

## PUBLIC BENEFIT CHARITY RULES TO BE REVIEWED A LANDMARK DECISION AFTER A LEGAL CHALLENGE



Many readers will have been awaiting the decision of the Upper Tribunal following a transfer of the judicial review launched by Independent School Council (ISC), which was then co-joined with a reference under the Tribunal rules by the Attorney General.

Briefly, the case was all about a challenge the ISC brought against the Charity Commissioners' guidance issued over public benefit, under its statutory duty to do so following the Charities Act 2006.

The Attorney General referred the matter generally to the Tribunal with lots of specific questions around,

principally, fee paying schools and whether or not such schools and in what circumstances such schools were charitable in nature.

In a substantial judgment, the Tribunal extensively examined the law both pre- the Charities Act 2006 and post- the Charities Act 2006. The Tribunal, however, has made clear that the decision applies to educational charities only. In our view, however, many of the principles considered in the judgment will be capable of being read across into other areas of charity law.

The Tribunal considered case law established over several centuries and determined that this case law had identified two strands in what was meant by "public benefit". The first strand is that a purpose must be of benefit to the community. The second strand of public benefit which must also be present is: whoever actually benefits from the carrying out of the purpose must be sufficiently numerous and identified in a manner as to constitute a "section of the public".

The Tribunal concluded that both of these strands must be satisfied whether the issue arises pre- or post- the Charities Act 2006.

In the judgment the Tribunal explained that it had considered a huge volume of case law and that not all of the case law or the arguments are actually recited in the judgment even though that judgment runs to 116 pages.

The Tribunal also concluded that even though the courts had not, prior to the Charities Act 2006, universally applied the presumption, i.e. the "sufficient section of the public" test, in considering cases it is necessary to look at this aspect on a case-by-case basis. Furthermore, the Tribunal concluded that a charity that either constitutionally or as a matter of practice, excluded the "poor" from benefiting from the charity, would not satisfy the public benefit requirement as it would not, in any circumstances, be capable of providing a sufficient benefit to a sufficient section of the public.

The Tribunal concluded that what constitutes a "poor" person or indeed a "rich" person is not straightforward in the context of charity law.

Overall, the Tribunal concluded that section 3(2) of the Charities Act 2006 had not changed the pre-existing law because there had, in fact, never been a presumption in relation to this aspect of public benefit, i.e. a sufficient section of the public.

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**In conclusion ...**

In conclusion, the Tribunal indicated that a fee paying school would be failing to satisfy the public benefit test if it did not provide some benefits for potential beneficiaries other than the fee paying students. It was acknowledged, however, that this might arise in a temporary state of affairs. Each case must be decided upon its merits and provided that the “de minimis” threshold in terms of assisting those who are classified as poor is passed, then it is for the trustees of the school rather than the Charity Commission or the Tribunal, to decide how the trustees’ obligations might be best fulfilled in light of their particular circumstances. Benefits may be provided in a variety of ways, including, for example, the remission or some or all of the fees to those who are “poor” students or indeed the sharing of educational facilities with the maintained sector.

It is interesting that the Tribunal concluded that, although very difficult to quantify, the fact that pupils who were educated out of the state system relieved the pressure on the state system was a valid contribution. Fundamentally, however, the Tribunal concluded that parts of the Charity Commission’s guidance on public benefit were erroneous and it is, therefore, highly likely in early course that the Charity Commission will have to revisit significant sections of the guidance in light of the Tribunal’s decision in order to correct their erroneous guidance.

We have no doubt that the sector will welcome this clarification in this extremely complex judgment, and whilst we would be reluctant to suggest there was either a winner or a loser as principally we have clarification, it does appear that the Charity Commission have been criticised for the production of guidance which now needs to be revisited in light of the Tribunal’s conclusions.

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Email: [stephen.claus@brabnerscs.com](mailto:stephen.claus@brabnerscs.com)**VOLUNTEERS – WHAT RIGHTS DO THEY HAVE COMPARED TO PAID WORKERS AND DOES THIS LEAD TO AN ADVANTAGE WHEN SEEKING EMPLOYMENT?**

The Court of Appeal case of *X v Mid Sussex Citizens Advice Bureau and others* held that a CAB volunteer could not enjoy similar rights as an employee to be able to pursue a claim for disability discrimination against an organisation.

In the above case, the Court held that it was far from obvious that the Equal Treatment Directive (from which UK discrimination law emanates) was meant to include volunteers. This was strengthened by the fact that the European Council rejected a specific proposal to clarify that unpaid and voluntary work should be covered, with the European Council stating that if those who drafted the Directive wished to specifically deal with volunteers then they would have included them in the wording.



Unlike wrongful and unfair dismissal, discrimination law has no minimum length of service requirement and applies to a much broader category of individuals. Some volunteers are entitled to protection and this will be judged on a case by case basis where the Court will decide whether there is a genuine volunteering arrangement in place or whether a volunteer is in fact an employee.

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To determine whether a volunteering arrangement is genuine the starting point is that the “volunteer” should receive no financial reward or benefits aside from reimbursements and expenses. Furthermore there must be no “mutuality of obligation” between the volunteer and the charity nor must there be any obligation on the voluntary worker to attend. This means that if the voluntary worker fails to turn up the organisation would have to find a substitute and no sanction should be imposed for the non-attendance. The volunteer and the charity should not enter a contract for the individual to personally do the work although it is permitted to put in place rules and working procedures which apply when the volunteer is carrying out voluntary work for the charity.

The volunteer should be required to sign a volunteer agreement. However, the wording of any agreement should be carefully considered and should point to the fact that it is neither a contract of employment by which the individual is contracted personally to do any work, and nor should it be legally binding. Simply labelling someone as a “volunteer” is not definitive of their employment status. In determining whether someone is a volunteer the tribunal or court will look at the reality of the relationship.

The charity must ensure that volunteering does not automatically lead to paid work or employment or that the volunteers are given preferential treatment if they apply for such work. If voluntary arrangements are made for the purpose of determining to whom the charity should offer employment then a Court would be inclined to find that the volunteer would be protected. In practice it is likely that the experience of having been a volunteer will be an advantage and this would be accepted by the courts so long as the purpose of the volunteering was to support the charity’s aims and that the fact that volunteers develop skills that are suitable for paid employment are simply a by product. Therefore it must be proven that any job vacancy will be advertised externally and a court may look at a charity’s past recruitment history to determine whether volunteers are kept on in paid roles.

The judgment in this case has brought relief to charities and other voluntary sector bodies that were concerned about the extra burden that enhanced rights for volunteers would bring. However, the EHRC has suggested that an appeal may be brought to the Supreme Court, commenting: *“Given that many employees begin their working life as volunteers, which provides them with valuable experience which they can use as a step up to paid employment, it seems unfair that certain groups of people can legally be denied this experience.”*

As the law stands we recommend that you review your current volunteer agreements and working practices to ensure as far as possible you do not unwittingly enter into an employment relationship with your volunteers.

**For more information about employment law please contact:**



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## CHARITY COMMISSION – THE NEW STRUCTURE



Following the Charity Commission's strategic review, brought about by a cut in its budget of approximately 33% over the next four years, a new organisational structure is currently taking shape at the Commission and is due for completion in October of this year.

The new structure will see the disappearance of the director-level roles that currently sit below the Chief Executive. This will leave 11 "senior managers" heading up 11 functions and reporting directly to the Commission's Chief Executive, Sam Younger. The new structure will also see the Commission's workforce cut by 125 staff.

In a recent speech, Sam Younger confirmed that as a result of its budget cuts, it is being forced to focus on its core regulatory duties, such as maintaining the register, providing online guidance on charity law, holding charities to account through its reporting requirements and, in serious cases, investigating individual charities.

Most worryingly for smaller charities, Younger also stated that the Commission will be "doing less hand-holding of trustees ... moving away from interactions with charities whose purpose is simply to provide reassurance the decisions they're about to make are legit". In plain terms, the Commission will be scaling back the amount of one-to-one advice it provides to individual charities.

The Commission suggests that infrastructure / umbrella organisations will be able to plug the gap by increasing their capacity for tailored advice to individual charities, however, as readers will be aware, many local infrastructure / umbrella organisations have found their budgets cut by considerably more than the Commission.

As such, many smaller charities are concerned that this new approach, whereby charities are expected to be more autonomous in their decision making on sometimes quite complex issues, will leave them vulnerable to mistake and, in the event that they get something wrong, allegations of mismanagement.

**For more information about the changes and how we are able to help you with your charity work please contact:**



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**CHARLES STANLEY IN LIVERPOOL – INVESTING FOR CHARITIES**

Charles Stanley Liverpool is part of an independently-owned national firm specialising in providing personalised investment services to individuals, charities, pension schemes and trusts. The Liverpool team at Charles Stanley are proud of their local roots, and all have longstanding connections with the area. The individual members of the team believe that being active in the community is important and in this respect they support a number of local charities and community organisations, in a range of ways. Working in what sometimes can be seen as quite a privileged environment, they take great pleasure in being able to give back in some small way to the community.

The Liverpool office supports a range of local charities through fund raising and events – and of course managing charitable funds. Two charities they have recently been involved with are St John's Hospice Wirral and Clatterbridge Cancer Research.

Back in June, Charles Stanley supported the St John's Hospice golf day which turned out to be the most successful one in its history. Commenting on the event, Will Roberts of Charles Stanley said "We are delighted to have been able to provide practical help to the Hospice in organising and drumming up sponsorship and support in the North West for the day at Caldy Golf Club. We are also extremely grateful to all our co-sponsors and the other firms that entered teams to support the event and made it the Hospice's biggest golf day in their history. In total, thanks to the generosity of all of those who took part, the Hospice made £7,000 – which exceeded our expectations and theirs."

For Clatterbridge Cancer Research, Charles Stanley's Liverpool office entered a team for their golf day. Derek Gawne of Charles Stanley commented "It was a lovely occasion – made all the better by us managing to win it!" Also for Clatterbridge they are sponsoring the Christmas bazaar at Thornton Hall, and also took a table and sponsored one of the prizes at the recent "Strictly Come Dancing" event held at St Georges Hall on 28<sup>th</sup> October. Charles Stanley's head of Marketing is a keen dancer and she made the trip from London to specifically attend the event and support the local office.

The local team can draw on considerable support from resources in their head office such as the firm's Head of Charities who can offer specialist advice and support to trustees, and their Marketing team who have provided advice and groundwork support on occasion.

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