



Briefing Papers

AFVS Briefing papers are intended only to give very general information in relation to the topics covered and should not be relied upon as a substitute for proper legal advice. No liability can be taken for actions taken, or not taken, on the basis of information contained within them.

EMPLOYING TRUSTEES AND CONNECTED PERSONS

NAVIGATING THE MINEFIELD

The Charity Commission spends a lot of its scarce and valuable time investigating conflicts of interest arising when gives a job to a trustee or a connected party

They recently found the RSPCA breached branch rules after allowing the daughter of a trustee to pick up a salary and live rent-free at on their premises, while still being registered as a trustee. (Mother and daughter were both trustees; nothing wrong in that of course)

The probe found the charity tried to manage conflicts of interest when the trustee applied for the role, but they didn't do a particularly good job of it, especially when it came down to keeping accurate and proper records.

So... can a trustee become an employee of a charity? The answer is it depends

Often, it's thought that trustees could become employees if they step down from their role when appointed. Things are quite a bit more restrictive than that, there's a process to follow and sometimes the Charity Commission needs to get involved.

CHECK OUT YOUR CONSTITUTION

All charities are different, and some governing documents grant the power to pay certain Trustees. It's not unusual, particularly where a church is concerned.

For most charities, however, it's doubtful that you will have this authority in your constitution. If you don't, the Charity Commission is your next port of call, either to have the governing document amended to enable a trustee to be paid or to give specific permission.

THE CHARITY COMMISSION

Generally you will need Charity Commission approval to employ someone who is, or was, one of your charity's trustees. This is compulsory where:

- a) The trustee has taken up employment while they are still a Trustee
- b) A job offer is made to a current Trustee, who then resigns to take it up
- c) The Trustee has resigned before the offer was made and took part in open recruitment, but was otherwise involved in the decision to create or retain the post, or in devising the recruitment process.

HOW TO AVOID HAVING TO GET CHARITY COMMISSION CONSENT

The interested trustee must resign before the entire process is underway, i.e. so none of the above 3 conditions apply. David Burland Charity Consultant said, 'I know of several examples of where Trustees became CEOs, but I do wonder if the charities followed due process.' Another CEO recently took over from a Trustee who had been the acting CEO. The person serving in the interim role applied, but didn't get the job and expected to return to the board as a Trustee. Not surprisingly, he found he wasn't able to re-join the board.

YOU MUST HAVE GOOD CONFLICT OF INTEREST POLICY

If you don't get the process right the Charity Commission will see it as being a serious conflict of interest. A person who has been instrumental in creating a role should not be eligible to apply for it. They may have been involved in setting the salary levels, or defining the person specification – and if that just happens to meet their own experience and qualifications, eyebrows will certainly be raised. Even fairly innocuous conversations between Board members about what they're looking for also gives an unfair advantage or inside track. In fact, the concerns about these advantages are also extended to those who are connected with a Trustee, such as being a spouse, close relative or even a business partner.

HOW IT CAN WORK IN PRACTICE

It's not uncommon for the founder of a small charity to start as chair of the board and chief executive. As the organisation grows through its early, difficult years it gets to the point where it can hire staff, the founder may often be the first to be employed - quite natural when they are already carrying the majority of the workload. In such cases, there may be a very clear argument that the founder is the best qualified person to lead the organisation forward. But, if they are, they should have no further role in developing the position and should resign immediately from the board (or at least entirely absent themselves from discussions) while the details are worked out and agreed. Permission should then be sought from the Charity Commission to ensure the legitimacy of the employment going forward. If a good case is made the Commission will be sympathetic.

JUSTIFYING THE DECISION

If a charity does hire a trustee, or a former trustee, the Board will need to fully justify its decision to the Charity Commission, including by demonstrating that it was open and transparent about the processes and decision-making which led to the employment, that it has avoided favouritism or improper influence, and that the trustee concerned did not have any kind of advantage because of their role as trustee.

WHAT ABOUT EMPLOYING THE FAMILY MEMBER OF A TRUSTEE?

Similar principles apply. A good conflict of interest policy properly followed will ensure that solid transparent procedures were followed and there is a sound rationale if the decision is challenged later on. The minutes must record the reasons and the manner in which any votes were taken, and the fact that the conflicted trustee was duly absent at the appropriate times.

WHY ALL THE FUSS?

Charities need to uphold public trust, and trustees must avoid conflicts of interest for this public trust to be maintained.

In practice, it's worth thinking long and hard about employing a trustee, and such decisions should only be made when they are unequivocally the best person for the job. Risks of employing trustees include negative public perceptions, loss of trust, and - perhaps most likely - the potential of a complaint by an unsuccessful – and potentially better qualified – candidate. Having said all that there are many occasions when there are considerable benefits to the charity for a trustee, or a connected party to be remunerated. (Don't forget that the trustee is not remunerated for being a trustee but for the non-trustee duties carried out, ie, admin, pastoral etc.

If a board does go down the path of employing a trustee or a connected person, it is imperative that they always prioritise the beneficiaries, uphold public trust and confidence, and avoid conflicts of interest.

WANT TO LEARN MORE?

<https://www.gov.uk/guidance/payments-to-charity-trustees-what-the-rules-are>

<https://www.gov.uk/government/publications/trustee-expenses-and-payments-cc11/trustee-expenses-and-payments#employing-a-trustee-or-connected-person>

In this article I have drawn on excellent material from Felicia Willow, a charity consultant specialising in organisational effectiveness and good governance at small-to-medium charities. For more information, visit her website <https://www.willowcharityconsulting.co.uk>

Daryl Martin – July 2018

www.afvs.org.uk

Advice For the Voluntary Sector CIC

Sovereign Centre, Poplars, Yapton Lane, Walberton, West Sussex BN18 0AS.

Email: support@afvs.org.uk – Web: www.afvs.org.uk