Volunteer status – they think it’s all over… but it isn’t

Charities and social enterprises may be surprised to learn that volunteers can have rights under employment law.

Lucy McLynn and Victoria Cook explain that it’s crucial to be clear about your organisation’s relationships with its volunteers

An astonishing 26% of the population of England formally volunteer at least once a month. Many not-for-profit organisations rely heavily on the contribution of volunteers to deliver services. With the continuing financial pressures on the sector, this is a trend that looks set to increase. Many organisations that work with volunteers assume that they do not need to worry about the employment status of this (often large) unpaid workforce as it has been clearly established that volunteers are not employees or workers and therefore are not eligible for protections under employment law.

At first blush this is a correct assumption. After a spate of cases in which volunteers sought redress in the employment tribunals for unfair dismissal and discrimination, the Supreme Court ruled in 2012 in X v Mid Sussex CAB that volunteers were not workers. One might, therefore, have thought that the issue was closed.

It is not quite that straightforward, however. The facts in the case of X were strongly supportive of the relationship having no obligations on either side. The CAB had been the subject of a number of previous claims by volunteers and had a well-defined approach to engaging with their volunteers by the time X started volunteering for Mid Sussex CAB in 2006. The volunteer agreement spoke only of hopes unpaid workforce as it has been clearly established that volunteers are not employees or workers and therefore are not eligible for protections under employment law.

What we are frequently seeing at BWB, however, are volunteer arrangements under which volunteers are, in practice, required to attend for set hours or duties. Sometimes this is because the volunteers are carrying out tasks that the organisation has made an external commitment to deliver – under an SLA for instance. Sometimes it is because the organisation has positioned the volunteering as an ‘internship’ – a term that is meaningless legally – and has set requirements about attendance on the basis that there is a structured relationship between the organisation and the volunteer in the same way that there would be with paid trainees or apprentices. In any case where a volunteer is, in reality, required to carry out duties the arguments about their employment status may well be wide open again.

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Simultaneously, we are beginning to hear of more challenges from volunteers about their rights within the workplace, and, at the time of writing, we are defending a live tribunal claim for unfair dismissal and discrimination from a volunteer. This is all the more notable given the new tribunal regime where claimants now have to pay fees in order to bring a claim. There is clearly a resurgence in volunteers’ interest in asserting legal rights, presumably as they see themselves doing an increasing amount of the work that keeps our society functioning. Coupled with an element of misplaced complacency by some organisations in assuming that they can use volunteers in the same way as paid workers – just without the pay and the employer’s responsibilities – this feels like a recipe for trouble in the future.

Voluntary organisations would be well advised to take stock of how exactly they are working with their volunteers, and ensure that it truly is about a voluntary donation of the volunteer’s time and talents.