



## **Volunteers and the Law**

### **Moorhead James LLP**

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Volunteering is by and large a positive experience for everyone involved. However, many organisations are unclear about the legal status of volunteers and the responsibilities they have towards them and sometimes things can go wrong. There have been several cases relevant to volunteer status but it remains a bit of a grey area as the cases are very fact-specific and the courts' approach has been varied.

In view of the growing interest in volunteering, it is important that organisations understand both good practice and the legal implications to ensure that volunteering remains a valuable experience for all.

#### **Volunteers – Who are they?**

There is no single legal definition of a volunteer. The Police Act 1997 (Criminal Records) Regulations 2002, which provides for Criminal Records Bureau checks, defines a volunteer as:

*“a person engaged in an activity which involves spending time, unpaid (except for travel and other out of pocket expenses), doing something which aims to benefit some third party other than or in addition to a close relative.”*

The legal status of volunteers is not clear cut as there are a vast range of different types of relationships, from the purely voluntary to those that are clearly contractual and those in between, which are difficult to define.

Unlike employees or workers, volunteers do not have specific rights in law. An organisation does not have to offer a volunteer a role or keep them in a role, however long they have been volunteering for. This also means that a volunteer has no obligation to the organisation and they can stop volunteering whenever they like.

### **Volunteers – What are they not?**

It is important to avoid volunteers obtaining either employee or worker status which attract certain rights and obligations. The manner in which the parties describe themselves and their intentions will not, however, be decisive in determining status as an Employment Tribunal or Court will look at what happens in practice.

It is important to establish the status of individuals from the start so that their legal rights, protections and the obligations owed to them can be determined. There are, broadly speaking, three types of employment status: employee, worker and self-employed.

Employment law gives protection to:

- (1) employees;
- (2) workers; and
- (3) a wider class of individuals who are protected from discrimination under the Equality Act 2010.

### ***Employees***

An employee is defined in s.230(1) Employment Rights Act 1996 (“the ERA”) as:

*“an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment”.*

A contract of employment is defined in s.230(2) ERA as:

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

Whether or not there is an employment relationship between the parties is a matter of law and there are three key factors:-

- (1) that there is an agreement whereby the individual personally provides their own work or skill in the performance of a service in return for a wage or remuneration (‘personal service’);
- (2) that there is an obligation on the ‘employer’ to provide work and an obligation on the individual to do that work (‘mutuality of obligation’); and
- (3) there is sufficient control over the individual (‘control’).

Employees have important legal rights, such as the right to claim unfair dismissal or a statutory redundancy payment. They are also covered by the ACAS Code of Practice, which must be followed in disciplinary and grievance proceedings, failing which a tribunal can increase any compensatory award made in favour of the employee by up to 25%. There are also terms that are implied into contracts of employment such as the duty of mutual trust and confidence.

### ***Workers***

The question of employment status has been blurred in recent years by the evolution of the status of the "worker", a creature created by statute. Where an individual cannot meet the definition of an employee, consideration should be given as to whether they are a worker. Whilst workers have less extensive employment protection than employees, statutory employment protections often cover workers as well, for example they are

afforded rights under the Working Time Regulations 1998 in respect of holiday entitlement and hours of work etc. Like employees, there are also entitled to be paid the National Minimum Wage.

By s.230(3) ERA, a worker is:

*“an individual who works under a contract of employment or any other contract, whether express or implied, who undertakes to do or provide personally any work or services for another party to the contract, where that other party is not a client or customer of any profession or business undertaking carried on by the individual.”*

Following the above definition, a worker is someone who on the one hand is not an employee, but on the other hand cannot be regarded as carrying on a business. A worker is in a ‘subordinate and dependent position vis-à-vis their employer’.

In determining whether someone has worker status, the following points should be considered:-

- (1) Personal service: did the individual undertake to personally perform work or services?
- (2) Business undertaking: is the ‘employer’ a customer of a business undertaking carried on by the individual?
- (3) Mutuality of obligation: is there mutuality of obligation between the individual and the ‘employer’?

Casual work often involves workers being engaged on a number of short-term contracts with gaps in between. In order for there to be a contract of service, there has to be

mutually binding legal obligations on both sides. Whilst it could be found that there is a contract of employment in place for the duration of each assignment (so the individual could be a worker, or even an employee), a lack of mutuality of obligation (to provide work and to do it) during any gaps between assignments can be fatal to any argument that there is a contract of employment in place at those times. However, tribunals have recently departed from this position and found that where there is sufficient mutuality during each engagement to constitute a contract of employment, a lack of mutuality between assignments will not necessarily prevent the successive engagements from constituting a contract of employment. Any gap in continuity between engagements may be bridged by statutory provisions (i.e. be deemed to be a ‘temporary cessation of work’ where continuity is not broken). The use of casual workers should therefore be considered very carefully and their status address at the start of the working relationship. A well-drafted contract would confirm that there is no obligation on the organisation to offer work and the worker is under no obligation to accept work. This means that they are not regarded as an employee. Alternatively, an organisation could use what is known as a ‘zero hours’ contract, under which they would not be obliged to provide a minimum amount of work, but the worker would be obliged to be available for any work when offered. Organisations should be careful, however, not to allow the arrangements to develop into a regular pattern of work, or this could give rise to employee status.

### ***Interns / work experience***

There is no definition of internship and the term ‘work experience’ means different things to different people. ‘Work experience’ normally refers to a limited period of time that an individual spends with an employer during which they have an opportunity to learn about the working environment. Some offer practical experience, whilst others simply provide an opportunity to shadow someone. Unless one of the specific exceptions for school-age children, student work placements, or certain types of volunteers applies, a work experience placement or internship may attract the National Minimum Wage if the individual is found to be a worker.

BIS guidance states that unpaid interns should not be under an obligation to perform

activities in accordance with instructions. By the same token, if an unpaid volunteer becomes subject to a sufficient degree of obligation to undertake tasks just like a worker, or employee, or fulfils an actual job, then the National Minimum Wage should be paid. This is likely to be the case where a genuine volunteer placement becomes more than a volunteer learning activity.

### **The National Minimum Wage and 'Volunteer Workers'**

Volunteers will only be entitled to the National Minimum Wage if they are found to be employees or workers. As explained above, individuals will not fall within the definition of worker if they have no form of contract of employment or contract to perform work or provide services and receive no financial remuneration or benefits in kind for providing their services.

For the purposes of the National Minimum Wage, the term 'voluntary worker' is used. This term refers to a category of worker who works for charities, voluntary organisations, associated fund-raising bodies and statutory bodies. Their status is slightly different to that of a simple volunteer. A 'voluntary worker' is not entitled to the NMW if the following conditions are met:

- They receive no monetary payment other than reimbursement of expenses actually incurred or reasonably estimated as likely to have been incurred in the performance of their duties; and
- They receive no benefit in kind other than reasonable subsistence or accommodation.

The government gives the following examples of expenses incurred in the performance of a voluntary worker's duties:

- Travel to and from the place of volunteering and in the course of volunteering; and
- Cost of care of dependants needed to enable the voluntary worker to do the voluntary work.

## **How to avoid giving volunteers rights**

To establish any protection as a worker or employee, an individual must establish that there is a contract of employment with the organisation. This means that organisations should avoid giving volunteers a contract. It should be noted that a contract does not have to be in writing and can be verbal or simply arise by implication. The parties can be deemed to have accepted relevant terms and conditions of employment (either express or implied terms) by their behaviour, which then makes those terms legally binding.

A contract is formed when the following basic elements coincide:

- (1) Offer;
- (2) Acceptance;
- (3) Consideration;
- (4) Intention to create legal relations; and
- (5) Certainty of terms.

## ***Expenses***

Volunteers are not paid for their time, but usually receive money to cover their expenses. This is normally limited to food, drink and travel. It is suggested that reimbursement of reasonable out-of-pocket expenses alone is unlikely to make a volunteer a worker. Nevertheless, each case would be considered on its individual facts and it would be sensible for organisations to reimburse only expenses actually incurred rather than estimated expenses. If not, then the sums paid could constitute a 'payment' amounting to remuneration, and the individual will be entitled to be paid the National Minimum Wage (see above) (which is currently £6.19 for those aged 21 and over; £4.98 for 18-20 year olds; and £3.68 for those under 18) and could potentially be viewed as a worker or indeed an employee giving rise to further legal rights and tax implications.

Organisations should avoid giving anything free of charge to the volunteer as a perk as this could constitute a ‘benefit in kind’ which would mean that they are entitled to be paid the National Minimum Wage. Consider volunteers at a music festival; if they are given free CDs or a wrist band to access certain areas when they are not volunteering, this would be a benefit in kind.

Organisations would be advised to keep receipts and records of money paid out in case there are any queries, so that they can prove that they have not been making payments over and above reimbursement of genuine expenses. It would also be a good idea to have a precedent expenses form that volunteers are required to complete to recoup their expenses.

Finally, just because payments are referred to as ‘expenses’ does not mean that they are genuine expenses. If the payment is found not to be in relation to genuine expenses, the payment could be taxable.

### ***Rewards & gifts***

A genuine honorarium in the form of an unexpected gift, with no obligation and of a small value is unlikely to change a volunteer's status to that of a worker. However, care should be taken to ensure this does not create a contractual relationship under which a person is undertaking work in return for gifts or rewards. Regular rewards and gifts are unlikely to be viewed as genuine honoraria, especially where there is an expectation that it will be paid.

### ***Training***

In its response to the consultation on voluntary workers and the National Minimum Wage, the government suggested that provision of training beyond the needs of the volunteering opportunity would represent a significant benefit in kind that would change the nature of the relationship between the voluntary worker and the qualifying organisation. Training will not be considered a benefit in kind for National Minimum

Wage purposes if it is:

- Necessary to perform the duties of the voluntary worker;
- For the sole or main purpose of improving the voluntary worker's ability to do the work; and
- Necessarily acquired in the course of the voluntary work.

### ***Provision of uniforms & equipment***

The government's view is that the provision of clothing or equipment to a volunteer is unlikely to result in them being regarded as a voluntary worker for National Minimum Wage purposes if it is reasonable and is required for them to perform their role.

### ***Attendance at events***

Free entry to an event is unlikely to result in worker status for National Minimum Wage purposes if it is necessary to carry out their role.

### ***In summary:***

- Avoid creating a contractual relationship. Avoid using language in any documentation that makes the arrangement sound contractual and adopt flexible language such as 'usual' and 'suggested' instead;
- Avoid making payments to volunteers that could be construed as wages. Expenses are ok, provided these only reimburse actual expenses incurred and are clearly identified as such;
- Remove or minimise perks that could be seen as consideration; and

- Reduce obligations on the part of the volunteer. Giving a volunteer the ability to refuse tasks and choose when to work will point away from the existence of a binding contract.

## **Good practice**

### ***Volunteer agreements***

In order to prevent a contractual relationship, it is a good idea to make sure the parties' intentions and reasonable expectations are clear from the start. The use of a volunteer agreement is a good idea, although an organisation must be careful not to confer obligations and commitments on to the parties through such an agreement. For example, the volunteer should be able to leave the role at any point. The existence of required standards or guidelines which are to be followed by a volunteer does not create an obligation on the volunteer to actually attend work or create any mutuality of obligation between the parties.

Any agreement should be as non-legalistic as possible and relatively short, covering the volunteer's role; induction and training; supervision, support and flexibility; expenses; insurance; and health and safety.

### ***Equal Opportunities***

There has been much debate as to whether discrimination law should explicitly cover volunteers. At present it does not, as true volunteers will not have a legally binding contract and are therefore not obliged to provide any services. The Equality and Human Rights Commission has suggested however that volunteering is akin to providing a service, but this argument has yet to be tested in the courts.

Although discrimination law only protects those who are in or applying for '*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*' (s. 83(2) Equality Act 2010 ("the EqA")), it is good practice to apply the

principles of the EqA to volunteers. This means that they should not be discriminated against because of a 'protected characteristic'. The protected characteristics are as follows:-

- Age;
- Disability;
- Gender reassignment;
- Marriage and civil partnership;
- Pregnancy and maternity;
- Race;
- Religion or belief;
- Sex; and
- Sexual orientation.

### ***Policies***

Whilst it is a good idea to avoid using the same grievance and disciplinary procedures for both staff and volunteers, there is nothing to stop organisations having an informal policy which aims to address any issues raised by volunteers. Listening to volunteers' concerns and having a means to achieve reconciliation when things do go wrong, can help make the relationship easier to manage. It might also be possible for an organisation to appoint a 'volunteering champion' to monitor complaints and explore independent means of conflict resolution where necessary.

Policies can include those relating to equal opportunities, grievances and expenses. It is also good practice to have in place appropriate policies for the Protection of Vulnerable Adults and/or Safeguarding Children and Young People. These policies should be reviewed annually to ensure they are kept up to date and volunteers should be made aware of them.

### ***Insurance***

Check that volunteers are adequately insured and that any existing policy covers them. Although the law does not compel organisations to insure volunteers under employers' liability, it is clearly advisable to do so because otherwise you may be open to negligence claims. Public liability policies may also vary.

### **Who can be a volunteer?**

#### ***Age***

There is no upper age limit on volunteering, but it is worth checking an organisation's insurance policy, as some will not cover people under 16 or over 80. It is also worth noting that under-14s cannot work for a profit-making organisation, even if they are not paid. For example, a charity shop could be viewed as a profit-making organisation and so may not be able to let young people volunteer. Also, some local councils have bylaws regulating the work that young people can do.

#### ***Foreign individuals***

The rules on which people from overseas can volunteer are complex and sometimes contradictory. People from outside the European Economic Area ("the EEA") are not allowed to take up work, paid or unpaid (which includes volunteering), without a work permit. However, the Home Office has allowed a concession to allow people from outside the EEA to volunteer for a charity if they meet certain criteria. They would still need an appropriate visa or entry clearance, however. Refugees and asylum seekers are allowed to volunteer.

#### ***State benefits***

Genuine voluntary work should not affect entitlement to benefits. Rules concerning the most common benefits are as follows:

- Jobseeker's allowance: individuals are allowed to volunteer as long as they remain available for and are actively seeking work. Whilst there are no

restrictions on hours, if someone is volunteering full-time they could be regarded as not making themselves available to seek work.

- Income support: individuals must not receive any income from volunteering.
- Incapacity benefit: there are no restrictions.

### ***Paid staff***

An organisation can allow its paid staff to volunteer for it at events etc. However, the paid role must be substantially different to the volunteering role, otherwise the individual could be found to have employee or worker status whilst volunteering and such activities would then attract the National Minimum Wage, as well as other legal rights. There need to be clear distinctions to prevent confusion over the different roles and responsibilities.

### ***Recruitment***

It is good practice to take up written references from at least two people who are not relatives of the applicant and who have first-hand experience of the applicant's work or experience within the sector. Ideally, they should be followed up verbally and the referee can be asked to confirm if they have any concerns about the applicant working in the sector.

## **Criminal Records and Criminal Records Bureau Checks**

### ***Background***

The Protection of Freedoms Act 2012 ("the PFA") has made a number of changes to criminal record checks. On 1 December 2012 the Criminal Records Bureau ("CRB") and the Independent Safeguarding Authority ("ISA") merged to form the Disclosure and Barring Service ("DBS"). The merger resulted in different terminology being adopted; for example Standard and Enhanced CRB checks are now known as Standard and Enhanced DBS Checks and an Enhanced CRB Check with a Barred List Check has become an Enhanced Check for Regulated Activity.

From 1 March 2013, only DBS application forms will be processed. Any CRB certificates already issued will remain valid.

The Safeguarding Vulnerable Groups Act 2006 (“the SVGA”) remains in place, although it has been amended by the PFA.

On 10 September 2012, the PFA made amendments to the SVGA and the Police Act 1997 Regulations which resulted in the following changes:

- A new definition of ‘vulnerable adult’: a vulnerable adult is someone who is 18 years old or over and who is the subject of a ‘regulated activity’.
- A new definition of ‘regulated activity’ as it applies to children and vulnerable adults: a ‘regulated activity’ in respect of children must be of a particular type and be carried out with a specified degree of frequency (unless it falls into a narrow exception relating to the provision of certain types of personal care or health care). The definition in relation to vulnerable adults is the same, save that there is no longer any degree of frequency required.
- The concept of ‘controlled activity’ has been removed.
- The registration and continuous monitoring provisions have been removed.

It follows that individuals who appear on the children’s or adult’s barred lists are prohibited from undertaking a regulated activity.

Organisations should consider whether they are a regulated activity provider (“a RAP”). In order to be a RAP and subject to the SVGA, each of the following three conditions must be met:

- They must be responsible for the management or control of a ‘regulated activity’.
- If the ‘regulated activity’ is carried out for the purposes of an organisation, they must not be subject to supervision or direction by any other person in exercising that responsibility.

- They must make arrangements (or authorise the making of arrangements) for another person to engage in that activity (whether in connection with a contract of service, a contract for services or otherwise).

If the organisation is a RAP, there are specific circumstances in which they must refer information about individuals to the DBS and in some circumstances they are required to comply with requests from the DBS for information about individuals.

The SVGA created criminal offences which can not only be committed by the individual worker, but by employers and personnel suppliers who give barred individuals access to regulated activities.

### ***Regulated activity***

The new definition of ‘regulated activity’ will have a large impact on the sport and recreation organisations. Organisations must understand what a ‘regulated activity’ is as to whether they can request barred information on an individual.

People who do not fall within the new definition of ‘regulated activity’ will no longer be eligible for list checks, but everyone within the old definition will remain eligible for enhanced level checks.

The new definition is similar to the old one, but with a further requirement that the individual conducting the activity must be unsupervised in order for a check to be necessary.

Supervision can be difficult to determine and the Secretary of State is required to publish guidance to help organisations decide whether supervision in particular circumstances means that an individual being supervised is not engaging in a ‘regulated activity’.

### ***Can someone with a criminal record volunteer?***

Whether or not someone with a criminal record can volunteer depends on the nature of their crime and the volunteering role. Even those without a criminal record may need to undergo a criminal records check to volunteer with children or vulnerable adults.

Checks are only available in cases where an organisation is entitled to ask ‘exempted questions’ under the Exemptions Order to the Rehabilitation of Offenders Act 1974 (“the ROA”). The ROA enables some criminal convictions to become ‘spent’, or ignored, after a ‘rehabilitation period’. After this period, an ex-offender is not normally obliged to mention a conviction. The exceptions to this are in the Exemptions Order of the ROA and the two main exemptions relate to roles that involve regular contact with children or vulnerable adults. If a person wants to apply for a role that involves volunteering with children or vulnerable adults, then they are required to reveal all convictions, both spent and unspent. The revelation of past convictions does not automatically prevent someone from volunteering and therefore organisations will need to consider the nature of the conviction.

For organisations that use volunteers, the key to making a decision on whether to obtain a check is to properly evaluate the risks associated with the activities of that organisation. However, unless volunteering is in a ‘regulated’ setting (involving regular contact with children or vulnerable adults) there is no legal requirement to carry out a check. It is bad practice to undertake checks on all volunteers without properly evaluating the risk and whether there is a legal or other reason to do so. The law seeks to maintain a balance between rehabilitating those with a criminal record and recognising the overriding need for disclosure in certain situations to protect certain groups from those who have committed certain offences. There are obvious drawbacks from relying on voluntary disclosure.

### ***Overview***

There are three types of disclosure: basic, standard and enhanced.

<b>Type of certificate</b>	<b>When used</b>	<b>Who can apply</b>	<b>What is shows</b>
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Basic	Only available to individuals	Person aged 16 or over	Unspent criminal convictions (shortly it will also show unspent conditional cautions)
Standard	Only in respect of excepted posts included in the Exemptions Order	Person aged 16 or over, countersigned by registered person confirming their entitlement to apply for the certificate*	Convictions (spent and unspent), cautions (spent and unspent), police reprimands and warnings
Enhanced with a Barred List check	Only in respect of posts that are included in both the Exemptions Order and the Police Act Regulations (for example, positions that involve work with children and vulnerable adults - the position must meet the new definition of 'regulated activity').	Person aged 16 or over, countersigned by registered person confirming their entitlement to apply for the certificate*	Convictions (spent and unspent), cautions (spent and unspent), police reprimands and warnings, any information stored about the person on statutory lists containing details of those who are unsuitable to work with children or vulnerable adults (where relevant to the post), relevant police information reasonably believed

			to be relevant.
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\* Only bodies or umbrella bodies registered with the DBS can apply for standard or enhanced disclosures. Only those entitled to ask excepted questions under the Exemptions Order or who will be countersigning applications on behalf of others entitled to do so may register. Those countersigning applications will need to be 18 years old or over.

DBS checks, both standard and enhanced, are provided free of charge for volunteers at the point at which the check is processed (although some umbrella organisations may charge admin fees), provided the individual is not a student who is undertaking a work placement to obtain a qualification. Before an organisation asks an individual to make an application for a DBS check, they are legally responsible for ensuring that they are entitled to ask that person to reveal their conviction history.

A standard check is available for any volunteering role which would enable someone to have access to children or vulnerable adults (persons aged 18 or above who have a learning or physical disability, illness or a reduction in physical or mental capacity, and as a result of this are in receipt of a specified service) in the course of their normal duties. Enhanced checks are only available for those who are regularly caring for, training, supervising or in sole charge of children or vulnerable adults. The Protection of Children Act legally obliges organisations to obtain a DBS check for certain staff and volunteers.

Where an organisation has been told voluntarily or as the result of a DBS check that an individual has a criminal record it needs to consider how to deal with this.

***Spent & unspent convictions***

<b>Sentence</b>	<b>Rehabilitation period for people aged 18 or over when convicted</b>
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Absolute discharge (this means that an offence was committed by no penalty was imposed)	6 months
Fines, compensation, probation (now called community rehabilitation orders), combination (now called community punishment and rehabilitation orders), action plans, curfews, drug treatment and testing, reparation orders	5 years
Detention centres (now abolished)	3 years
Borstal (now abolished)	7 years
Prison sentence of 6 months or less	7 years
Prison sentence of 6 months to 2.5 years	10 years
Prison sentence of more than 2.5 years	Never becomes spent.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 will make rehabilitation periods shorter when it is brought into force in April 2013.

***When spent convictions must be disclosed***

The excepted occupations, offices and professions, where spent convictions must be disclosed, fall into five broad groups:

- Professions (medics, lawyers, accountants, vets, chemists and opticians);
- Those employed to uphold the law (judges and officers of the court, the police, prison officers and traffic wardens);
- Certain regulated occupations (such as financial services, those in charge of certain types of nursing homes, taxi drivers and firearms dealers)
- Those who work with children, provide care services to vulnerable adults or who provide health services.

- Those whose work means they could pose a risk to national security (such as air traffic controllers and certain Crown employees).

### ***Impact of Data Protection Act 1998***

Information about the commission or alleged commission of criminal offences constitutes ‘sensitive personal data’ for the purposes of the Data Protection Act 1998. Before it can undertake the processing of the data, an organisation will require the individual’s explicit consent. Any processing must also be adequate, relevant and not excessive. An organisation should make it clear early in the recruitment process that vetting will take place and how it will be conducted and should leave vetting until as late as possible in the recruitment process.

### ***Proposed changes for future***

The government intends to launch a new update service which will enable individuals to register once for a DBS check which will then be automatically updated and available for organisations to check.

If you have any questions or queries on this guidance, please contact Samantha Murray-Hinde.

Email: [sammh@moorheadjames.com](mailto:sammh@moorheadjames.com)

Phone: 020 7400 6574

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