

## Welcome to edition 4 of the Brabners Chaffe Street Charity and Social Enterprise Unit Newsletter.

As you will see we have a variety of topics which we hope you will find interesting, covered in this edition of our newsletter. There is a lot happening in the charity world at the moment and we hope that the pages of this newsletter will be some help in keeping you up to speed with the latest developments.

Some long awaited news is that the Charitable Incorporated Organisation for which we have all been waiting for for some time, is now a step closer. We are also awaiting progress of the first appeal to be heard by

the Charity Appeal Tribunal now scheduled to be heard in December 2008.

If there are any topics that you would wish to see addressed in these pages, then please take the opportunity to contact me and if at all possible we will construct an article around that topic. We want these pages to be of use to all our clients.

With best wishes  
Stephen Claus

## Seminar Update

All seminars are free of charge, and to book your place please make contact with Kate Arnold, email: [kate.arnold@brabnerscs.com](mailto:kate.arnold@brabnerscs.com) and direct dial: 0151 600 3032. We look forward to seeing you.

### For your information - up and coming events include:

Charity and Wills and  
Legacy Preservation:

Wednesday 12th November 2008

- guest speaker Peter Somerfield,  
Charity Commission Lawyer

Charity 2009 Update:

Wednesday 28th January 2009

New Charity Tribunal:

Wednesday 11th March 2009

Charity and Fundraising:

Tuesday 19th May 2009

## Employment Law And Volunteering

The benefits that volunteers add to charities are immeasurable; indeed many charities would not function without them. However attempts in recent years by angry former volunteers to bring legal proceedings against charities have raised questions about the legal implications of volunteer help. In the following we will outline the main issues for organisations when engaging volunteers.

### Volunteers as employees?

The main 'volunteering' issue in Employment Tribunals is whether the relationship between volunteers and charities is one of employer and employee. The distinction of volunteers from employees is key to charities because persons falling within the legal definition of 'employee' and 'worker' benefit from rights arising out of the employment relationship. Such employment rights derive from Acts of Parliament and European legislation and can be enforced against employers in proceedings before a court or tribunal.

For example, if volunteers have 'employee' status they are not only entitled to claim unfair dismissal and discrimination, but also (to name but a few rights) to a statutory minimum notice period, statutory grievance procedures, paid annual leave, maternity and paternity leave and pay, be paid the National Minimum Wage and access to a stakeholder pension scheme.

### Contract of employment between the charity and the volunteer?

Whilst courts will often look at the reality of the actual relationship, if there is any volunteering agreement (oral or written) between a charity and volunteer, this will normally be the starting point for ascertaining the whether an employment relationship exists. Charities benefiting from volunteer services should therefore clearly put down in writing the scope and nature of the volunteer activity. More crucially, it must be clearly expressed and agreed that there is no intention between the parties to create legal relations.

The legal test of whether a person is an 'employee' is whether there is an arrangement under which, in exchange for remuneration, a person is contractually obliged to work personally for the employer, who in turn must provide the work. These are mutual obligations owed by both parties to each other. The distinction between a contract of employment and volunteering agreement often hinges on whether the volunteering agreement imposes mutual contractual obligations on the charity to provide work for the volunteer to do and on the volunteer to personally do the work for the charity. Indicators of mutual obligations would be, for example, whether there are sanctions on the volunteer for not performing the activity or whether the charity would have any legal redress against a volunteer for not providing the agreed service.

### Is the volunteer paid?

In order for there to be a contract in English law, consideration is required, whether financial or not. In an employment contract this would normally be remuneration for work done. Volunteer work must be unpaid save for the repayment of expenses incurred by the volunteer in the course of the volunteering activity. The court has held in recent cases brought against Citizens Advice Bureaux that monies paid to volunteers as reimbursement for expenses do not constitute remuneration and that there is therefore no contract of employment. However it is noteworthy that any reimbursement given to volunteers must be strictly limited to reasonable expenses actually incurred by the volunteer. If the reimbursed expenses are embellished there is a risk that they might constitute 'remuneration' and give rise to an employment relationship.

### Insurance

The Health and Safety at Work Act imposes on employers obligations to ensure the health and safety of their employees and non-employees who might become affected by the employer's activities, including volunteers. Whilst there is no explicit legal requirement for charities to obtain compulsory employers' liability insurance for volunteers, guidance from the Health and Safety Executive states that it is advisable for charities to inform their insurers of volunteer activity. This is particularly advisable where certain categories of volunteers, such as children and young people, are involved, since these are subject to stricter health and safety controls than adults.

### Is the volunteer protected by non-discrimination legislation?

For employees, the right not to be discriminated against on grounds of sex, race, disability, religion/belief, sexual orientation or age is enshrined in law and a breach of this right can result in employers owing large sums of compensation to the party discriminated against. Volunteers who are not employees are not currently entitled to rely on these employment rights. However, in light of the fragility of the distinction of volunteer status from 'employee', charities should always bear anti-discrimination provisions in mind when dealing with volunteers.

### Right to work in the UK?

It is a criminal offence to employ someone who does not have the right to work in the UK. Given that the legal boundaries between employment and volunteering are often indistinct, charities should be aware that they could potentially be committing a criminal offence if a volunteer does not have the appropriate immigration status. With the maximum penalty currently £10,000 this risk can easily be avoided by charities by following the Home Office's simple three-stage document checking procedure: (1) see it; (2) check it; and (3) keep a copy.

### Conclusion

The way in which a volunteer engages with a charity can leave the charity open to raft of legal actions. It is therefore vital from the outset that charities and volunteers are clear on the scope of activities. If these issues have raised any questions for your charity, please feel free to contact a member of our employment team who will be happy to advise you further.

# A summary of the changes to the duties and liabilities of Directors of a Company registered in England & Wales pursuant to the Companies Act 2006

## Directors' Duties

Company legislation has undergone a major overhaul in the past 12-18 months, and continues to do so. Company directors need to appreciate the ever increasing legal obligations and responsibilities being placed on them in that role. A breach can give rise to personal liabilities under the civil and criminal law and may lead to disqualification from holding office as a director.

The Companies Act 2006 ('the Act') has sought to clarify this area of law, previously based on existing common law rules, by introducing a statutory statement of 'general duties'.

## Pre Companies Act 2006

Prior to the introduction of the Act, the common law rules governing directors were based on two main types of duties. Directors owe both fiduciary duties (a duty to act honestly, in good faith and not use the company for personal gain) and general duties of skill and care (a duty to exercise reasonable skill and care with regard for the company's property) to their company.

## Companies Act 2006

The Act has introduced a statutory statement of directors' duties that are intended to replace case law derived duties, although on the whole the intention seems to be to "codify" the existing duties without substantially changing them. The seven general duties of directors under the Act, which are:

- to act within powers;
- to promote the success of the company;
- to exercise independent judgement;
- to exercise reasonable care, skill and diligence (not a fiduciary duty);
- to avoid conflicts of interest;
- not to accept benefits from third parties;
- to declare an interest in a proposed transaction or arrangement.

The first four general duties came into force on 1 October 2007; the last three will come into force on 1 October 2008. On the

relevant date, the statutory duty replaced, or will replace, the corresponding common law duty outlined above.

## Duties to Act within Powers

This duty replaces the previous common law duty to act within the powers conferred by the company's memorandum and articles of association (the articles), and not to exercise those powers for improper purposes.

## Duty to Promote the Success of the Company

The duty to promote the success of the company for the benefit of its members as a whole replaces the existing duty to act in good faith and in the company's interests. While these duties seem similar, there are a number of differences that may cause difficulties. The 'success' of the company is not defined, but it is suggested this will mean a 'long-term increase in value' having regard (among other matters) to:

- a) the likely consequences of any decision in the long term;
- b) the interests of the company's employees;
- c) the need to foster the company's business relationships with suppliers, customers and others;
- d) the impact of the company's operations on the community and the environment;
- e) the desirability of the company maintaining a reputation for high standards of business conduct; and
- f) the need to act fairly as between the members of the company.

However, Directors can take comfort from the fact that a director acting in good faith will not be held liable for a process failure that would not have affected his decision.

The running of the company will not be for the benefit of its members in some situations, including charitable companies or companies on the verge of insolvency (at which point the directors' duty shifts to the company's creditors). This duty allows

directors to pursue the business of the company for the benefit of others in those situations.

## Duty to Exercise Independent Judgement

Replacing the existing duty of a director not to fetter his discretion, this duty is not infringed if a director acts in a way authorised by the company's constitution, (such as delegation to a committee established in accordance with the company's articles). Furthermore, he will not be in breach if he acts in accordance with an agreement entered into by the company which restricts the exercise of discretion by its directors.

In addition, directors may rely on the judgement of others if they are not competent or expert in a particular area. However, they must exercise their own independent judgement in deciding whether or not to follow such advice, for example by ensuring that the person whose advice they propose to take is properly qualified to advise them.

## Duty to Exercise Reasonable Care, Skill and Diligence

This replaces the existing common law duty to exercise care and skill.

## Duty to Avoid Conflicts of Interests

This duty codifies the current duty to avoid conflicts, and makes a substantive change in allowing directors to authorise a conflict, rather than reserving this to the members in general meeting (provided that it is not invalidated by the company's constitution).

This duty has major implications for directors who sit on more than one board. It is suggested that companies may pass a general authorisation in relation to each other directorship held by a director of that company, provided the directors have authority wide enough to do this.

For more information regarding this article, please contact Adrian Rogers on 0151 600 3000 or [adrian.rogers@brabnerscs.com](mailto:adrian.rogers@brabnerscs.com).

## Duty not to accept Benefits from Third Parties

Directors may not accept a benefit from a third party that is conferred by reason of their directorship, or any actions (or inactions) as a director. The duty is subject to a test of reasonableness, suggesting that gifts of a value that is not unreasonable in the circumstances will be acceptable.

## Duty to Declare Interest

Director's must declare an interest (whether directly or indirectly interested) in a proposed or existing transaction. As these duties are separate from the provisions relating to conflicts outlined above, directors need not obtain authorisation from the rest of the board before the transaction can be entered into or before it can continue. They merely need to notify their interest in accordance with the section.

## Change in Directors' Duties

Although the new statement of general duties is intended to replace the existing common law rules, it is clear that courts will be required to interpret the scope of the new duties by reference to the existing and substantial body of case law.

The main practical concern for boards is whether (and the extent to which) they need to alter their practices and procedures in order to accommodate the new legislation. Comfort can be taken from the government's view that wholesale changes to decision-making processes are not required, provided that those processes are already following good business practices and lead boards to at least give consideration to the new general duties.

Please note this is not an exhaustive guidance note on all a director's obligations, it is intended to outline the headline obligations only and as such it is not a substitute for seeking specific legal advice on specific circumstances.

# Know your Contract!

In August, Brabners Chaffe Street assisted Liverpool Charity and Voluntary Services in putting on a seminar for local charities on charity governance and contracts, hosting the seminar and providing the three speakers.

Stephen Claus, charity law partner, opened by highlighting some of the key issues surrounding contracting by charities. He urged charities contracting for the first time to consider whether they were contract ready - looking at the most appropriate legal form for charities entering into contracts, and the risks associated with having the trustees' own names on the contracts. He emphasised the importance of full cost recovery on a contract, and urged charities to consider where additional funding is going to come from if the contract price does not meet the costs of delivery. He emphasised that when calculating the full cost of a contract it is important to take everything into account, and if possible also to limit the charity's liability to the assets subject to the contract.

Nick Campbell, employment law partner, then gave an overview of the impact of the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations of 1981 and 2006. He began by setting out the circumstances in which TUPE applies to service provision changes, being where activities are no longer carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor"); or where activities are no longer carried out by a contractor on the client's behalf but are carried out instead by another person ("a subsequent contractor") on a client's behalf; or where activities are no longer carried out by a contractor or subsequent contractor on the client's behalf but instead are carried out by the client on his own behalf.

Nick explained that these types of situations arise very frequently where an organisation is taking over a contract from another organisation. When the TUPE Regulations apply, any employees employed principally in the carrying out of the relevant activities are automatically transferred to the transferee organisation, are protected against dismissal for a reason connected to the transfer, and the transferee has an obligation to inform them of the transfer and consult with them during the process. He went on to explain the issues that can arise where a transferee is taking over a contract and receiving the staff, and the difficulties of making any changes to their terms of employment.

His presentation stimulated many questions from the audience, and the clear message seems to be that charities need to be aware of these Regulations to avoid being caught out.

Finally Nik White, commercial/ intellectual property partner, discussed issues relating to the content of contracts. He emphasised the importance of striking a balance between raising any issues that the charity has with the contract at an early enough stage so that there can be some negotiation of the terms, and not raising so many issues that the contractor is put off contracting with the organisation at an early in the tender process.

He emphasised the importance of understanding the implications of everything in the contract and the impact it will have on the charity. This includes establishing whether the tender submission itself is part of the contract, and also the content of any standards, policies or codes to which the contract refers. Contracts can sometimes place restrictions on contracting parties and the charity needs to consider if this will have any impact on their other work.

It is also important to understand clearly the duration of the contracts (and the consequences of any early termination and procedures for such determination), the particular terms for payment and invoicing under the contract (and whether there is any possibility for a review of these terms during the contract), and the extent of warranties and indemnities that the charity is expected to give under the contract.

The message is – know your contract!

(The firm advises on all aspects of charity contracting, and if you would like to discuss any of these issues further please contact the individuals named above on:  
Stephen Claus – 0151 600 3341,  
Nick Campbell – 0151 600 3154  
and Nik White – 0151 600 3103).

## STOP PRESS...STOP PRESS

### Charitable Incorporated Organisation

The draft Regulations for the Charitable Incorporated Organisation (CIO) have now been released for consultation, together with draft Model Constitutions for a CIO with and without a membership structure. The consultation will be open for three months, closing on 10 December 2008.

The CIO is intended to address some of the issues that charities currently face because they have to use a company structure designed specifically for businesses if they want to take advantage of the benefits of incorporation. We will provide you with further details about this new legal form once the Regulations and Models have been finalised. In the mean time, to view the consultation documents go to:

[http://www.cabinetoffice.gov.uk/third\\_sector/Consultations/current\\_consultations/cio.aspx](http://www.cabinetoffice.gov.uk/third_sector/Consultations/current_consultations/cio.aspx)



Brabners Chaffe Street LLP is a leading law firm based in the North West. Its business focus is on providing the full range of legal services to the mid corporate sector, specialised services to the plc and larger corporate, plus private client services to business owners and other high net worth individuals. Brabners Chaffe Street also operate in the Charity and Social Enterprise Sector.

For further information about Brabners Chaffe Street please go to [www.brabnerschaffestreet.com](http://www.brabnerschaffestreet.com). Contact David Maples, Stephen Claus and Louise Platt in Liverpool on +44 (0)151 600 3000, in Manchester on +44 (0)161 836 8800 or Preston on +44 (0)1772 823921.

Brabners Chaffe Street is a Limited Liability Partnership