Interns and volunteers: to pay or not to pay?

Internships typically last longer than traditional work experience and often involve work that might otherwise be done by employees. There is widespread use of interns by MPs and they are also common in the media, arts and fashion, including in large fashion houses such as Alexander McQueen and Stella McCartney. Deborah Nathan looks at the debate about the fairness of unpaid internships and past cases brought by volunteers

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Internship does not amount to a specific legal status, although in practice interns may meet the criteria for establishing employee or worker status or may be genuine volunteers. In contrast, the status of volunteers and nature of volunteering has been the subject of much discussion in the EAT and Court of Appeal. Genuine volunteer status is defined by an absence of remuneration (wages or benefits such as training) save for reimbursement for genuine expenses, the lack of a requirement to commit to the role for a certain period and to give notice. There is also a further category of 'voluntary workers' defined by statute.

The National Minimum Wage Act

Volunteers are not expressly defined in employment legislation save for a limited definition under the National Minimum Wage Act 1998. 'Voluntary workers' are excluded from national minimum wage legislation by virtue of s.44. In order to rely on this section, the employer must first fall within one of the following categories:

- a charity, meaning an organisation or the trustees of a trust established for charitable purposes only
- a voluntary organisation, defined as an organisation or trust 'which is established only for charitable purposes (whether or not those purposes are charitable within the meaning of any rule of law), benevolent purposes or philanthropic purposes, but which is not a charity'
- an associated fund-raising body, meaning any organisation or body of persons whose profits are applied wholly for the purposes of a charity or voluntary organisation
- a statutory body.

The Department of Trade and Industry (as it was) 'Guide to the National Minimum Wage' (revised October 2004) cites schools, hospitals and charity shops as examples of organisations that can take advantage of s.44. Registered charities will be able to rely on this provision, while other not-for-profit organisations – such as community interest companies whose activities must be carried out for the benefit of the community – may be able to rely on s.44 if they can show that their purposes are solely charitable.

S.44 also requires that the voluntary worker must not receive any monetary payments except for expenses. Payments for expenses must relate to expenses 'actually incurred' or 'reasonably estimated as likely to be or to have been so incurred'. Appropriate evidence such as receipts or specific information about the costs incurred is therefore necessary. Honorariums, lump-sum allowances and payments for expenses, which do not relate to specific expenses actually incurred, will generally mean that an employer cannot rely on this exemption. Such payments have other consequences; in *Migrant Advisory Service v Chaudri,* the EAT confirmed that payments that do not relate to actual expenses can amount to wages and are indicative of employee status.

S.44(1)(b) further provides that the voluntary worker must receive no benefits in kind other than some or all subsistence or accommodation 'as is reasonable in the circumstances of the employment'. The provision of subsistence or accommodation should therefore be limited to work that requires residential volunteers.

Volunteers and employment status

In *Armitage v Relate*, a first instance decision, it was held that a volunteer counsellor was an employee and therefore entitled to pursue a claim of race discrimination against the charity. Under the terms of her service agreement, the claimant was required to provide a minimum amount of counselling for which she received training. If she failed to complete 600 hours of unpaid counselling work, she was required to repay a portion of the cost of her training. There was also a possibility of paid work in the future. The tribunal found that the obligation to carry out a minimum amount of work in return for training and the prospect of future work gave rise to a contract of employment.

In *Murray v Newham Citizen's Advice Bureau*, the EAT made it clear that the provision of reimbursement for genuine expenses only would not, in itself, negate employment status. The volunteer post Mr Murray had applied for was subject to requirements to complete certain hours, book holiday in

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advance and give notice. Despite the fact that there was no entitlement to payment beyond reimbursement of genuine expenses, the EAT found that there was a binding contract and obligation to perform work.

In *Grayson v South East Sheffield Citizens Advice Bureau*, the EAT considered mutuality of obligation in the light of the reality of volunteering and drew a distinction between contractual arrangements that give rise to the usual remedies and a charity's expectations which do not infer binding duties and obligations. Such expectations are inevitable if any organisation is to make use of volunteers.

This Citizens Advice Bureau volunteer agreement was 'binding in honour only' and asked volunteers to give 'as much notice as possible' if they wished to leave. The EAT observed that it was helpful to consider what legal remedies would be open to the CAB if a volunteer failed to comply and considered that no breach of contract complaint or other sanction could arise. In contrast to *Murray*, the EAT in *Grayson* felt that it was not surprising that there was an express commitment from the CAB to reimburse volunteers if they incurred expenses. While this created a contractual obligation, there was still no obligation on the part of the volunteer to 'actually do any work' for the CAB. The Court of Appeal's judgment in *X v Mid Sussex Citizens Advice Bureau* (reported in *ELA Briefing*, April 2011) adopted the principles of previous authorities and dismissed the claimant's argument that the Framework Directive covered volunteers.

One consequence of the increase in internships is the change in their responsibilities and the demands made of them. In *X v Mid Sussex Citizens Advice Bureau*, Elias LJ noted at the outset that, 'Volunteers come in many shapes and sizes, and it cannot be assumed that all will have the same status in law.' This statement could very well apply to the assessment of an intern's correct legal status, and there is certainly scope for more litigation in this area as unpaid internships increase in complexity and number.

Vicarious liability

S.109 of the Equality Act 2010 provides that employers are liable for the acts done in the course of a person's employment. The recent case of *Mahmood v Irish Centre Housing*, which concerned a claim in respect of an agency worker's discriminatory acts, demonstrates the difficulties claimants may face when complaining about the behaviour of volunteers. The agency worker was not an employee of the respondent and therefore vicarious liability on this basis did not arise. It was possible that the agency worker had acted with the respondent's authority as their agent and this specific issue was remitted to the tribunal.

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The future

On 5 April, deputy prime minister Nick Clegg announced the government's social mobility strategy, 'Opening doors, breaking barriers'. This promises a new 'business compact on social mobility' to encourage employers to create fairer access to internships, along with warnings that employers who do not comply may fall foul of national minimum wage legislation.

The legal remedies for unpaid interns faced with an employee's duties are well established in the NMWA 1998. The small number of cases in this area is undoubtedly due to the fact that interns do not want to endanger future job prospects, particularly when it is the hope of future work that makes unpaid internships palatable. It is therefore questionable whether a voluntary code for employers will change the current position.

HM Revenue & Customs has the power to take enforcement action against employers failing to pay the minimum wage and impose penalties, although this is capped at £5,000. Greater use, or reform, of these powers is more likely to change access to, and the conditions of, internships.

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Cases referred to:

- *Migrant Advisory Service v Chaudri* EAT 1400/97
- *Armitage v Relate 1994* Unreported
- *Murray v Newham Citizen's Advice Bureau* [2000] All ER (D) 1493
- *Grayson v South East Sheffield Citizens Advice Bureau* [2004] All ER (D) 398
- *X v Mid Sussex Citizens Advice Bureau* [2011] EWCA Civ 28
- *Mahmood v Irish Centre Housing Ltd* UKEAT/0228/10/ZT