

## REMUNERATION OF TRUSTEES

### **Question:**

*We are finding it increasingly difficult to appoint trustees of suitable calibre as many are unable to devote necessary time without remuneration. In particular we want to pay trustees who carry out specific tasks which require specialist skills. Can we remunerate our trustees in general and can we pay them for specific services?*

### **Answer:**

This is a very interesting issue and highlights a dichotomy in the law and practice of trusteeship. There are two important matters which often pull in different directions. First, the law is liberally sprinkled with cases where it has been established that trusteeship is not an office of profit and that trustees must always act altruistically and not for their own benefit. In essence, they should not have financial reward or gain from their position as trustees of the charity.

Second, there is the issue that charities are becoming much more complex and must be administered properly. Trustees must be more than names on a letterhead and be able to devote time to running them and, in some cases, specialist skills might be required.

In addition, there is a thrust to make trustee boards more representative and sometimes individuals who would and could contribute are unable to accept appointment since they can not "afford" the time. In their 1978 Report, the Charity Commissioners stated "Traditionally, trustees of charities have given their services free of charge, and retired professional people have been glad to place their knowledge and experience at the service of the community in this way. Bank managers, surveyors, solicitors and the like are invaluable after retirement as trustees of a charity, and it is for this reason that we have never provided in our schemes for a retiring age for trustees. The idea of payment would in the past never have arisen, and to profit from charitable funds is incompatible with the concept of charity."

My experience is that the Charity Commission's thinking has come a long way since then. Although they start from the principle that trustees are not automatically entitled to remuneration they will authorise remuneration where it can be shown to be expedient in the interest of the charity - that is it must be both necessary and reasonable.

### **Constitutional powers**

If you were setting up a new charity you could include a clause in your governing instrument which would allow trustees' remuneration. The inclusion of such a clause would not preclude charity status. However, you would need to show that the remuneration is commensurate and reasonable with the services being provided to the charity. In your case where your charity already exists the position is somewhat different. Since you do not have a remuneration clause in your constitution the trustees are not entitled to receive remuneration for their services. Some charities have clauses allowing them to amend their constitution and I have heard it said that in this way a remuneration clause can be inserted. Such an amendment would be an amendment conferring personal benefit on the trustees. The Charities Act 1993 requires clearance from the Charity Commission before such amendments can be made. Therefore, you must apply to the Charity Commissioners before you remunerate your trustees; before they grant their consent they will look very closely at the particular circumstances of the case.

If the charity is complex, without the relevant level of paid management, thus requiring involvement on the day to day running of the charity by the trustees then there may be a prima facie case for remuneration. You may have to demonstrate that the burden on the trustees is onerous and cannot be mitigated by restructuring the trustee body. For example, by increasing their number.

In certain cases there may be specialist skills required, for example a medical charity may need expert advice on its publications and this skill may not be available from employees or other



advisers and may only be provided by a trustee. In such circumstances, the Charity Commission might consider that a reasonable amount of remuneration would be acceptable. In all cases the Charity Commission will ensure that the charity is receiving value for money and remuneration is not considered to be excessive. In addition the total amount of remuneration must be such that the charity's income can cover the payments without adversely affecting its charitable operations.

### **Trading subsidiaries**

I am often asked the question as to whether it is possible to remunerate a trustee through a non charitable trading subsidiary. The trustees can only be remunerated for their services as directors of the subsidiary and the principles discussed above would still apply. Directors of the trading subsidiary who are also trustees would need to show that such a joint appointment is necessary and that any remuneration they receive is reasonable with regard to the work they are carrying out for the subsidiary.

### **Employees as trustees**

The question about whether an employee can be a trustee is one I am asked with regular frequency. Once again, if the charity's constitution provide for such an appointment then this is not usually a problem. However, the charity should have in place checks and balances which identify and prevent conflicts of interest. For example, the individual should not be present when the trustee body is discussing issues about his/her remuneration.

Clearly, it would be unacceptable to have a situation where the trustee body was mainly or wholly made up of employees. What is more usual is that perhaps the chief executive also sits as a trustee. (This is sometimes required by law, such as the case of a head teacher sitting as a school governor). Many chief executives believe that being part of the trustee body reflects the reality of the situation where to all intents and purposes they are often acting as one of the board of trustees. Having said this, the Charity Commission's view is that it will be necessary only in exceptional circumstances for employees to serve on the trustee body. Their main concern is with conflicts of interest and confusion between the dual role of trustee and employee.

My understanding is that an employee becoming a trustee is seen to be more acceptable than a trustee becoming an employee. In reality even the former case is fraught with difficulty and the Charity commission have expressed concern that the trustee will then be reviewing matters where judgements had been made by one of their number as an employee. In assessing these requests the Charity Commission will want to know why the employee has to be a trustee.

### **Specific tasks**

In some cases a retiring chief executive may wish to become a trustee. I believe that can sometimes be problematic and that it is best to wait for a couple of years. Your particular question related as to whether you can pay a trustee for a specific piece of work and the Charity Commission have made it clear that charities may obtain from them an order under Section 26 of the Charities Act 1993 allowing such payment in certain circumstances.

They will look to see that the work is exceptional and not part of the trustee's normal duties. The specialist work must be necessary and it must be expedient in the interest of the charity to use the trustee to carry out this work. That is to say, the remuneration and work carried out must provide value for money to the charity and the charity should be able to show that the carrying out the specific piece of work by a trustee would benefit the charity. For example, because the cost would be higher if it was carried out by an independent party.

### **Disclosures**

The Statement of Recommended Practice on Accounting by Charities requires a disclosure of trustees' remuneration and reimbursed expenses. In fact it requires a statement that no remuneration has been paid if that is the case.



## Emerging issues

The Cabinet Office in their consultation draft “Private Action – Public benefit favour the idea of trustee remuneration. Their recommendations 35 is *“A trustee body should have a statutory power to pay an individual trustee to provide a service to a charity (outside their duties as a trustee) if they reasonably believe it to be in the charity’s interests to do so,”*

It is one of the only recommendations where the Charity Commission has expressed reservations. In their response to the consultation they have said:  
*“The Commission has reservations about this proposal.*

*We see the advantage for charities in being allowed to pay trustees who provide services to their charities, often at reduced cost, which are outside the duties of trusteeship. Some charities’ governing documents already allow this; in other cases, the Commission authorises it where it would be in the charity’s best interests.*

*The risks of providing a universal power to pay remuneration of this kind are that: a damaging perception might be created, in relation both to specific charities and to charities generally, if it became widespread practice for charities to prefer a trustee to an unconnected contractor; and the Commission’s experience is that some charities will have difficulty managing the inherent conflict of interest and confusion of roles which arise when a board of trustees has a commercial relationship with one or more of its number.*

*If the proposal is adopted, it is important that safeguards should be provided. These should, for example, limit the number of members of trustee bodies who could be paid, and specify duties that trustees would have for managing the conflicts of interests that would be involved.”*

## Conclusion

I’m afraid there can be no blanket formula as to whether trustees can be remunerated. Case law and the Charity Commission’s practice have shown that the circumstances of each scenario will be looked at. If you carefully consider the principles expressed above and the rest of the Board have really considered the best interest of the charity it should be possible for your trustee to be remunerated.

If your charity is a company the Charity Commissioners will use their powers under S64 of the Charities Act 1993 to consent to an amendment to the Memorandum of Association. Unincorporated associations or trusts with a power to vary will require an Order from the Commissioners under S26 of the 1993 Act. Where there is no such power a Scheme will be necessary.

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