

**EMPLOYMENT LAW BRIEFING
ADVICE FOR CLUBS**

- I VOLUNTEER, CONSULTANT OR EMPLOYEE?

- II PAYMENT: NATIONAL MINIMUM WAGE AND HONORARIA

- III CONTRACTS OF EMPLOYMENT

- IV FIXED TERM CONTRACTS

- V THE ACAS CODE OF PRACTICE ON DISCIPLINARY AND GRIEVANCE PROCEDURES (“THE CODE”)

- VI GROSS MISCONDUCT DISMISSALS

FARRER & CO LLP
66 LINCOLN’S INN FIELDS
LONDON
WC2A 3LH

I VOLUNTEERS/EMPLOYEES/CONSULTANTS

What is an employee?

For a relationship to be an employment relationship there must be some mutuality of obligation, so that there is an obligation on the employer to provide work and an obligation on the employee to work when work is provided, for which salary is paid. An employer has far more control over an employee and the methods that are used to carry out their work. An employee is not normally expected to provide their own equipment or facilities, or take any financial risk in performing their employer's work.

What is a Consultant?

A consultant on the other hand is self-employed. He or she is engaged to perform a specific service, they determine how they work, provide their own equipment and hire others to assist them in their work if they choose to do so. They normally submit invoices to their clients for work done charged on a time, commission or target basis.

What is a Volunteer?

By contrast, the key characteristic of a volunteer is that they provide services to an organisation free of charge. A volunteer should be readily identifiable not only by the absence of remuneration but also the lack of any obligation on the organisation to provide, and on the volunteer to accept, work. There is no specific Inland Revenue guidance on this question, but if the club can answer "yes" to the following questions it will usually mean that the person is a volunteer:

- Are they paid for the services they volunteer (except for reimbursement of expenses)?
- Can they withdraw their services at will and without giving any prior notice?
- Could the Club, if it so wished, stop their voluntary work without giving any prior notice?
- Does the Club deny them the benefits which it provides to its employees (eg: pension, holiday pay, car, life assurance, medical cover)?

A volunteer is not paid for their time they contribute for providing their services and can only be reimbursed for expenses they actually incur. However, it is not only a case of money and if there is

mutuality of obligation and full integration of the volunteer into the Club it may be that the person should be re-classified as an employee rather than a volunteer.

What is the Importance of the Employee/Volunteer Distinction

The employee/volunteer distinction is important, due to the whole host of statutory rights that employees have in addition to anything contained in their contract of employment. The Club also owes duties to HMRC and the Department of Work and Pensions in relation to each of its employees, but not to volunteers. Just running through some of those obligations:

- to pay employers' and employees' National Insurance contributions
- to deduct income tax and National Insurance contributions at source through PAYE
- to give statutory minimum notice of one week per year of service up to a maximum of twelve weeks' notice
- to give a statutory written statement of terms of employment within two months of commencement of employment
- not to dismiss employees unfairly
- not to victimise or dismiss an employee on the grounds of race, sex, disability, sexual orientation, religion or belief, age or trade union membership
- not to victimise or dismiss the employee for any reason relating to his/her health and safety at work
- to provide a statutory redundancy payment on dismissal for redundancy
- to pay statutory sick pay during periods of sickness
- to pay statutory maternity or paternity pay during periods of maternity or paternity leave and to allow the employee to return to work thereafter
- to provide on request written reasons for dismissal
- to hold employer's liability insurance covering all employees

The basic position is that (in contrast) volunteers are owed very little in the way of obligation, and certainly none of the rights set out above.

II VOLUNTEERS, THE NATIONAL MINIMUM WAGE AND HONORARIA

Under the National Minimum Wage Act 1998 (“NMWA”) genuine volunteers will be automatically exempt from the NMW because they have no legally enforceable contract and do not fall within the definition of “worker” as defined in the NMWA. However, care must be taken to ensure that some “volunteers” do not fall within the definition of worker as a result of receiving expenses or other forms of payment or benefits in kind in return for the services they perform. The intention of the NMWA is to ensure that valuable work provided by volunteers is not threatened, whilst ensuring that those who are in fact “workers” are not exploited.

Up to date rates of the NMW can be obtained from the Department for Business, Innovation and Skills (“BIS” formerly the DTI and BERR) website (<http://www.berr.gov.uk/policies/employment-matters/rights/nmw>).

Honorarium

Some volunteers who are paid an honorarium may be covered by the NMW, particularly if the honorarium constitutes a regular cash payment. It is important to ensure that any such payments are not in effect a set fee for services as a part-time employee. However, BIS Guidance states that providing that the payment is a genuine gift with no obligation and of a reasonable amount then it is unlikely to give the volunteer the right to the NMW.

There is no definitive legislative guide to define who should receive an honorarium. However, existing case law suggests that questions to ask in determining whether an individual is an office holder rather than an employee are as follows:

- (i) Is payment described as an honorarium or a fee/salary?

An honorarium is more likely to be for an office holder.

- (ii) Is payment fixed in advance or is it calculated in accordance with the work done?

A fixed fee fixed in advance, unrelated to the hours worked is more likely to be for an office holder than an employee.

- (iii) Is there any right to the payment or is any payment made ex gratia?

Ex gratia would suggest an office holder.

(iv) How large is the payment?

The larger the payment, the more it will seem it will be akin to an employee's salary.

(v) Is the official required to report for all of their actions to the employer or do they act independently?

An office holder will have to be accountable to the organisation, but they will be more independent than an employee.

(vi) What is the extent of the duties?

The greater the duties the more likely the individual is an employee.

(vii) How is the payment described and how is it treated by the organisation and the individual for tax purposes?

Payment should not be treated in the same way as a monthly salary, and should be declared by the individual as an honorarium payment.

III CONTRACTS OF EMPLOYMENT

Under Section 1 of the Employment Rights Act 1996 an employer must, within 2 months of employment commencing, provide the employee with a written statement of terms and conditions relating to the following particulars:

1. identity of the parties

i.e. names of the employer and the employee

2. date of commencement of employment

3. date of commencement of period of continuous employment

taking into account any employment with a previous employer which counts towards that period

4. rate of remuneration and intervals of pay

i.e. weekly, monthly or other specified intervals

5. hours of work

including any terms and conditions relating to normal working hours

6. details of terms relating to holidays

public holidays, holiday pay

7. details of terms relating to incapacity due to sickness or injury

reporting procedures for absence, details of sick pay

8. the length of notice which the employee is employed to give and entitled to receive to terminate his employment

9. job title which the employee is employed to do or a brief description of the work for which he is employed

10. details of terms relating to pension schemes

11. the place of work

the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer

12. particulars of any collective agreements in force

13. particulars of disciplinary and grievance procedures

14. whether a contracting out certificate is in force (under the Pension Schemes Act 1993)

15. where the employee is required to work outside the UK for a period of more than one month, the period for which he is to work outside the UK, details of pay, benefits and currency of payment and any terms and conditions relating to his return to the UK

Failure to provide the written statement of terms and conditions may result in a penalty being awarded by an Employment Tribunal of up to four weeks' pay.

IV FIXED TERM CONTRACTS

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations ("the Regulations") came into force on 1 October 2002. The Regulations introduced several changes to the way in which fixed-term employees employed under fixed-term contracts should be treated by employers and contained a number of traps for the unwary employer.

Who is covered by the Regulations?

The Regulations apply only to fixed-term employees, i.e. those employed for a specific period of time or until completion of a specific task or until the occurrence or non-occurrence of a specific event (other than retirement).

Less favourable treatment

Under the Regulations fixed-term employees are protected from being treated less favourably than comparable permanent employees as regards the terms of employment and from being subjected to any other detriment (whether by act or by deliberate omission). An example of the latter would be selecting a fixed-term employee for redundancy instead of a permanent employee purely because he/she is on a fixed-term contract. The Regulations particularly refer to less favourable treatment in respect of periods of service required to qualify for a particular benefit, the opportunity to receive training and the opportunity to secure a permanent position (in the latter case, fixed-term employees have the right under the Regulations to be informed of vacancies for permanent positions). Treatment should be assessed on a pro rata basis.

Fixed-term employees are entitled to compare themselves with employees who are employed by the same employer and who are engaged in the same or broadly similar work (with regard, if relevant, to levels of qualification and skills). Furthermore, comparators should be based at the same establishment as the fixed-term employee or, if there is no comparable permanent employee working at that establishment, to an employee based at a different establishment of the same employer.

Objective justification

The right not to be treated less favourably only applies if the less favourable treatment is on the ground that the employee is a fixed-term employee and the treatment is not justified on objective grounds.

Whether or not less favourable treatment is objectively justified is going to depend very much on the circumstances of each particular case, but an employer may, for example, be able to argue that the provision of a particular benefit to a fixed-term employee is disproportionately expensive. BIS cites the example of a company car. An employer may decide that the cost of providing a fixed-term employee on a contract of, say, three months with a company car, in a situation where a comparable permanent employee has a company car, is disproportionately high and that the business need for the employee to travel can be met in some other reasonable way.

Employers can also justify less favourable treatment if they can show that the value of a fixed-term employee's total package of terms and conditions is equal to (or greater than) the value of a comparable permanent employee's total package.

Right to receive a written statement of reasons

Fixed-term employees who think that they are being treated less favourably can request a written statement of reasons for that less favourable treatment from their employer. The employer is obliged to provide it within 21 days. The idea behind this is not to allow fixed-term employees the opportunity to find out what permanent employees are earning or receiving by way of benefits, but rather to seek clarification from the employer as to whether or not there is less favourable treatment, and if so, why. The statement will be admissible as evidence in an Employment Tribunal ("ET") and, if the employer has deliberately or without reasonable excuse failed to provide a written statement or has provided a statement which is evasive or equivocal, then an ET may draw an inference from this.

Unfair dismissal

Since 1 October 2002, the expiry of a task contract (i.e. a contract specified to run for as long as it takes to complete a specific task) and the expiry of a contract that comes to an end on the occurrence or non-occurrence of a specific event are deemed to be dismissals. Therefore, if the employee has one year's continuous employment or more, he/she will be protected from unfair dismissal. As a consequence, anyone using fixed-term contracts should take particular care to note when the contract will come to an end and should either ensure that a new contract is in place or that appropriate measures have been taken sufficiently far in advance to ensure that the "dismissal" is fair by following the usual rules for conducting a fair dismissal (i.e. for reason of: some other substantial reason, redundancy, capability, misconduct, or illegality in accordance with the Employment Rights Act 1996).

Statutory redundancy payments

After 1 October 2002, following the introduction of the Regulations, any attempt to waive the right to a statutory redundancy payment on the expiry and non-renewal of a fixed term will not be valid. A waiver that is signed prior to 1 October 2002 still applies if the fixed term comes to an end and is not renewed.

Limiting the use of success of fixed-term contracts

The Regulations state that, if a fixed-term contract is renewed or an employee is re-engaged on a new fixed-term contract, then the contract will become permanent if the employee has been continuously employed for four or more years. Any period of service prior to 1 July 2002, however, is to be ignored for the purpose of continuous employment. The contract becomes permanent on the renewal or re-engagement on new terms after the acquisition of four years' continuous employment from 10 July 2002.

Once again, the employer has the opportunity under the Regulations to avoid this provision if the employer can objectively justify employment on a fixed-term contract. Employers would need to show a legitimate objective. Employers may also avoid this provision if there is a collective or workplace agreement (see the Regulations for specific guidance on this).

Remedies

If a fixed-term employee believes that he is being less favourably treated than a comparable permanent employee, or if a fixed-term employee believes that his employer has infringed the rights under the Regulations in any other way, then he may apply to an ET. ETs may award compensation if they believe it just and equitable to do so. Employees who think that their fixed-term contracts have now become permanent may apply to an ET for a declaration that this is the case, although such employees should first request a written statement from the employer asking for confirmation of the permanence of their contract. Similarly, fixed-term employees who think that they have been less favourably treated should also apply for a written statement from their employer before making an application to the ET.

V THE ACAS CODE OF PRACTICE ON DISCIPLINARY AND GRIEVANCE PROCEDURES (“THE CODE”)

.The Key Changes

The Code replaced the Statutory Dispute Resolution Procedures in April 2009 and a copy of the Code can be found at www.acas.org.uk. It retains many of the key features of the statutory procedures – in particular: the requirement to inform the employer/employee of the nature of the discipline/grievance; to hold a meeting; and the right of an employee to appeal against a decision. Therefore, it is unlikely that the new regime will result in significant changes to employer’s current practices. However, we touch on some of the key implications below:

In a broad sense there will no longer be a free standing obligation, either on an employer or an employee, to follow a mandatory dispute resolution procedure

This means that:

- from an employer’s perspective, a dismissal will not be automatically unfair where it has failed to follow the defined procedure;
- from an employee’s perspective, there will no longer be a requirement for a grievance to be submitted before an Employment Tribunal claim can be filed; and
- from the perspective of both employers and employees, the complex time limits and extensions in respect of Employment Tribunal claims will, in most cases, be removed and a standard three-month time limit for filing claims will apply.

The Code sets down minimum standards for dealing with disciplinary and grievance issues

Whilst the Code is not legally binding, Employment Tribunals will take it into account when considering whether a dismissal is fair in all the circumstances. A failure to comply with the Code that is considered by a Tribunal to be unreasonable may result in any compensation awarded to an employee being adjusted upwards or downwards in favour of either party by up to 25%.

The focus will be on informality and flexibility

- The Code encourages the informal resolution of disputes; and
- An employer is free to formulate its own procedures as it wishes, as long as the procedures adhere to the standards contained in the Code.

The scope of application will be reduced

The Code will not apply to redundancy dismissals or the non-renewal of fixed-term contracts. Nor will it apply to collective grievances. However, disciplinary warnings will be covered by the Code, so employers should follow a formal process and allow an appeal to be filed against any formal disciplinary decision.

Further benefits for the employee

- Employees and, where appropriate, their representatives, should be involved in the development of rules and procedures. Employers should help employees and managers understand how the new rules and procedures are to be used;
- There is an emphasis on ensuring that an adequate investigation has taken place before any formal action is taken;
- Employers will be obliged, rather than merely encouraged, to inform employees of their right to be accompanied to disciplinary meetings and should ensure that the complaint and the evidence gathered at the meeting is thoroughly reviewed (rather than taking this as read);
- Employees should be given a ‘reasonable opportunity’ to call relevant witnesses at a disciplinary hearing; and
- Employers should deal with issues ‘promptly’ and without unreasonable delay.

Further benefits for the employer

- Employers will be able, where an employee has been persistently ‘unable or unwilling to attend without good cause’, to hold a disciplinary hearing in the employee’s absence;
- The size and available resources of an employer will be taken into account by a Tribunal in the event of a dispute concerning whether appropriate action was taken;
- Employers may no longer be obliged to hear grievances from ex-employees.

Suggested Action

- Conduct a review of your disciplinary and grievance procedures to ensure they are compatible with the Code;
- Consider including the option of mediation in your procedures;
- In light of the transition period, consider whether you can time the handling of disciplinary and grievance procedures to ensure they come under the new regime;
- Encourage managers to identify situations where a more informal approach to dealing with problems at work may be more appropriate, and to deal with problems at an early stage to stop them from escalating where possible; and

Most importantly, make sure that any managers who deal with these issues are aware of the new regime and receive training to ensure that they comply with your procedures and the new Code

VI GROSS MISCONDUCT DISMISSALS

The ACAS Code sets out the procedure that an employer should follow in cases involving gross misconduct. The failure of employers to follow the ACAS Code in such cases may result in an ET awarding an uplift in compensation of up to 25% in any successful unfair dismissal claim against them (presuming the employee has over a year's service). However, again presuming the employee has unfair dismissal rights, even if an employer does comply with the ACAS Code, it might still be found to have unfairly dismissed the employee if, for example:

- (a) there was not a potentially fair reason for the employee's dismissal; or
- (b) if the employer had not acted reasonably in treating the potentially fair reason as being sufficient to dismiss the employee.

Misconduct is a potentially fair reason for dismissal when dealing with a case of gross misconduct, the following factors will be considered in ruling on the fairness of the dismissal:

- (a) whether the employer believed in the guilt of the employee (the relevant burden of proof is the balance of probabilities rather than "beyond reasonable doubt");
- (b) whether that belief was based on a reasonable investigation (which should have been carried out by someone within the organisation independent of any subsequent decision);
- (c) whether dismissal fell within the range of reasonable responses open to the employer. Any ET ruling on the fairness of a dismissal cannot substitute its own view for that of the employer and should only rule on whether the decision reached fell within the band of responses available to a reasonable employer in the relevant circumstances. An employer should, however, consider whether any sanction falling short of dismissal is appropriate before reaching any decision to dismiss;
- (d) whether a fair procedure was followed in reaching the decision to dismiss.

In terms of the procedure to be followed, once an investigation has been carried out and assuming that the investigation finds that there is a case to answer, the employer should follow, as for any other disciplinary offence, a fair procedure which complies with the ACAS Code using the ACAS Guide as additional guidance. However, in doing so, it will need to ensure that it covers off the following:

- (a) the letter to be sent to the employee inviting them to attend a meeting should provide reasonable notice of the meeting and should set out:
- (i) details of the allegations being made against the employee so that they can understand what they are accused of;
 - (ii) notification of the employee's right of accompaniment by a colleague or by a trade union representative;
 - (iii) notification that the allegations are sufficiently serious to potentially amount to gross misconduct and that one outcome of the dismissal might therefore be the employee's summary dismissal (i.e. dismissal with immediate effect);
 - (iv) some information as to who will be chairing and/or attending the meeting and as to how the hearing will be conducted, i.e. that the employee will be asked to explain their version of events in relation to the allegations.
- (b) At the hearing itself the employee must be given the opportunity to put their version of events. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. The employer should also ensure that someone is present at the hearing to take a note. At the end of the hearing, it is advisable for the person chairing the hearing to adjourn the hearing so that they can consider all of the evidence and then communicate their decision to the employee in writing shortly following the hearing.
- (c) The employee should be given the right to appeal against any decision taken to a more senior employee/officer within the organisation. If the employee decides to appeal, they should then be invited to attend an appeal hearing to discuss their grounds of appeal.

A FINAL WORD OF WARNING!

The briefing note set out above covers a wide range of employment issues which we hope will be helpful to you. However, it by no means expects to cover all of the potential employment law problems that may arise and a Club may need to address. Therefore, please do seek specialist advice from your Club's solicitor or an employment law expert if you require guidance.

April 2010