

payment of charity trustees

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1 Introduction

This is the next in our series of briefing papers on the traps that Trustees can inadvertently find themselves in when handling church and charity issues. This covers the area of payments and benefits for Trustees – or in older fashioned language “trustee remuneration”.

This briefing paper covers:

- The general principles
- Definitions
- Expenses
- Small benefits
- Problem areas
- What is currently accepted for new charities
- What to do if change is needed
- When unauthorised payments have already been made
- Disclosure in the charities accounts
- If further help is needed

2 The general principles

In “The Essential Trustee: What you need to know” (Charity Commission leaflet CC3) the Charity Commission states:

“Trustees are not entitled to receive any payment out of the charity’s property other than reasonable and necessary out-of-pocket expenses such as the cost of travel to attend Trustees’ meetings. Additionally, they must not benefit, either directly or indirectly, from the charity by, for instance:

- Taking a lease of the charity’s property;
- Borrowing money from the charity; or
- Making contracts to do business with the charity

This is a legal rule and the trustee who breaks it may have to make good any loss that results to the charity out of their own pocket. Even if there is no loss, a trustee who makes a profit from breaking the rule may have to pay the amount of any profit to the charity”.

The Charity Commission have issued very useful guidance on this subject in the leaflet CC11 “Payment of Charity Trustees”. This is essential reading for anyone who is or may be in the position of making payments to or for the benefit of Trustees. Given the pitfalls we have seen charities get into in this area we would suggest it is mandatory reading for all charity trustee boards.

In it the Charity Commission outlines: “The law states that Trustees cannot receive any benefit from their charity in return for any service they provide unless they have express legal authority to do so.” This authority must be by explicit written authorisation in the

charity's trust deed (or other governing document), or by written authorisation from the Charity Commission or from Court instruction.

In other words – unless the governing document explicitly says you can pay Trustees and the circumstances in which you can, then you should not do it. Where the church is an 'excepted charity' (ie a charity that is not presently required to register with the Charity Commission) these principles still apply.

The Charity Commission does however operate simplified procedures for the payment of minor benefits to Trustees. By 'minor' they mean payments totalling under £1,000 per annum for all of the Trustees of the charity . These payments may be made without authorisation provided the laid down conditions are met (see below under 'small benefits').

The Charity Commission has authority in England and Wales. However, the principles apply in broad terms similarly in Scotland and Northern Ireland and the Charity Commission guidance should be taken as 'best practice'. Legislation in the course of development in the two provinces which will bring charity law closer in line with that currently applying in England and Wales.

3 Definitions

Throughout this paper we refer to 'Trustees'. Charity Trustees are defined as the people responsible for controlling the management and administration of the charity. They may be called Trustees, directors, governors, managing Trustees, committee members or other titles. It is the role that is being played – those who are ultimately responsible for 'controlling the management and administration' that defines a trustee.

So, not everyone with a title of 'Director' is necessarily a 'Trustee'; for example, in a charitable company it is those who are directors as recorded by Companies House which may not include various people who carry the title 'Director of ...'.

What is often not appreciated, however, is that it is not only the Trustees themselves that are affected by the payment / benefit rules but also 'connected or related parties'. These are people close to the trustee, who may influence their decisions – such as close relatives, businesses owned or managed by the trustee and close business associates (see the 'problem areas' section for more on this).

Also what is not appreciated is that the Charity Commission treats 'ex Trustees', in some situations, in the same way as current Trustees. In those circumstances it is not sufficient for the trustee simply to resign before the payment is made. Paragraph 23 of CC11 should be referred to if those circumstances may apply to your situation.

What is meant by 'payment'? CC11 says: "Payment can be by money or other material benefit" and goes on to say, "... an honorarium, even if it is a modest or token sum not intended to reflect the real value of a trustee's service, is a form of trustee payment". From this it can be seen that it does not have to be at a commercial level for it to be considered inappropriate by the Charity Commission.

This whole area is one that the Charity Commission takes extremely seriously and needs to be treated similarly by trustee boards if they are to avoid difficulties.

4 Expenses

Not all payments to Trustees are 'payments' for this purpose. Certain expenses which are reimbursed and generally are supported by bills or receipts from third parties are perfectly satisfactory and do not need any express authority to pay.

These fall under two categories:

1. Certain expenses incurred as a Trustee.
2. Expenses incurred as agent for the charity – e.g. buying something needed by the charity which has been bought on the credit card of one of the Trustees.

CC11 lists a number of expenses under the first category which the Charity Commission consider acceptable:

- Reasonable cost of travelling to and from Trustee meetings.
- Reasonable cost of childcare whilst attending trustee meetings.
- Reasonable overnight accommodation and subsistence whilst attending trustee meetings
- Cost of postage and telephone calls on charity business.
- Communication support / special aids or equipment for Trustees with disability.

But the following are not considered acceptable:

- Travel, accommodation and subsistence for partners who are not themselves on charity business.
- Payment of private telephone or other private expenses incurred on business unrelated to the charity.

Also, the following fall outside of what is regarded as 'expenses' therefore do require explicit authorisation:

- Loss of earnings whilst on trustee business
- 'Financial loss' allowances
- Honoraria
- Payment for specialist skills

Expenses which include a 'profit element' require authorisation. Examples are payment for use of a property for working on charity matters or for an event which is higher than the costs actually incurred by the trustee, or payment for buying an item for the charity including a 'buying fee'.

5 Small benefits

The Charity Commission has for some time accepted that small presents on retirement of a trustee are acceptable – but when they say 'small' they certainly mean 'small' – the limit set in their operational guidance is £25!

In January 2005 they issued new guidance on low levels of payments to Trustees (www.charity-commission.gov.uk/supportingcharities/ogs/g092b003.asp) where it is made clear that provided certain conditions are met they do not expect charities to contact them over payments to Trustees that do not exceed £1,000 in total in a financial year even if there are express prohibitions on payment in the governing

document. This is known as “de minimis”. It does not cover gifts to retiring Trustees which are still limited as before.

The conditions for this to apply are:

- The service is needed, is in the interests of the charity and will not have an adverse affect on the charity in meeting its objectives.
- The amount paid is reasonable for the service.
- The Trustee in question must be able to carry out the task
- A majority of the Trustees must not receive any payment.
- The trustee in question must not take any part in the payment discussion
- The charity must be up to date in filing its accounts and comply with any reporting requirements on trustee benefits in the accounts.

6 Problem areas

Over the course of 2004 we saw many problems arise where there were payments that occurred inadvertently and we continue to see them in 2005. This tends to happen more in churches than in other charities because there is a wider diversity of individuals involved and also Trustees can have a lower profile where there is a defined spiritual leadership team.

Typical examples are listed below:

- **Pastors or youth workers of churches** who are put on the Board of Trustees without the question of the legality of their salary being considered.
- **Trustees who fill a short term ‘hole’ in the church administration** and receive salary or a gift for serving the church in this way.
- **Employing close relatives in the same household:** spouses of Trustees employed in administrative roles. This can be common in churches where leading members may be Trustees and their spouse may be available to work for the church but cannot afford not to be paid for their time. This may be legal under the terms of the governing document but it does not automatically become so, just because the spouse who is a trustee is eligible for remuneration (eg if there is a trust deed referring to the employment of the pastor, senior elder or other spiritual leader who may be a trustee). In these circumstances the spouse is strictly considered to be ‘treated as a trustee’ because of the relationship but may not be specifically authorised because they are not specifically covered in the deed.
- **Support for mission activities of children of Trustees:** churches have been known to provide support payments to children of members who are Trustees not thinking of the relationship. Where you have adult children this is not normally illegal and the Charity Commission does not normally object as long as the parent does not personally benefit from the church’s payments. There is however, a clear need to manage the conflict of interest.
- **Gifts given to the church to benefit leaders who are Trustees** which are then paid on. Payment of salary may be authorised by a governing document but it should be remembered that additional voluntary payments over and above the agreed salary are not.

- **Services supplied by a business in which the Trustee is a partner** or part owner at more than marginal cost. For example; accountancy services provided by a firm of which a Trustee is a partner , or building work done for the charity by a building firm (albeit at a discount) of which the owner is a Trustee.
- **Rent paid** for a property owned by a trustee, close relative or business partner.
- **Personal exploitation of business opportunities** which arises out of a Trustee position, such as a property purchase the charity does not take up but the Trustee does in their own capacity.

7 What is accepted for new charities

The Charity Commission have become more relaxed about governing documents specifically authorising employment and professional services by a member of the trustee body and now readily accept that there are benefits in churches for the pastor or lead elder to be a Trustee as well as employed.

It would now be normal for governing documents prepared for our clients to contain clauses authorising employment of a trustee and it would be a point of discussion with the Trustees as to what are the most suitable clauses.

It is also worth mentioning that at the time of writing (June 2005) a process is underway involving Stewardship together with the African Caribbean Evangelical Alliance, Evangelical Alliance and Anthony Collins Solicitors to agree with the Charity Commission new forms of governing documents suitable for independent churches. These documents are suited to churches with a leadership team form of church government (rather than congregational/church meeting) and will include clear trustee remuneration powers. Once finalised, they will be published on the Charity Commission website.

The Charity Commission's model deeds (which can be viewed at www.charity-commission.gov.uk/registration/mgds.asp) showing a number of possible general alternatives.

It should be noted, however, that these are not unlimited powers and the Charity Commission insist on specific limitations in the governing document which are, at present, along the following lines:

- “(i) that at no time shall a majority of the Trustees receive remuneration or other benefits for services rendered to the Trust
- (ii) that any Trustee whom it is proposed to remunerate or confer other benefits upon shall not be present during the formal deliberations and decision making by the other Trustees relating to any such proposed remuneration or benefits
- (iii) that the Trustees are satisfied that the level of the proposed remuneration or the nature and value of any such other benefits is reasonable and proper having regard to the nature and value of the work carried out or services undertaken by such Trustee and to the income of the Trust
- (iv) that the decision to remunerate or confer other benefits upon such Trustee and the level of that remuneration and nature and value of any such other benefits shall be taken and decided upon by not less than two thirds of all the remaining Trustees”

In 'non church' charities a case needs to be put to the Charity Commission why it is considered important that an employee is also a trustee, but where a reasonable case is put forward then clauses along the lines of those above are being accepted.

All of those conditions are essential and evidence in the Trustees meeting minutes that they have been complied with is also vital. Making some comment on these:

- We would recommend that there should be a clear majority of Trustees who don't receive any payment or benefit (not just salary) and not simply an equal number.
- The trustee minutes should clearly record the discussion on the employment arrangements, at a meeting with the necessary quorum and majority of two thirds but preferably by all other Trustees, and also make a point of recording that the person in question was not present at the point of the meeting when the discussions took place and had no influence upon the decisions made.
- There should also be a record of the 'reasonableness' of the salary package; if possible by comparisons with other similar positions.
- It is recommended that there is an employment contract for the person so that not only the salary but also the other 'terms and conditions' are clear and not open to dispute.
- These points should be remembered at each review of salary or 'terms and conditions'.

It must be remembered that none of the above allow the payment to a trustee for acting as a trustee – it is only for undertaking non-trustee services to the charity that it needs in its ordinary activity.

8 What to do if change is needed

For those charities that are in existence already but don't have the necessary authority to do what they want to do it is essential that changes are made properly. It is a good opportunity to review other aspects of the trust deed or other governing document to see if there are other changes needed in the management and administration parameters. There have been many changes in governing documents in the recent past and if your document is over ten years old there may well be benefits in a wider review. It is recommended this is carried out by a lawyer with charity law experience.

If you do not want a wider change to the governing document then application should be made to the Charity Commission on form CHY-1377 under what is now described as the 'fast track authorisations'.

Details of this procedure can be found on the Charity Commission website (www.charitycommission.gov.uk/supportingcharities/ogs/g092b003.asp)

This is not the place to go into a full explanation of this procedure. There is a guide to it (CHY1377A) on the Commission's website. However, there are a few points that are worth making:

- Details (as set out in the Trustees minutes) may be required of the reasons for choosing that person rather than someone else for the service, that the person themselves had no influence on the decision, of the rate of pay and how the conflict of interest will be managed.
- There is a declaration that the Trustees have to sign confirming, amongst other things, that

- a) It is in the interests of the charity to employ/contract with the trustee rather than an outside person and that the appointment is by open competition or, if not, there are good reasons for this.
 - b) The amount to be paid is reasonable in relation to the service.
 - c) The duty to file annual accounts has been complied with.
 - d) That if the payment is approved it will be declared in the accounts.
- The form must not be signed by the trustee who may receive payment.

The conditions that apply to new charities requiring permission in their trust deed will also be expected in these circumstances.

Where the form is completed properly and the Charity Commission does not see any undue issues they will approve the form and send a standard letter (which acts as authorisation) except where the governing document has an express prohibition of payment. In which case, for a trust the process takes longer, but in the case of a company also needs some additional forms (for further details see the Charity Commission guidance).

Where the church is an 'excepted charity' (ie one that is not required to register with the Charity Commission) none of the principles are changed and it is recommended that the issue is discussed with the charity's 'governing' body (Baptist Union, FIEC, Diocesan Board, etc) after which an approach to the Charity Commission is likely to be the next step.

9 When unauthorised payments have already been made

This process cannot be used where the arrangement has already inadvertently been in force. It used to be the case that both were covered on the same form, but as part of a detailed case review. Now it will be dealt with under the Charity Commission operational guidance OG 92 B5 – but unfortunately at the time of writing (June 2005) this has yet to be issued!

Where unauthorised payments have already been made the Charity Commission position has been:

"... where benefit has already been paid to a trustee...these cases will need to be handled in accordance with our policy on unauthorised remuneration: in broad terms, this involves establishing whether or not the payments represented good value to the charity and the Trustees were acting in good faith. Where we conclude that both these factors applied, we will seek to regularise the position if the payments are to continue. ... Where we conclude that these factors did not apply, we may need to use our formal inquiry powers to protect the charity".

This means they would consider seeking restitution of the amounts paid from the trustee in question, or if not from them, from the other Trustees.

They generally state that: "the Commission does not have the power to grant retrospective authority to the remuneration of Trustees and cannot eliminate the legal liability to repay the money. However, where we are satisfied that it is likely that the Courts would excuse the person from repaying all or part of the money received, we can decide, as an administrative matter, not to pursue the question of repayment. For practical purposes, our decision not to take any action would usually be the end of the matter.'

The question of seeking restitution is not an empty bluff: it has in practice been applied and this is another very good reason why Trustees should not make payments where there is doubt over the legal basis.

10 Disclosure in the charity's accounts

The accounts referred to here are the formal annual accounts that, for registered charities, are lodged with the Charity Commission and made available to the public.

The Statement of Recommended Practice "Accounting and Reporting by Charities" (The SORP) requires disclosure in the notes to the accounts of all trustee remuneration and benefits regardless of size and whether there is an issue of legality.

The disclosures required cover:

- The names of the transacting parties.
- A description of the relationship (eg wife of a trustee)
- A description of the transaction (eg payment of salary and the role, or payment of rent and the property concerned)
- The amounts involved
- Outstanding amounts owed by the person at the year end, and any amounts written off, if any
- The legal authority for making the payment (eg Trust deed, specific Charity Commission authority, or 'de minimis' authority, etc)

If no Trustees or connected persons have received any remuneration or benefits, this should also be stated.

A new SORP ('SORP 2005') was issued in March 2005 and details of these requirements can be found in paragraphs 221 – 233.

The SORP applies to all charity accounts prepared on the 'accruals' basis in the United Kingdom (i.e. including Scotland and Northern Ireland). This covers all company charities and currently all charities with gross income over £100,000. The levels at which accounts are required to be prepared on the 'accruals' basis currently differs in Scotland and Northern Ireland. At the time of writing, legislative changes are being progressed in both provinces which will set new levels.

These disclosures are also mandatory when specific authority has been given by the Charity Commission for payment (see section on "what to do if change is needed" above) and remain best practice in all charity accounts regardless of basis.

11 If further help is needed

If you want further help and would like to discuss your own situation with us please either write to us at: PO Box 99, Loughton, Essex IG10 3QJ

Or ring a member of our specialist team:

Stephen Mathews on 020 8502 8588, or

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