authorised by the trust's governing document.

Documenting the relationship – trustees

Trustees may be given an agreement that sets out the term of office, and their role and responsibilities and the parties' intentions and expectations in the same way as a volunteer agreement. The agreement should also provide for a trustee to be removed where appropriate by the other trustees.

The legal position of trustees can be complex, and you would need to take into account the trust deed and other legal responsibilities. You should seek specialist advice before seeking to change a trustee's relationship with the trust or providing them with a formal agreement.

Further Information

The Charity Commission has produced guidance, 'Trustee Expenses and Payments' (1st March 2012):

www.gov.uk/government/publications/trustee-expenses-and-payments-cc11/trustee-expenses-and-payments

SECTION II
DOCUMENTING THE RELATIONSHIP

13.WRITTEN CONTRACTS

Introduction

Although it is often best to avoid too many formalities, and in many cases it is best to avoid too many obligations (for example, in making sure an individual is a worker rather than employee), it is still almost always worth having a written contract or agreement in place. The risk is that without a written agreement, it will be for the tribunal to determine what the terms of the contract are based on the evidence presented by the parties.

A written contract has a number of other advantages:

- It can cover issues beyond the areas that have to be included in a **Section 1 Statement**.
- It provides certainty to the individual and employer.
- It can cover areas which, if they are not dealt with, will be covered by an implied term which might not suit either party.

Does a contract of employment have to be in writing?

No. A tribunal will acknowledge an oral contract but this will of course lead to difficulties in identifying what the terms of the contract are.

There is a duty to provide an employee with a written statement that sets out certain particulars of the employment relationship, referred to as a 'Section 1 Statement' from section 1 of the Employment Rights Act 1996 (see below). This does not cover every aspect of the employment relationship, so if an employee has a Section 1 Statement but no other written contract, the court or tribunal would still need to look at other factors in order to determine the terms of a contract.

If a court or tribunal is asked to decide what the terms of the contract are, it will consider a number of matters. This will include any written agreements or contracts, but also other things including:

- Any other documents or correspondence, whether signed and agreed or not.
- Anything said by either party about the employment relationship.
- How the parties work together in reality.
- Custom and practice.
- A number of duties implied by law.

The terms of the contract could be:

- **Express –** something that has been clearly communicated between the parties, if not necessarily agreed between them, either in writing or verbally.
- **Implied –** something decided upon by the court or tribunal to be part of the contract by considering the actions of the parties, custom and practice in the particular industry, or the general legal obligations that should apply in such cases.

Implied terms may become part of the contract in one of the following ways:

- **Terms implied in fact:** the term is necessary to give 'business efficacy' to the contract. One way in which this is put is that if an 'officious bystander' had been with the parties when they drew up the agreement and asked about the term, they would say it was obviously intended to be part of the contract (the officious bystander test).
- **Terms implied in law:** the term is a necessary condition of the contractual relationship. For example, every contract of employment has an implied duty of mutual trust and confidence between the parties.
- **Terms implied by custom and practice:** certain terms are implied because they are 'reasonable, notorious and certain' within a particular market, industry or region.

- **Terms implied by statute:** these terms are added by legislation, for example, the 'equality clause', which requires that men and women are paid the same for the same work, or the statutory minimum periods of notice (see below).

Does a contract of employment have to be signed?

No, but it is best practice to ensure it is. This is much easier to enforce with new starters. A tribunal will take an unsigned contract into account, but if it is not signed the individual may claim that they had not agreed to a specific term. For example, if the change relates to pay or hours of work, the employee would have to work for that pay, or in accordance with those hours, whether they signed the contract or not. It would be harder for them to argue that they had not agreed to a change when it had taken effect. For some terms, such as enhanced redundancy payments or restrictive covenants, they may never take effect until the relationship has come to an end. It might be difficult for the employer to say that the employee was aware of and agreed to that change unless a new written contract had been signed.

A tribunal would also expect to see a signed agreement if an employer wishes to enforce onerous terms, such as restrictive covenants.

Collective agreements

An employee's contract of employment may not be the only source of their terms and conditions. In many industries, employers' associations and trade unions have negotiated agreements which may become part of the contract of employment. For example, in the NHS many workers are subject to the NHS Terms and Conditions Handbook, known as 'Agenda for Change'.

Is a collective agreement binding?

These terms are not necessarily binding between an employer and an employee. They are often stated to be 'binding in honour only' (in other words, not legally binding). They may include agreements on matters which do not directly affect an employee's work on a day-to-day basis, such as broad statements of principle, or systems for resolving disputes. They will be binding if a court or tribunal decides that they are 'apt for incorporation'. This means that they cover the sort of things that an employee and employer might agree between themselves. This often covers the hours of work, rates of pay, and sickness absence or disciplinary procedures.

What are incorporated terms?

Incorporated terms are different from implied terms. A term can be incorporated into a contract if it is 'apt for incorporation', that is, it is suitable to be part of the contractual relationship. The source for the term itself is usually another document, such as a collective agreement or a staff handbook.

Tip: You must be careful when preparing a staff handbook to ensure that it does not unintentionally become incorporated into the contract of employment. Even if the handbook states that it is not contractually binding, the courts or tribunals may consider that it is. Once it is incorporated, an employee will be able to rely upon it.

Case Study – Department of Transport v Sparks (2016)

The Department had a short-term absence policy that set a trigger point of 21 days absence in any 12 month period. The Court of Appeal held that the policy was incorporated into the contract so that this threshold was binding on the managers.

Notice periods

A contract may not contain a clause that sets out how much notice either party must give to terminate the contract. In any event, Section 86 of the Employment Rights Act 1996 sets out minimum periods of notice.

- For the employer, this is one week's notice for each complete year's service (in other words, one week for one complete year's service, two weeks for two years, and so on) up to a maximum of 12 weeks' notice.
- For the employee, this is one week's notice (if they have been employed for one month or more).

This does not prevent an employer from dismissing an employee with less or no notice and making a payment in lieu of notice. Neither does it prevent an employer dismissing an employee without notice if it is justified in the circumstances, for example, in cases of gross misconduct.

These rights apply specifically to employees. Workers and other staff are not entitled to minimum notice periods. However, you may provide for a notice period in your agreements. If you do not, the courts or tribunals may imply a reasonable period of notice into the contract. What is reasonable will depend on the type and seniority of the role.

Protection from Unlawful Deductions

Every employee and worker has special protection from unlawful deductions from their wages (or being required to make payments to their employer). It is a 'day one' right.

As an employer, you can only make a deduction from a worker's wages if:

- The deduction is authorised by statute (this would cover tax, national insurance and any county court enforcement action).
- It is authorised under the worker's contract.
- The worker has given their prior written consent.

'Wages' is defined widely enough to cover most payments made to a worker, including statutory sick pay and payments for family leave such as statutory maternity pay.

A deduction is simply any deficiency or difference between what the worker is paid and what they are normally or should be paid.

There are certain exceptions. The scheme does not cover errors of computation, deductions to recover an overpayment of wages, or payments made under a statutory authority or court order. Payments to third parties, such as pensions or trade union subscriptions are also allowed. You would also be entitled to deduct wages in the event of a strike.

These rules can be very restrictive. You would need to have a clear term in the contract of employment or workers agreement which entitles you to make the deduction. This is particularly useful for the last payment of wages when a worker leaves.

Tip: Think about the circumstances in which you would need to deduct money from a worker's wages and make sure the clause in the contract is wide enough to cover this. This could be for:

- *A float, or a sum of petty cash given to the worker for anticipated expenses.*
- *A sum to cover equipment or uniforms, or other property, that is not returned when the relationship ends.*
- *The recovery of training costs. It is common practice to operate a sliding scale – the longer a worker stays with you after completing the training, the less they have to repay.*

14.SECTION 1 STATEMENTS

Written statement of terms and particulars

Under Section 1 of the Employment Rights Act 1996, an employer must provide an employee with a written statement of the particulars of employment no more than two months after the employee has started.

What should a Section 1 Statement contain?

This 'Section 1 Statement' must contain certain information on a number of different matters in a single document (a 'principal statement'), with other information in instalments. You will probably find it more convenient to have all the information in a single document. The information is:

- The names of the employer and employee.
- The date the employment starts and the date the employee's period of continuous employment began.
- Pay (or method of calculating it) and interval of payment (whether it is weekly, monthly, etc.).
- Hours of work.
- Holiday entitlement and holiday pay.
- The employee's job title or a brief description of the work.
- Place of work.
- Terms relating to absence due to incapacity and sick pay.
- The notice periods for termination by either side.
- Information about disciplinary and grievance procedures, and the process for appeals.
- Terms as to pensions and pension schemes, including whether there is a contracting-out certificate.
- Terms related to work outside the UK for a period of more than one month.
- Terms as to length of temporary or fixed-term work.
- Details of any collective agreements directly affecting the employment.

Section 4 Statements – Statement of Changes

Under Section 4 of the Employment Rights Act 1996, the employer is obliged to provide a statement if any of these particulars change, setting out what those changes are. This must be provided no later than one month after the change takes place.

What happens if I don't provide a Section 1 Statement?

An employee will not be able to bring a claim before a tribunal simply because they do not receive a written statement. Instead, if they have brought another employment claim, such as unfair dismissal, they can add as a separate complaint the employer's failure to provide a Section 1 Statement.

If this other claim is successful, the tribunal has the discretion to increase the amount of compensation awarded to the employee by a sum equivalent to between two and four weeks' pay (unless there are exceptional circumstances which mean that would be unjust or inequitable).

The amount of a week's pay is subject to the statutory cap. From 6 April 2016, the cap is £479.

Itemised pay statements

Under Section 8 of the Employment Rights Act 1996, an employer is obliged to provide an employee with written itemised pay statements at or before the time payment is made, which must include the following information:

- The gross amount of wages or salary.
- The amounts of any variable or fixed deductions from that gross amount, and the purposes for which they are made.
- The net amount of wages or salary.
- If different parts of the net amount are paid in different ways, the amount and method of payment for each of them.

Further Information

The Government has produced guidance, 'Employment Contracts', which deals with Section 1 Statements, and links to a template, 'Written Statement of Employment Particulars Form' (ref. BIS/13/768):

www.gov.uk/employment-contracts-and-conditions/written-statement-of-employment-particulars

"Workers and other staff are not entitled to minimum notice periods. However, you may provide for a notice period in your agreements. If you do not, the courts or tribunals may imply a reasonable period of notice into the contract"

15.VARIATIONS OF CONTRACT

Introduction

Having entered into a written contract, you may find the terms no longer suit your needs. You will need to be careful before making changes to someone's working arrangements. If the changes go beyond what the contract allows, the resulting breach of contract could entitle an employee to resign and claim that they have been constructively dismissed (and so bring a claim of unfair dismissal).

Step 1: Does the change relate to a term of the contract?

If the change to the working relationship is not part of the contract, then there is no need to vary the contract. It is only when the term has contractual effect that a formal variation is required.

For example, if the change relates to a non-contractual policy (as long as it has not been incorporated into the contract) then there is no need to seek to vary the contract.

Step 2: Does the contract already allow you to make the change?

The contract may give you the power to introduce the change or vary the contract. A variation clause should be clear as the tribunals will interpret the power in a restrictive way and against the employer.

Step 3: Will the employee agree to the change?

The contract can be varied as long as both parties agree. If you can reach an agreement with the employee, make sure that it is properly recorded – in principle you can agree to the changes orally or in writing.

Tip: If your employee has a Section 1 Statement, don't forget to issue a Section 4 Statement to record any changes.

You may need to offer an incentive or 'buy out' the term you wish to change. In order to be contractually binding, the employee should receive some 'consideration' (something of value) in exchange for agreeing to the new terms. This is particularly true of restrictive covenants.

Step 4: Do you want to impose the change?

This is a very drastic step, and you should only impose a **unilateral variation** of contract if you have considered all of the options carefully. If you are clear that the change falls outside the scope of the existing contract, and any power to vary it, and the employee refuses to accept it, you may impose a change of contract. Your employee will have four choices:

- Accept the change, however reluctantly.
- Comply with the change, but under protest. As long as the employee is clear that they reserve their rights, they may still bring a number of claims in a tribunal as a result of the changes, such as claims for loss of pay.
- Refuse to work under the new terms.
- Resign and bring a claim of constructive dismissal if the change represents a fundamental change to their working conditions.

Tip: A unilateral variation of contract can create a lot of disruption in the workplace, generate grievances, and lead to lower morale. It might also create uncertainty where an employee continues to work and the new terms don't take effect immediately, for example, changes to pension arrangements or redundancy entitlements.

"You should seek specialist advice before imposing a change or dismissing and offering reengagement"

Step 5: Do you want to 'dismiss and reengage' those who refuse to accept the change?

This is an equally drastic step but it reduces the degree of uncertainty. You would dismiss all those employees who refused to sign up to the new terms (usually giving them all the same amount of notice) and offering to reengage them on the new terms. Your employees will have two choices:

- Sign up to the new terms, otherwise face dismissal.
- Leave once their notice has expired.

If an employee refuses to sign the new terms but refuses to accept that notice to dismiss has been served, you should still insist that they must go.

This approach carries risks. Employees may claim unfair dismissal and wrongful dismissal. You should seek specialist advice before imposing a change or dismissing and offering reengagement.

What to watch for:

- **Collective consultation –** there are special rules in place when you decide to dismiss 20 or more employees. These apply even if you offer to reengage staff under new contracts. Again, you should seek specialist advice in this situation.
- **Discrimination –** if the changes may particularly affect staff with a protected characteristic, you should be careful that the decision to impose the change or to dismiss staff is not discriminatory. For example, a change in working hours or a shift pattern that impacts on childcare arrangements may be discriminatory on the grounds of sex.

Tip: Some staff, particularly those in the public sector, may have pay protection policies which would be relevant in situations such as this. You would need to review whether or not such policies had been incorporated into the contract and whether they would take effect when you dismiss and reengage.

16.FLEXIBLE WORKING

What is flexible working?

A request for flexible working can cover changes to:

- The hours an employee works.
- The times when they are required to work.
- Their place of work (as between their home and any of the employer's workplaces).

Who can make a request?

Since 30 June 2014, any employee who has 26 weeks' continuous employment is eligible to make a request for flexible working. Take care when considering any advice or guidance produced before that date, as the statutory scheme was simplified then.

Only employees can make a request, not workers. Agency workers are specifically excluded from the scheme unless they are making the request after returning to work following a period of parental leave.

An employee can make only one request every 12 months. The requested change can be permanent or temporary.

How does the employee make a request?

It is important to emphasise that the right is to make a *request* for flexible working, not the right to flexible working itself. A request must comply with a number of formalities. No special form is required, but you may wish to have a template application form to make it easier for both you and your employee to understand the process.

KEY POINTS

The formalities are:

- *The request must be in writing and dated.*
- *It must state that it is a request for flexible working made under the statutory procedure.*
- *It must set out the change which the employee is looking for, and when they hope it to take effect.*
- *It must explain what effect, if any, the employee thinks the change would have on the employer and how, in their opinion, any such effect could be dealt with.*
- *It should state whether the employee has previously made a request and, if so, when.*
- *It is recommended that it should state if the request is made for a reason related to the Equality Act 2010, for example, a reasonable adjustment due to the employee's disability.*
- *If the employee is looking for a short term change, they should state how long they would like it to last.*

How should you consider a request?

An employer must deal with a request in a 'reasonable manner'.

A tribunal cannot substitute its own decision for that of the employer, and it cannot question the reason given by the employer for rejecting the request if it falls within one of the permitted categories (set out below).

The ACAS Statutory Code of Practice, *'Handling in a reasonable manner requests to work flexibly'*, and the ACAS Guidance, *'The Right to Request Flexible Working: An ACAS Guide'* provide more information on what that means in practice. They are both well worth reading before you consider a request.

You should respond to a request promptly and the whole process, including any appeal, must be dealt with within three months from the day you received the request. You are allowed to take longer only by agreement with the employee. You must also notify the employee of your decision.

You are not obliged to arrange a formal meeting, but you must discuss the matter with your employee. If you do arrange a meeting, both the ACAS Code and Guide recommend that you allow the employee to be accompanied at the meeting.

"Since 30 June 2014, any employee who has 26 weeks' continuous employment is eligible to make a request for flexible working"

Having arranged a meeting that the employee fails to attend without good reason, you should arrange another. If the employee fails to attend the second without good reason, you may treat the request as having been withdrawn. You should inform the employee of this, and make it clear that you will not go on to consider the request.

An employee does not have the specific right to appeal against your decision but the ACAS Code recommends that you consider any appeal. Again, you should arrange to discuss the issue with the employee and allow them the right to be accompanied to any meeting.

On what grounds can you refuse a request?

If the person making the request is not eligible to do so, for example if they are not an employee or do not have sufficient continuous service, you do not need to consider the request. You may reject it for those reasons.

If you do consider the request, but then decide to reject it, it *must* be for one of the following business reasons:

- The burden of additional costs.
- An inability to reorganise work amongst existing staff.
- An inability to recruit additional staff.
- A detrimental impact on quality.
- A detrimental impact on performance.
- A detrimental effect on ability to meet customer demand.
- Insufficient work for the periods the employee proposes to work.
- A planned structural change to your business.

You should respond to the request in writing, after a meeting (if one has taken place), and after it has been fully considered stating which of these reasons applies. You may decide that more than one is relevant. You should also give a brief description as to why in your view it is a problem.

Tip: If you agree to a permanent change to an employee's working arrangements, this could be a variation of their terms and conditions of employment. If so, you will need to provide an employee with a Section 4 statement to confirm what changes have been made.

If you wish to change the arrangements back again, or make a further change, this might also be a variation of contract. You would normally need the employee's agreement.

Tribunal claims and compensation

An employee may bring a claim before a tribunal on one of the following grounds:

- The employer failed to deal with their request in a reasonable manner.
- The employer failed to notify them of the decision within the appropriate time.
- The employer rejected the application for a reason other than one of the permitted grounds.
- The employer's decision to reject the application was based on incorrect facts.
- The employer wrongly treated the application as withdrawn.

Whilst the tribunal will not substitute their decision for yours, they will expect to hear evidence from the decision-maker explaining how the decision was reached. If the request was not properly considered and rejected without a fair and reasonable assessment of its merits, the tribunal may decide that it was not considered in a reasonable manner.

An employee should bring their claims within three months of the date on which the claim arises, or if that it is not possible, within a further period which the tribunal considers reasonable.

If the tribunal upholds an employee's claim, they may order the employer to:

- Reconsider the request.
- Pay a sum of compensation to the employee. This will be an amount which the tribunal considers to be just and equitable in the circumstances but up to a maximum of eight weeks' pay. A week's pay is subject to the statutory cap. From 6 April 2016, the cap is £479.

Constructive dismissal

An employee who resigns in response to their employer's unreasonable behaviour may claim that they have been constructively dismissed. The employee may claim that the decision to reject the request was wrong, or that the way in which the request was considered was unreasonable.

If the request is accepted, and the employee's terms and conditions of contract are varied, that change must be respected. If an employer later tries to change the terms again, or puts pressure on the employee to revert to their old terms, it may amount to a constructive dismissal.

Protection from discrimination

It is likely that an employee will make a request to work flexibly for a reason which relates to a 'protected characteristic' which may be the basis for a discrimination claim. This could include:

- **Sex discrimination**, as it is more likely that women will have childcare responsibilities, or it may be a request made on the return to work following maternity leave.
- **Religion or belief discrimination**, to alter the hours or days of work or other working arrangements to accommodate days of rest, religious rituals or celebrations or changes in diet.
- **Disability discrimination**, particularly where the request is made by an employee in order to persuade their employer to make a reasonable adjustment to their working conditions on account of their health.

As a matter of good practice, an employee should state in their request if it is made because of a disability.

Case Study – Walkingshaw v John Martin Group (2001)

A male employee's request to work part-time (after his wife had taken maternity leave) was rejected. He claimed direct discrimination, alleging that female colleagues who made similar applications were given more consideration. The tribunal held that he had been subjected to direct discrimination on the grounds of sex and he was awarded compensation.

Further Information

The ACAS publications, including those referred to above, are:

- A Statutory Code of Practice, 'Handling in a reasonable manner requests to work flexibly'
- Guidance, 'The Right to Request Flexible Working: An ACAS Guide'
- An Advisory Booklet, 'Flexible Working and Work-Life Balance'
- A Policy Sample Template for 'Flexible Working'

All are available from **www.acas.org.uk.**

"It is likely that an employee will make a request to work flexibly for a reason which relates to a 'protected characteristic' which may be the basis for a discrimination claim"

17.WORKING TIME AND HOLIDAYS

Workers (and therefore employees) are entitled to the following working time limits and rest breaks and holidays:

- A maximum 48-hour week; this would be the average working time, normally calculated over a 17-week rolling period (unless agreed otherwise).
- A 20 minute break after working six hours in a row.
- 11 hours uninterrupted rest per day.
- 24 hours uninterrupted rest per week.
- 5.6 weeks' paid holiday per year (or 28 days' leave for someone working 5 days a week). This should include their entitlement to bank holidays as well.

The position is more restrictive with **nightworkers**. A nightworker is a worker who works at least three hours between 11pm and 6am (unless that period has been varied by agreement; if so, it must be a seven hour period including the hours between midnight and 5am). A nightworker's normal hours of work must not exceed an average of eight hours in each 24 hour period.

There are more restrictions for **young workers** (those aged under 18 but above compulsory school age). If you have any workers of school age in whatever capacity, you should seek specialist legal advice on their working arrangements.

*Tip: A **Section 1 Statement** must refer to an employee's hours of work and holiday entitlement. This duty applies specifically to employees but in order to avoid uncertainty and disputes, you should also confirm these matters with workers and volunteers.*

Sleep-Ins and On Call Contracts

The situation for workers who are on call, on standby, or sleeping-in at the workplace is not entirely clear.

- If a worker is on call but required to be at their workplace (even if they have been provided with sleeping facilities), they are still at their employer's disposal and this is more likely to be working time.
- Where workers are required to stay at a particular place, or within a certain travelling time or distance from work, this is also likely to be working time.
- There will be difficulties where the worker has tied accommodation or where their housing is at the workplace. In this situation, if the worker is required to be at the workplace (which is also their home), it is likely to be working time.
- If the worker is on call, but not required to be at home or at their workplace during this time, it is unlikely to be working time.

This is a complex area, and a tribunal's decision will be based very much on the individual facts of the case. If you have any concerns or grievances about this issue, you should seek specialist advice.

18.CONTINUOUS EMPLOYMENT

What is continuous employment?

'Continuous employment' or 'continuity of employment' is a statutory concept to calculate how long an employee has worked for an employer. Like employment status, ultimately it may be for a tribunal to decide how long that is. Continuous employment is calculated in the following way:

- The period starts on the day the employee starts their employment. Continuity is calculated on a week-by-week basis, and for these purposes a week starts at midnight on Saturday and ends at midnight the following Saturday.
- Any period when the employee is at work as normal will count as continuous employment. Other periods will also count, including absences due to sickness and injury, a temporary cessation in work, or an absence by custom or arrangement.
- Certain periods do not count towards the period of continuous employment but do not break it. Instead, the start date is (for the purposes of the calculation) postponed by the length of the interval. These gaps include service in the armed forces, strikes and lockouts. Employment will be continuous as long as the relationship is still governed by a contract of employment. If an event ends the contract or relationship (and if that break lasts longer than the week from Saturday to Sunday), continuity will be lost. Continuity will also come to an end if a redundancy payment is made.
- The period ends on the day the employee's employment ends, whether that is their last day of work or the day their notice expires. If they have not been given notice but should have been, the period may be extended by the statutory minimum notice period they should have received.
- A change of employer may not break continuity if it involves a move from a connected company or if it is a protected 'TUPE' transfer.

Why is continuity of employment important?

Continuous employment is important for a number of reasons. It is used to work out whether an employee is eligible for certain statutory rights, such as the right to bring an unfair dismissal claim and the right to be paid a redundancy payment.

What is 'reckonable service'?

Many employers have a different way of calculating an employee's service for purposes such as holiday entitlement, sick leave entitlement, redundancy payments or pension. This is often referred to as 'reckonable service'. It may include service with another associated or connected employer, or in certain circumstances an employer in the same wider organisation or industry (this can happen in the public sector). An employer may also ignore breaks or gaps that would normally end continuous employment.

SECTION III
AVOIDING DISPUTES

19.AVOIDING DISPUTES

Introduction

Disputes rarely arise about an individual's employment status purely and simply. In reality, it becomes an issue because of the consequences of that status, and the rights and protections that an individual would have if they were an employee or a worker. The most common types of complaint will be:

An individual claiming that they are an **employee** in order to claim

- Unfair dismissal
- A redundancy payment

An individual claiming that they are a **worker** in order to claim:

- Arrears of pay under the National Minimum Wage Regulations
- Pay in lieu of holidays, or other claims in relation to working time and holidays
- Whistleblowing protection
- Discrimination

Avoiding disputes – general principles

Since a dispute about employment status is often a precursor to a dispute about something else, many of these potential disputes can be dealt with by developing good working relationships and maintaining clear communication with staff.

KEY POINTS

For employees:

- Ensure you have an up-to-date grievance procedure. If possible, consult with the trade union or employee representatives on the procedure. Make sure staff are aware of it, and that they feel able to use it.
- Include the option of informal resolution in the grievance procedure. Do not expect your staff to put a complaint in writing, or to a manager who is either the subject of the grievance or closely connected to it. Allow staff the opportunity to make a verbal complaint, and to a different manager if they wish.
- Be careful with staff asking for the complaint to be dealt with anonymously, or without certain managers knowing their identity. Staff can expect their grievances to be heard and resolved but this can prove difficult if managers don't know the full story.
- Make sure your managers have received training (regularly updated as well) on how to handle grievances and workplace disputes, as well as equality and diversity issues. This is particularly important for those managers who might be called upon to chair grievance meetings or appeals.

"Many of these potential disputes can be dealt with by developing good working relationships and maintaining clear communication with staff"

- Ensure you have up-to-date policies covering equality and diversity, harassment and bullying. Staff who feel bullied at work are more likely to raise complaints about other issues, and if they are feeling bullied this may make their other complaints seem unmanageable. Make sure staff are aware of these policies, and that you will enforce them. Equally, make sure that your managers know that they will be taken seriously so a difficult relationship between an individual and their manager does not become toxic.
- Consider alternative forms of dispute resolution, such as workplace mediation.

For workers, volunteers and other staff:

- Support and assess your staff, and seek their feedback on their roles. They may have concerns that can be easily dealt with before things escalate to a stage where they seek to bring themselves within the categories of employee or worker. Always treat your staff in a way that is consistent with your view of their employment status, otherwise it may suggest that their status has changed.
- If you allow volunteers or other workers the opportunity to raise a grievance, that would suggest you were treating them as if they were an employee. That would increase the risk that a tribunal would decide that they were.
- Ideally you should have a dispute resolution mechanism that allows you to address their concerns, take the heat out of a dispute and potentially resolve it, but does not suggest that they are an employee.
- If you have a volunteer coordinator or manager, offer them training on handling disputes and managing staff.

For trustees, directors (including non-executive directors) and similar officeholders:

- Disputes at leadership level can seem intractable. As they will often have a considerable effect on the running of the charity, disputes at this level have to be handled sensitively. For the smooth running of the organisation it is often better to pursue a mutually acceptable parting of the ways.
- For trustees, the trust deed, governing agreement or the agreement with the trustee should include a dispute resolution mechanism. It should also deal with what happens if the parties cannot reach agreement. You could refer the matter to a supervising body, a senior officeholder in a related organisation or a third party, or to an independent or impartial figure.
- You would also need to make sure that trustees can be removed if necessary. Make sure any written agreement between the charity and the trustee is consistent with any trust deed or governing agreement.
- Directors and non-executive directors and other officeholders can be removed if they have not complied with their service agreement. That agreement could also provide a grievance or dispute resolution mechanism.
- In exceptional circumstances, for example when you have no properly appointed trustees, you may wish to contact the Charity Commission for guidance.

Avoiding disputes on employment status

Steps to avoiding disputes on employment status include:

- What type of worker do you want? Consider what category of employment status would best suit your organisation.
- Have a written agreement in place, such as a volunteer agreement.
- Make sure the agreement is clearly drafted. Although it is not definitive, make it plain what the employment status of the individual is. If the role is intended to be purely voluntary, the agreement could state that it is not legally binding, binding in honour only, or both.
- Avoid using terms that would be out of place. For example, a volunteer agreement should not refer to the sorts of thing that should only be in an employment contract, such as disciplinary and grievance procedures.
- Keep the agreement under review. The agreement should reflect the reality of the working relationship. If things change, consider changing the agreement, changing the working arrangements, or reassessing the risk of an employment status dispute.
- Make sure the agreement is signed, and keep a signed copy in a secure place.
- Take care that your working arrangements continue to reflect the agreement and the employment status. For example, avoid paying volunteers anything other than their expenses, which are properly accounted for. If you treat your staff as employees, it is more likely a tribunal will decide that they are employees.
- Make a clear distinction between different categories of staff – employees and volunteers in particular. This should not be a source of tension in the workplace. Volunteers should understand that employees have more obligations, and also more rights and responsibilities, so it would not be appropriate to treat them in the same way. If all staff are treated in the same way, boundaries between the different categories will be blurred, which may lead to more disputes.
- For volunteers, make sure that they are only paid their genuinely incurred out-of-pocket expenses, or a realistic estimate of what their anticipated expenses will be. Do not offer them any perks or benefits, or additional training that goes beyond what is required for their role.
- Make sure you establish clear expectations for all staff. If they are employees or trustees, you may have a formal document such as a job description to set out their normal duties. A similar document, such as a role description, could still be given to volunteers or workers so that they know what their duties will involve. This could help you if they should say that their role has changed, or they have taken on extra duties, which could give them employment status. You would have to be careful to ensure that, like a written contract or agreement, it still reflects what is actually happening from day-to-day.

“What type of worker do you want? Consider what category of employment status would best suit your organisation”

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