



HEWITSONS

Charity

Briefing

Summer 2009



***Safeguarding
the vulnerable***

***Charity Tribunal
makes first decision***

***Recession continues
to affect charities***



Welcome to the latest edition of Charity Briefing. This is a time of uncertainty for many charities and other not-for-profit organisations, with concern growing about the level of charitable donations and the permanence of local government contracts.

Here at Hewitsons we have seen a notable increase in mergers and other collaborative working schemes, suggesting a growing awareness amongst charities of the benefits of economies of scale that such schemes can afford.

In such times, keeping abreast of your legal obligations is all the more important and in this edition we report on the first Charity Tribunal case, some Employment Tribunal cases, POVA and POCA, and a wealth of information about Gift Aid.

Whatever your current position, Hewitsons' Charities team is here to advise, so please feel free to pick up the phone for a chat. I can be contacted on **01604 233233**.

**Chris Knight,
Head of Charities**



ABOVE: Anny Bossom of Wood Green Animal Shelters with Denise Wilkinson and Chris Knight of Hewitsons.
ON THE COVER: Chris Knight of Hewitsons with Margery Gowlett of Wood Green Animal Shelters.

Contents

<i>Charity Tribunal makes first decision in Catholic adoption agency case</i>	03
<i>Safeguarding the vulnerable</i>	03
<i>POCA, POVA and the European Convention on Human Rights</i>	04
<i>A more effective Compact?</i>	04
<i>Charity news from the Budget</i>	05
<i>Recession continues to affect charities</i>	06
<i>Charities are not immune to the problem of debtors</i>	06
<i>HMRC help</i>	06
<i>Essex County Council sets up new charities fund</i>	06
<i>European charity donations eligible for tax relief after EU ruling</i>	07
<i>Gift Aid and Qualifying Donations</i>	07
<i>Volunteer Ombudsman?</i>	07
<i>Should Charities be restricted from fundraising?</i>	07
<i>Government response to consultation on CIOs</i>	08
<i>Charities encouraged to enter Yorkshire Bank's Community Awards</i>	08
<i>How often does your charity reclaim Gift Aid on donations?</i>	08

Charity Tribunal makes first decision in Catholic adoption agency case

The Charity Tribunal's first decision was published on 1 June 2009 in the case of *Catholic Care (Diocese of Leeds) v The Charity Commission*.

The case concerned the application of the Equality Act (Sexual Orientation) Regulations 2007 to Catholic Care which, although it provides adoption services, has never allowed same sex couples to adopt as it asserts this is incompatible with its Catholic faith.

The Regulations, which came into force on 30 April 2007, make unlawful discrimination in the provision of goods and services on grounds of sexual orientation. The charity had relied on an exemption provided by Regulation 15 for adoption and fostering agencies, to allow it to continue providing its services as it had always done but this expired on 31 December 2008.

The Charity then hoped to alter its Objects to allow it to take advantage of Regulation 18 which allows discrimination if it is contained within a charity's governing document. However, the Charity Commission's consent was needed for this change to the Objects and the Commission refused. Catholic Care then appealed to the Charity Tribunal.

The Tribunal also refused consent, saying the exemption for charities under Regulation 18 was not available when the activity was no longer permitted or had been made unlawful by another Regulation, in this case Regulation 15. The proposed new Objects had been made unlawful by the ending of the Regulation 15 exemption, so the appeal was dismissed. Catholic Care may now seek to make an appeal to the High Court.

What can we learn from this decision? The facts of this case are very specific, but it is possible the Charity Commission might now refuse a change which creates a discriminatory practice in areas other than adoption. The same may also be true for new charities seeking registration by the Commission. Any such moves will need careful thought.

Additionally, whilst the Charity Tribunal is a great innovation, it is neither cheap nor particularly swift justice. This case required 25 weeks, two barristers and five solicitors to resolve, and cost the two charities involved, one of which withdrew its appeal after a directions hearing, £120,000 in legal costs. Perhaps other cases will be more straightforward!



Safeguarding the vulnerable

Regular readers of Charity Briefings may recall an article exploring a new scheme to protect the vulnerable.

This will require anyone who wishes to work, whether paid or as a volunteer, in a regulated activity to register with the Independent Safeguarding Authority (ISA) following the enactment of the Safeguarding Vulnerable Groups Act 2006.

A 'regulated activity' includes frequent contact with vulnerable people either of a specified nature, such as teaching, or in a specified place, such as a school. Certain specific positions are also defined as regulated activities, for example, school governors and trustees of children's charities.

ISA is responsible for making decisions about whether an individual should be barred from

working with vulnerable people, or whether work should be allowed but with restrictions imposed. ISA is intended to work in parallel with the present system of CRB checks but, as with that system, it is expected that registration will be free for volunteers.

From October 2009, it will be a criminal offence to employ someone barred by the ISA in a regulated activity or to carry out a regulated activity while barred from doing so.

From November 2010, it is anticipated that registration with the ISA will be mandatory for anyone wanting to carry out a regulated activity. Employing someone, or allowing someone to volunteer to carry out a regulated activity without checking their registration and status with ISA, will become a criminal offence.

By 2015, it is thought that mandatory registration will be rolled out to include all

existing employees and volunteers. Once registered, an individual's status will be updated whenever any new information is made available to ISA. Employers will be able to check the status of an individual online and will also be notified of any change to an employee or volunteer's status.

Where notification is received that an employee or volunteer has been barred, it will be necessary to take action immediately to remove that employee or volunteer from work. However, in the case of employees, although summary dismissal may be possible, it will still be necessary to follow the ACAS Code of Practice to protect the charity from any Employment Tribunal claims.

If your charity finds itself in this situation in future, please don't hesitate to contact our Employment Team for advice on **01223 461155**.

POCA, POVA and the European Convention on Human Rights

A recent decision by the House of Lords has raised queries about the legality of the provisional inclusion of personal data under the Protection of Children Act (POCA) and the Protection of Vulnerable Adults (POVA) schemes.

Provisionally including a person on one of the lists before his or her employer has made a decision about the alleged misconduct, has been deemed incompatible with the right to a fair hearing under the European Convention on Human Rights.

In R (on the application of Wright and others) v Secretary of State for Health and another, the appellant was listed on the POVA list without a

hearing. However, the court found that 80 per cent of referrals to the list are not confirmed and held that the termination of someone's employment without a hearing breached that person's right to a fair hearing.

In addition, the court determined that provisional entry on the list was incompatible with a person's right to a private life. However, until the legislation is changed so as to be compatible with the European Convention on Human Rights, it will still be necessary to refer anyone who has committed an alleged misconduct to be put on the relevant list.

In addition, it has also been found by the High Court in R (on the application of G) v The

Governors of X School that there may be circumstances which entitle a person to be represented by a legal representative at an internal disciplinary hearing which, if the individual is found guilty, could result in the individual being added to the POCA or POVA lists. Prior to this decision, the general right to be accompanied at internal disciplinary hearings by either a work colleague or a trade union representative applied.

If your charity is affected by this issue, please contact the Employment team on **01223 461155** to discuss what to do next, before taking any action you may later regret.

A more effective Compact?

A Bill has come before Parliament which aims to put the Commission for the Compact on a statutory footing.

If the Bill, which was presented by Labour MP Tom Levitt, is successful, it is hoped it will provide the Commission with additional powers to enable it to better implement the Compact.

This will include the power to investigate where there is a breach of the Compact, and to access information. It will also be able to place a duty on other bodies to co-operate with its investigations.

The text of the Bill can be found at: <http://tinyurl.com/nqhdhz>. It will be read for the second time on 16 October 2009.



Charity news *from the Budget*

The big news from the April Budget was the new 50 per cent top rate of tax for those earning over £150,000 per year, who make up approximately 1 per cent of the population.

The question is: What effect will this new rate of tax have on this section of the population's charitable giving? One possibility is that if a large proportion of these high earners move abroad to avoid the new rate, donations will fall. This may also be the case if they stay, and the reduction in their net income makes them less willing to donate.

However, another possibility is that those subject to the new tax will see an advantage in continuing their charitable giving, both to utilise the tax relief available and as a way of diverting cash away from the Government to a destination of their own choosing.

Only time will tell what happens to the donations of high earners. However, some hope for the sector is provided by a poll carried out by Coutts with a group of 100 philanthropists, which showed that 45 per cent intended to maintain their charitable giving during the recession, and 42 per cent planned to increase their donations to charities.



'Substantial donors'

Once more, the Government has announced plans to reform the law on 'substantial donors', and a further consultation is planned. There are currently complex anti-avoidance provisions in place in relation to transactions between charities and their substantial donors.

Briefly, the legislation creates a tax charge for the charity if it enters into specified transactions with its substantial donors. A substantial donor is someone who gives at least £25,000 over a period of 12 months or £100,000 over a period of six years.

The consultation should be concluded before the pre-Budget Report in the Autumn, with a view to implementing any reformed system in April 2010.

Gift Aid

On the perennial issue of Gift Aid, the Government is currently carrying out research into higher rate taxpayers and Gift Aid.

This could result in the difference between the higher rate and standard rate of tax on a Gift Aid donation going to the charity rather than the donor. It is hoped this research will be completed in time for the Autumn Pre-Budget Report.

And... help for charities in trouble

Finally, there was some good news in the form of the £20 million grant fund for charities that run into difficulties during the recession, and an additional £18.75 million to help credit unions make more loans to those on low incomes.

This supplements other initiatives for the sector, such as the £42.5 million pledge in the Third Sector Action Plan.



Recession continues to **affect charities**

According to a new survey commissioned by the Charity Commission just over half of all charities (52 per cent) reported they had been affected by the economic downturn.

Of these, 6 per cent reported they had been affected very significantly; 19 per cent, significantly; and 27 per cent, not significantly.

Of those affected by the economic downturn, 58 per cent reported a reduction in income, and just 1 per cent reported they had

experienced a reduction in income not linked to the economic downturn.

Of the charities which reported that investment income was their most important source of income, about half stated that this source of income was the most seriously affected by the recession. Again, the survey suggested that demand for services had increased.

More information can be found in the Charity Commission Economic Survey of Charities, at: <http://tinyurl.com/lj6pte>



Charities are not immune to **the problem of debtors**

Although not immune to the problem of debtors, charities are more aware of the possible pitfalls of pursuing unpaid debts, including the potential for negative publicity.

However, charity trustees have a duty to act in the best interests of the charity, and sometimes that requires the recovery of an

amount owed, whilst trying to keep the cost of doing so to a minimum.

Key to cost effective recovery is the quality of information obtained by the charity prior to a debt being incurred, and the research on the debtor's finances completed by the charity's legal advisors as to whether the debtor is worth pursuing.

Our Debt Services Unit offers bespoke advice on charities' own procedures and terms, together with a debt recovery service at a preferential rate. We deal with both 'one-offs' and bulk debt collections, so if your charity has problems with debtors, the head of our Debt Services Unit, Penny Wilkinson, would be happy to discuss how we can assist. Penny can be contacted on **01604 233233**.

HMRC help

Helpfully, HM Revenue & Customs has published a list of all references in statute to charity specific tax legislation, and this can be found at: <http://tinyurl.com/n56nru>

Essex County Council sets up new charities fund

Essex County Council has allocated a proportion of the funds received under its local area agreement to create a £2 million endowment fund which will support charities in the county.

The fund will be administered by Essex Community Foundation, and applications will be accepted from autumn this year. The Essex Community Foundation website can be found here: <http://tinyurl.com/mty3o3>.



European charity donations eligible for **tax relief after EU ruling**

The European Court of Justice (ECJ) has ruled in favour of tax relief on cross-border donations following a case involving a German man who won the right to claim a tax deduction in his German tax return in relation to donations made to a charity established in Portugal.

The ruling concluded that donors were more likely to make a gift when they are able to obtain a tax deduction, if one is available. Therefore, preventing the availability of tax relief for donations outside the donor's country in effect restricted the movement of capital within the EU, which is contrary to one of the EU's founding principles.

The ECJ's ruling will allow donations to charities established abroad to be eligible for tax relief in the country of the donor, provided the charity would be accorded charitable status in the donor's country. This effectively changes the law in the UK and several other countries.

In the short term, UK donors who wish to receive UK tax relief on donations to EU charities will have to challenge HMRC in order to obtain the tax relief. However, in the long term the UK Government will need to bring legislation in line with this change.

Volunteer Ombudsman?

The 'sacking' of volunteers by branches of the Citizens Advice Bureau in East Staffordshire and Lincoln has prompted lobbying of the Government to introduce a volunteering ombudsman.

The campaigners assert that at a time when the Government is trying to encourage more people to volunteer, it is vital to safeguard their rights. Many charities are indebted to their volunteers but care is needed to distinguish them from employees.

Clear documents and practices are the key here. Feel free to call Nick Hall in our Employment team for further guidance on **01604 233233**.

Gift Aid and Qualifying Donations

Those involved in charities should be wary of applying all or most of its money by way of transfer to another body, especially if that other body is not a charity.

The case of East Berkshire Sports Foundation v The Commissioners for HMRC concerned the reclaiming of Gift Aid in respect of donations by individuals to the Windsor & Eton Football Club's sports ground.

A circular arrangement was created whereby the individuals re-designated the donations as loans which required repayment to a specially created charity. The Charity claimed Gift Aid on the repayments then applied the money by paying it to the club which was not a charity. The individuals were also the directors of the Charity.

The individuals who had made the donations subsequently set up and became directors of The East Berkshire Sports Foundation (the 'Charity'), which was registered as a charity with the Charity Commission.

HMRC argued that the donations were not qualifying donations for the purposes of Gift Aid, and that the Charity had applied charitable funds for uncharitable purposes. The Special Commissioner determined that the Charity, although it had been registered by the Charity Commission, was not a charity because the intention was that all donations would be filtered through to the Club, which was not a charity and had not used the funds for charitable purposes.

The Charity's Trustees were required to account for the incorrect repayment of tax to the Charity, as the Charity was wound up before the Special Commissioner's decision.

The way the Special Commissioner was willing to look behind the Objects in the Charity's governing document at what it considered to be the true purpose of the Charity is an instructive reminder. This is also a cautionary tale of trying to fix an arrangement after the event. Careful planning beforehand could have made the Gift Aid intentions perfectly workable.

Should Charities be restricted from fundraising?

The Charity Commission's third stakeholder survey has revealed that some people believe that charities with large reserves should be prevented from further fundraising.

The survey also revealed concerns within the sector that there are 'literally thousands' of unregistered organisations who have income above the threshold of £5,000 and who should be registered.

In addition, the survey showed further improvement in the Charity Commission's ratings since 2006, with its overall effectiveness now standing at 68%, compared to 63% in 2006.

The Charity Commission survey 'Delivering effective regulation for the sector and the public' can be found at:

<http://tinyurl.com/lm5bh6>

Government response to consultation on CIOs

The Government has announced its plans to amend the rules on charitable incorporated organisations (CIOs) in time for the advent of the new legal constitution next April. This is intended to be a simpler option than incorporation as a charitable company.

It follows a consultation which revealed some felt that the draft regulation relied too heavily on company law, which could cause it to be too complex for small charities.

In particular, the draft provisions relating to criminal penalties for CIO trustees who fail

to carry out their legal duties, and those related to public access to the trustee and member lists, are to be reworked.

A summary of the consultation responses and the next steps is to be published soon, hopefully, and the constitution is not expected to be available to charities until April 2010, after which there may be a phased introduction.

When the summary is published, it will appear on the Office of the Third Sector website at <http://tinyurl.com/36p8fm>. More information about CIOs can be found on the Charity Commission website at <http://tinyurl.com/3hyqca>

How often does your charity reclaim Gift Aid on donations?

The rules on the amount of time charities have to reclaim Gift Aid on donations is set to be reduced from six years to four years from 1 April 2010.

HM Revenue & Customs has stated that the change forms part of a review they are currently undertaking with a view to creating a single tax regime for direct taxes.

Therefore, charities should check they have reclaimed all the Gift Aid they are entitled to by 1 April next year.

Charities encouraged to enter Yorkshire Bank's Community Awards

Charities in Northampton, Wellingborough and Kettering are being encouraged to enter Yorkshire Bank's 150th anniversary community awards.

The bank is inviting all charities and community groups in its coverage area between Newcastle and Birmingham to take part and bid for a slice of its £150,000 fund.

In each of the four categories: environment, volunteering, education and regeneration, the winning project will be awarded £10,000 and four commendable projects will each receive £5,000. One outstanding project will be awarded a further £10,000 and twenty smaller awards of £1,000 will also be made.

Only registered charities, community organisations and constituted voluntary groups

who can provide evidence of their not-for-profit status may apply.

Full details and instructions on how to apply are available online at <http://tiny.cc/WSyP8> or can be requested by e-mailing yb150awards@eu.nabgroup.com.

Completed application forms together with supporting information must reach Yorkshire Bank by 16 August 2009.



For further copies please contact:

The Marketing Department, Hewitsons, Shakespeare House, 42 Newmarket Road, Cambridge CB5 8EP
Tel 01223 461155 www.hewitsons.com

Hewitsons LLP is regulated by the Solicitors Regulation Authority.