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THE COST OF KINDNESS: VOLUNTARY WORKERS AND INTERN'S RIGHTS UNDER EMPLOYMENT LAW

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ABSTRACT

This article involves analysis of the employment rights of voluntary workers in the United Kingdom or more appropriately, their absence of rights. To emphasize the nature and extent of the problem for volunteers, a review of voluntary working in Scotland will be undertaken. Also, a critical evaluation of the approach taken by the UK Government and the judiciary to protect this diverse group of workers will be undertaken. Comparison with the legal position of volunteers in the other member States of the European Union will also be made. Consideration of the legal position of interns will also be undertaken with a comparison of the law in the UK and the US. Finally, recommendations will be made for formalizing/changing the classification of voluntary workers and improving the legal protection for certain categories of voluntary workers, including interns.

I. INTRODUCTION

Two years after the European Year on Volunteering in 2011¹ and three years after an EU report on volunteering which was carried out across all 27 member States,² it seems an opportune time to consider the legal rights of voluntary workers. Volunteering has been defined as “an activity that involves spending time, unpaid, doing something that aims to benefit the environment or individuals or groups other than (or in addition to) close relatives.”³ The importance of volunteering activity is underlined by the following quote: “...volunteering is a crucial renewable resource for social and environmental problem-solving the world over. The scale of such work is enormous and the contribution it makes to the quality of life in countries everywhere is greater

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¹ The European Year of Volunteering (EYV) was launched by the European Commission to celebrate the efforts of an estimated 100 million Europeans, about a quarter of the European adult population, who profess to volunteering.

² Study of Volunteering in Europe carried out by European Commission. <http://ec.europa.eu>.

³ Volunteering England, www.volunteering.org.uk.

still.”⁴ In the United Kingdom (and in most other European countries) voluntary workers are undoubtedly second or possibly third class citizens when it comes to entitlement to employment rights.⁵ This article will identify the legal status of voluntary workers and interns and the employment rights available to them in the UK.⁶ It will be argued that the legal status of these workers needs to be re-defined and increased protection provided for certain types of voluntary workers and an analysis of the legal rights of voluntary workers will be undertaken for the whole of the United Kingdom.

II. BACKGROUND TO VOLUNTARY WORKING IN SCOTLAND

In considering the background to this problem it is contended that it is beneficial to focus on the position in Scotland, a considerably smaller jurisdiction than the UK as a whole.⁷

Nature of Voluntary Sector in Scotland

The voluntary sector is defined as organizations that are non-profit driven, non-statutory and autonomous. It is also often referred to as the ‘third sector’, ‘not-for-profit sector’ or the ‘social economy.’ The following quote from the leader of the Scottish Government⁸ highlights the importance that he and his party place on the work carried out by voluntary organizations and the people who work for them. “The Third Sector has a very important role to play in Scotland. I would like to pay tribute to the hundreds of thousands of people who play a vital role in the sector, whether as one of the 137,000 paid staff or one of the 1.2 million volunteers.”⁹

⁴ Department of Statistics, International Labor Office, Manual on the measurement of voluntary work 2011 p. 1 www.ilo.org.

⁵ Supra, note 2.

⁶ It will not include unpaid apprenticeships, internships and students carrying out work as part of their degree/ Pg qualification.

⁷ For a UK perspective see MARK RESTALL, VOLUNTEERS AND THE LAW (2005).

⁸ First Minister of the Scottish Parliament.

⁹ Alec Salmond, First Minister, www.scotland.gov.uk. The Scottish Council for Voluntary Organizations is the national body representing the interests of charities, voluntary

Composition of the workforce in the voluntary sector

Employment in the voluntary sector has been growing steadily in Scotland and in the rest of UK. It has been bolstered by the Coalition Government's idea of a big society and the availability of volunteers and interns from the vast number of unemployed that have been created by the recession. It is difficult to know exactly how many people are involved in voluntary work in Scotland. Although the figures cited above by Alec Salmond were the official figures for Scotland in 2008 there was and still is a considerable number of workers who, because of the nature of their work or when or where it was/is carried out, do not show up in the figures e.g. home carers, ad hoc volunteers and sponsored people involved in sports etc.

In 2012 staff numbers had increased to 138,000 and the full time equivalent employees went down to 83,350.¹⁰ There are features of employment in the voluntary sector in Scotland which needs to be highlighted. Work in this sector is predominantly undertaken by females. This is illustrated by the fact that an average of three quarters of paid staff and three fifths of volunteers are female.¹¹ The number of people working part-time is considerably higher in the voluntary sector in Scotland (60%) than in other sectors (33%). Also the voluntary sector has a large proportion of workers with disability and around 6% of the paid workers classify themselves as being from an ethnic minority. For unemployed people, the work experience gained in the voluntary sector can act as a gateway to further career opportunities. These figures point out that a considerable number of voluntary workers are drawn from some of the most vulnerable groups in society. Despite this as will be seen, they are largely denied any employment rights.

Types of volunteers in the UK

There are various types of volunteers in the UK, but in the absence of any proper legal definition, it is difficult to classify them. A relatively recent phenomenon is skills-based volunteering whereby, the specialized skills and talents of individuals are utilized to help causes. This can be done either through a corporate or public sector organization lending out the services of its employees to help a charitable cause¹² or individuals providing their skills

organizations and social enterprises. The Scottish voluntary sector turns over £4.4 billion a year and employs 137,000 people.

¹⁰ Scottish Third Sector Key Statistics 2012, www.scvo.org.uk.

¹¹ In Sweden which has a very substantial number of volunteers (around 48% of the population in 2009) there are slightly more men than women involved. Study on volunteering in European Union, Country Report Sweden <http://ec.europa.eu/citizenship>.

on a voluntary basis.¹³ Volunteering in developing countries often involves individuals volunteering to help communities in these nations. The volunteers might spend their time working in schools, teaching, working in orphanages or in hospitals or giving advice or support to local communities etc. Environmental volunteering refers to volunteers who contribute towards environmental management or conservation. Volunteers can conduct a range of activities including; protecting endangered animals, monitoring or challenging environmental problems, ecological projects such as creating or maintaining green spaces in an urban setting and educating others about the natural environment.

Volunteering also often plays a pivotal role in the recovery effort following natural disasters such as; floods, droughts, fires, earthquakes and tsunamis. Community volunteering refers to volunteers working to improve or enhance the community in which they live. These might involve working for a neighborhood, church, community group or working for a local charity. Within these (and other) broad groups there is a considerable variation in the type of work done, the working conditions experienced and the number of hours worked by volunteers. As seen, there is also a considerable variation in the nature of the organizations volunteers work for.

III. LEGAL RIGHTS OF VOLUNTARY WORKERS IN THE UNITED KINGDOM

Voluntary workers often undertake the role of employees (e.g. providing support to prisoners or the mentally impaired, working in a charity shop) and work alongside employees in their daily lives.¹⁴ However, they tend not to be regarded as employees working under a contract of service or as workers¹⁵ and consequently will be denied employment rights.¹⁶

¹² In Austria four out of ten companies allow their employees to go on leave for education and training or for voluntary engagement outside of the company. Study on Volunteering in the European Union Country Report Austria p. 3.

http://ec.europa.eu/citizenship/pdf/national_report_at_en.pdf p 20.

¹³ Examples are Pro bono volunteers.

¹⁴ It is estimated that there are about 45,000 charities in Scotland.

¹⁵ As defined by section 230 of the Employment Rights Act 1996.

¹⁶ Right to claim unfair dismissal or redundancy rights, family friendly rights, restrictions on working time, entitlement to national minimum wage etc.

Contractual Position

Volunteers do not tend to have a contractual relationship with the organization they are working for. The norm is that when a person volunteers to work for an organization, they enter into an agreement with the organization known as a volunteering agreement. This will often be verbal (and confirmed in a written document or a letter) or in written form. The agreement will often specify that the relationship is based on volunteering rather than employment and state specifically that it is not a contract of employment. It will sometimes be drawn up after discussion between the management of organizations and trade union representatives or their equivalent (e.g. employee representatives). It will often specify details of how the management of volunteers will be undertaken and how any problems will be handled. Other issues which might be included is how the organization involves and support volunteers, what volunteers can expect from the organization and what in turn the organization can expect from the volunteers. It will often set out in detail, the role of the volunteer and will be issued to all new volunteers.

This volunteering agreement will not normally be legally binding on the parties. In *Armitage v Relate*,¹⁷ Ms Armitage was a volunteer who agreed to offer her services to Relate, the relationship counseling charity, for a minimum number of hours in exchange for training and supervision as a counselor. She later decided to pursue a claim of race discrimination against the charity. Ms Armitage entered into an agreement with Relate that stated that if she left before completing the minimum amount of work the charity would be entitled to recover part of her training expenses. The Employment Tribunal found that the service arrangement was in fact a contract of employment. The existence of a contractual relationship with the employer allowed Ms Armitage to go ahead with her claim of race discrimination against them. However, in a similar case *Gradwell v CVS Blackpool, Wyre and Fylde*¹⁸ the employment tribunal decided that volunteers were not employees. All the volunteers had signed a written volunteer agreement which stated that volunteers were obliged to attend relevant training and monthly meetings but, there was no other minimum time commitment and the CVS only reimbursed actual expenses. The tribunal held that there was no consideration, as neither payment of genuine expenses or providing training amounted to consideration, and no intention that the agreement should be legally binding. This case is distinguishable from the *Armitage* case.¹⁹ In the

¹⁷ IT Case Number: 43438/94 (11 October 1994).

¹⁸ (1997) COIT 2404314/97.

¹⁹ IT Case Number: 43438/94 (11 October 1994).

Armitage case,²⁰ there was no written agreement in place which clearly stated it was not a contract of employment and no lack of consideration involved.

In another case, *Chaudri v Migrant Advisory Service (MAS)*,²¹ consideration proved a vital element in determining the nature of the agreement. Mrs. Chaudri did administrative work with MAS for two years and claimed unfair dismissal and sex discrimination. The tribunal decided that she was an employee. Mrs. Chaudri worked four mornings a week and was described by MAS as a volunteer. She lived nearby, walked to work and returned home for lunch. Nevertheless MAS paid her 'volunteer expenses' of £25 rising to £40 a week, including weeks when she was on holiday or off sick. The expenses payments were a clear case of consideration. The regular payment of these amounts, including holidays and sick leave, meant they became wages for employment. The EAT upheld the decision on appeal.

More recently in *South East Sheffield Citizen's Advice Bureau v Grayson*,²² Mrs. Grayson was a volunteer who argued that Bureau volunteers were working under a contract of employment. This was because volunteers had to agree to work at least six hours a week and they received consideration in the form of training, reimbursement for expenses and an indemnity (promise of repayment) if a negligence claim were successfully brought against them. The case went to an Employment Appeal Tribunal (EAT) and it was held that there was a limited unilateral contract, which they called an *if* contract: "If you do any work for the Bureau and incur expenses in doing so, and/or suffer a claim from a client you advise, the Bureau will indemnify you against your expenses and any such claim." However, the EAT decided that this did not impose any obligation on the volunteer to do any work and so did not constitute a contract for services or a contract of employment. Furthermore, the training was necessary to enable the volunteer to do the work but, did not constitute consideration for the work. The EAT said that the fact that the volunteer agreement was not signed and its stated intention was to clarify the reasonable expectations of both the volunteer and the Bureau suggested it was not intended to be legally binding. The key issue for the EAT was whether the volunteer agreement imposed a contractual obligation on the Bureau to provide work or on the volunteer to carry it out. The EAT held that the Bureau provided training for its volunteers and expected of them in return a commitment to undertake work for them. However, the work expected of them was expressed to be voluntary and was in fact unpaid. All that the Agreement purported to do was to set out the Bureau's expectations of its volunteers. A volunteer for the Bureau would be able to leave at any point without them having recourse to an action for breach of contract. The EAT concluded that the Bureau's volunteers were not employees.

²⁰ *Id.*

²¹ (1998) EAT 1400/97.

²² (2004) IRLR 353.

The outcome of these decisions is that volunteers are unlikely to be working under a contract if they only get reimbursement of genuine expenses and undertake training necessary to do the work they are undertaking (rather than training that is not necessary for the work). Other factors in favor of an agreement not being binding are where workers receive no perks or anything else that could be viewed as consideration and are not subject to sanctions if they decide not to work.

However, if volunteers receive lump sum expenses or other reimbursements which are not linked to actual out-of-pocket expenditure or benefits which are not related to volunteering, they may be working under a contract of service. Also if there is a mutuality of obligation between the parties in the relationship, it will often be regarded as a contract of service if there is no contrary intention in writing. A key factor in determining if a contractual relationship applies is whether there is a mutuality of obligation between the volunteer (e.g. they carry out work during regular hours) and the organization (e.g. provide them with regular work). If there is a mutuality of obligation the volunteer could be working under a contract of employment. In *Melhuish v Redbridge Citizens Advice Bureau*,²³ it was held that for an employment contract to exist each party needs to gain tangible benefit from it. Melhuish was a volunteer and the CAB benefited from his work. He could attend training courses provided by the CAB although there was no requirement for him to do so. Melhuish did not have to work and the CAB did not have to provide work for him. He received no wages but was reimbursed for his travel expenses. He brought a claim for unfair dismissal. The Employment Appeal Tribunal held that there was no contract of employment in existence as there was no mutuality of obligation to attend or provide work.²⁴ Accordingly, the volunteer was not considered an employee under Section 230 of the Employment Rights Act 1996.²⁵

Statutory Employment Rights

Volunteers are often denied all the employment rights that employees are entitled to and the limited rights that workers have. This is because in the majority of cases this type of worker will not be treated as an employee or a worker as defined by statute.²⁶ Their precise legal status is often unclear but the majority of them will be denied the most basic of employment rights.²⁷

²³ (2005) IRLR 419 EAT.

²⁴ Furthermore, the opportunity to attend training courses did not provide any kind of similar consideration to remuneration.

²⁵ Similar decision to the EAT in *South East Sheffield Citizen's Advice Bureau v Grayson* (2004) IRLR 353.

²⁶ Section 230 of the Employment Rights Act 1996.

²⁷ *Supra*, note 7. In Sweden there is no legislation covering voluntary workers and with respect to legal status they tend to be lumped in with existing groups such as employed

Equal Rights

As was seen in the case of *Armitage v Relate*,²⁸ the existence of a contract of service between an employer and his volunteer will often be necessary for the volunteer to be protected against inequality of treatment. Volunteers who are workers may also be protected. However, volunteers in this position would also need to establish that they have been subjected to direct or indirect discrimination, victimization or harassment as defined by the Equality Act 2010. The basis of the claim for discrimination will not normally be because they are volunteers but, because they have been unfavorably treated because they fall within one of the protected categories.

The difficulty for volunteers in bringing a case for discrimination was illustrated in the recent case of *X v. Mid Sussex Citizens Advice Bureau and another*²⁹ where it was held that volunteers that have no contractual connection to the employer can be denied equality rights under the Equality Act 2010.³⁰ In this case the claimant was a specialist adviser for welfare rights at the Citizens Advice Bureau who was working as a part-time unpaid volunteer. She was asked to cease to attend as a volunteer in circumstances that she claimed gave rise to a claim under the Disability Discrimination Act 1995 (DDA). The Employment Tribunal held that she did not have a legally binding contract or a work placement as defined in the DDA and accordingly the DDA did not apply to her. The Court of Appeal agreed with this finding and said that voluntary workers are not entitled to protection under the Disability Discrimination Act 1995 (now the Equality Act 2010).³¹ The Supreme Court³² upheld the Court of Appeal's judgment concluding that the Framework Employment Directive³³ does not extend the protection of volunteering beyond that already given by the DDA (now the Equality Act 2010). The Directive covers employment and occupation and the claimant argued that the reference to occupation in article 3(1) (a) of the Directive was wide enough to cover her voluntary activity. The Supreme Court disagreed.³⁴ A similar decision was reached in the case of *Breakall v. West Midlands Reserve Forces' and Cadets Association*,³⁵ another disability discrimination claim. The Employment Appeal Tribunal found that there was no obligation to offer work to the volunteer and no obligation on the volunteer to personally

persons, students or the unemployed but the majority of them will be denied any employment rights.

²⁸ IT Case Number: 43438/94 (11 October 1994).

²⁹ [2012] UKSC 59.

³⁰ [2011] EWCA Civ 28 CA.

³¹ Sections 6, 13, 14, 15, 20, 21, 22.

³² [2012] UKSC 59.

³³ Directive 2000/78 EC.

³⁴ Leave to refer the case to Court of Justice of EU was denied.

³⁵ UKEAT/0372/10.

perform work. This was fatal to the volunteer's claim that he was a worker, and the fact that a capped allowance to replace lost earnings was paid on days when voluntary work was performed did not change the situation.

It seems likely that these decisions put in jeopardy discrimination claims brought on the basis of any of the characteristics under the legislation.³⁶ Volunteer victims of discrimination who do not have a contractual relationship with their employer or fall within the definition of a worker could be unable to bring a discrimination claim. It seems very unfair that certain groups of people undertaking work for an organization can be denied this type of legal protection.

National Minimum Wage Act 1998

In the same vein the National Minimum Wage Act 1998 explicitly excludes voluntary workers from its coverage. Section 44 of the National Minimum Wage Act 1998 states:

(1) A worker employed by a charity, a voluntary organization, an associated fund-raising body or a statutory body does not qualify for the national minimum wage in respect of that employment if he receives, and under the terms of his employment if he is entitled to, (a) no monetary payments of any description, or no monetary payments except in respect of expenses (i) actually incurred in the performance of his duties; or (ii) reasonably estimated as likely to be or to have been so incurred; and (b) no benefits in kind of any description, or no benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment.

Voluntary workers who work for the specified type of charities are specifically excluded from the provisions of the Minimum Wage Act 1998 provided they meet the conditions in the Act regarding payment and reimbursement of expenses. There is no mention of mutuality of obligation or training and provided an employer can circumscribe the entitlements of his voluntary workers he can ensure the Act does not apply to them.

Working Time Regulations

The Working Time Regulations (WTR) 1998 cover matters such as daily and weekly working hours, rest breaks and holiday entitlement. While a lot of employment legislation only extends rights to employees, the WTR applies to workers, which is a broader category than employees.³⁷ However, most organizations are not obliged to follow this piece of legislation when working with volunteers as it is unlikely that genuine volunteers would be seen as workers.³⁸ On the other hand, there are persons who volunteer

³⁶ Sex, race, age, disability, sexual orientation and religion or belief.

³⁷ Guy Davidov, *Who is a worker?* 34 (1) INDUSTRIAL LAW JOURNAL 57-71 (2005).

³⁸ *Gradwell v. CVS Blackpool, Wyre and Fylde* (1997) COIT 2404314/97.

regularly and over whom charities have considerable control who might be regarded as workers and be protected by the Regulations. This is an uncertain area which makes it difficult for organizations to know what to do. ACAS in their guidance are of the opinion that as voluntary workers are defined as a category of worker they are covered by the Working Time Regulations.³⁹ However, the TUC and Volunteering England hold a contrary view.⁴⁰

Data Protection Act 1998

Volunteers have the same rights to protection against misuse of data under the Data Protection Act 1998 as employees. This means the organization must comply with rules on personal data held on a computer or in paper files. They cannot process any of the data held on a volunteer without his permission. They must make sure the information is used: fairly and lawfully; for limited, specifically stated purposes; in a way that is adequate, relevant and not excessive and is: accurate; kept for no longer than is absolutely necessary; handled according to people's data protection rights and kept safe and secure. The rules relating to the right of access to personal data are set out in section 7 as follows:

(1)... an individual is entitled (a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller, (b) if that is the case, to be given by the data controller a description of (i) the personal data of which that individual is the data subject (ii) the purposes for which they are being or are to be processed, and (iii) the recipients or classes of recipients to whom they are or may be disclosed, (c) to have communicated to him in an intelligible form (i) the information constituting any personal data of which that individual is the data subject, and (ii) any information available to the data controller as to the source of those data, and (d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking. (2) A data controller is not obliged to supply any information under subsection (1) unless he has received (a) a request in writing, and (b) except in prescribed cases, such fee (not exceeding the prescribed maximum) as he may require.

An area where a volunteer and an intern might want access to data about himself is in respect of references concerning his work within an organization

³⁹ ACAS Volunteers www.acas.gov.uk.

⁴⁰ www.tuc.org.uk.

(provided by his ex or current employer) and made available with his permission to others.

Health and Safety Law

Under the common law, voluntary organizations and individual volunteers have a duty of care to each other and others who may be affected by their activities. Because of this duty of care, volunteers may, in some cases, sue for damages under the law of delict or tort if they are injured as a result of another person's negligence. A third party injured by the actions of a volunteer may in limited circumstances make a claim against an employer on the basis that they are vicariously liable for the volunteer's actions.⁴¹ This right will normally be restricted to the situation that the volunteer is an employee. However, there are restricted circumstances where an employer will be liable for the actions of an independent contractor (volunteer?).⁴²

For a negligence claim to succeed, the injured person must show that the defendant owed a duty to take reasonable care towards him and that he has suffered injury because of a breach of that duty. The injured person must also show that the type of loss or injury for which damages are being claimed was a foreseeable result of the breach of the duty.⁴³ Under the statutory rules, organizations have a duty of care towards its volunteers. In practice, this means an employer must take all reasonable steps to reduce the likelihood of harm coming to them through his action or inaction. To demonstrate that an employer has exercised his duty of care, he will need to assess any potential risks that volunteers may encounter and take the necessary steps to minimize them.⁴⁴ Voluntary groups with no employees are not bound to carry out risk assessment but, if they take their duty of care seriously they would be well advised to conduct risk assessment.

Risk assessment is an excellent way to identify and overcome health and safety problems and each role undertaken by a volunteer should ideally be subject to a risk assessment.⁴⁵ Section 3 of the Health and Safety at Work etc Act 1974 places a duty on employers to ensure, as far as reasonably practicable, that persons not in their employment (e.g. volunteers) who may be affected by their undertaking, are not exposed to risks to their health and safety and to give information to them or others as might affect their health or

⁴¹ In *South East Sheffield Citizen's Advice Bureau v Grayson* Supra 23 the CAB indemnified its volunteer against any delictual claims against her.

⁴² *Marshall v Wm. Sharp & Sons Ltd* (1991) SLT 114.

⁴³ *Caparo Industries plc v Dickman* (1990) 2 AC 605.

⁴⁴ Management of Health and Safety at Work Regulations Regulation 9.

⁴⁵ For organizations with five or more employees the outcome of these risk assessment must be in writing.

safety.⁴⁶ It requires employers and the self-employed to protect people other than those at work (e.g. members of the public, volunteers, clients and customers) from risks to their health and safety arising out of, or in connection with, their work activities.⁴⁷

Public Liability Insurance

This type of insurance covers the organization in the event of injury, death, and loss or damage to the property of non-employees.⁴⁸ However, as it only covers legal liability, it will not provide compensation when there is an accident that is not due to negligence. It is important that organizations ensure that their public liability insurance extends to the acts of volunteers as in the absence of this insurance (where for example the volunteer's negligent acts could lead to a claim by a third party injured by his negligence) the organization or more appropriately its senior management could be held personally liable. Organizations that have no employees still need to ensure adequate insurance cover is in place.⁴⁹

Criminal Records Checks

A Criminal Records Bureau (CRB) check provides information about an individual's criminal record. Volunteers must be checked before they take up certain positions where they would be working with children or vulnerable adults. There are two levels of check: standard and enhanced. The standard check reveals criminal information on the applicant, such as previous convictions, warnings and reprimands. Standard check is usually conducted on applicants for positions of high responsibility. Enhanced checks on the other hand are aimed at people who care regularly for or are in the sole supervision of those at risk, such as children, the elderly and persons with disability. The Independent Safeguarding Authority (ISA) is a body that is set up to prevent unsuitable people working with children and vulnerable adults. If volunteers work with or want to work with vulnerable adults or children, they need to apply to register with the ISA in the same way as an employee.⁵⁰

⁴⁶ *R v Swan Hunter Shipbuilders Ltd* (1982) IRLR 403 CA.

⁴⁷ AI HINDE, & CHARLIE KAVANAGH, *THE HEALTH & SAFETY HANDBOOK FOR VOLUNTARY & COMMUNITY ORGANISATIONS* 2nd edn. (2001).

⁴⁸ Other insurance policies which could be relevant to the actions of volunteers are; personal accident insurance, professional liability insurance, product liability insurance and motor vehicles insurance.

⁴⁹ Volunteering England Information Sheet © Volunteering England 2008, Page 7 of 10.

⁵⁰ If somebody has a record of unsuitability for working with vulnerable groups or they have committed certain offences they may not be able to register with the ISA and may not be able to work with vulnerable people.

European Union

There was a study into volunteering in the European Union in 2010 and the final report⁵¹ provided valuable research findings on the current situation in Europe. It included a comparative analysis of volunteering in the 27 Member States with national reports on each of the 27 Member States being provided. The purpose of the study was to reach a better understanding of the conditions and the state of volunteering in the 27 Member States.⁵² The following quote highlights the high level of volunteering taking place across the Member States of the EU. "An analysis of the national surveys and reports on volunteering identified by key stakeholders in the Member States indicates that, there are about 92 to 94 million adults involved in volunteering in the EU. This in turn implies that about 22% to 23% of Europeans aged over 15 years are engaged in voluntary work. The national surveys tend to show lower levels of volunteering in comparison to some of the key European or international surveys."⁵³

With respect to the legal status of voluntary workers there is some variation but generally they have very few legal rights as illustrated by the following finding:

In 19 Member States, volunteers do not have a specific legal status. This means that their rights and obligations derive from legislation in other fields, such as the specific professional sector covered, their 'professional' status (e.g. student, unemployed, employed) or the laws applicable to non-profit organizations, etc.⁵⁴

The national studies on volunteering show that the level of volunteering in Austria, the Netherlands, Sweden and the UK is extremely high e.g. over 40% of adults in these countries are involved in voluntary activities. In Finland, Denmark, Germany and Luxembourg the level of volunteering is high where about 30%-39% of adults are involved.⁵⁵

⁵¹ Volunteering in the European Union – Final Report, Study on behalf of European Commission (Director General for Education and Culture) Published on 17 February 2010.

⁵² The purpose of the study also includes analyzing the state of the voluntary sector at national, regional and local levels as well as to identify trends, similarities and differences and opportunities and challenges.

⁵³ *Id.* p. 7.

⁵⁴ *Id.* p 202.

⁵⁵ *Medium high* in Estonia, France and Latvia where 20%-29% of adults are involved. *Relatively low* in Belgium, Cyprus, Czech Republic, Ireland, Malta, Poland, Portugal, Slovakia, Romania, Slovenia and Spain where only 10%-19% of adults volunteer and *low* in Bulgaria, Greece, Italy and Lithuania where less than 10% of adults are involved in voluntary activities.

United Nations Volunteers (UNV) commissioned the International Centre for Not-for-Profit Law (ICNL) and European Centre for Not-for-Profit Law (ECNL) to conduct global research on the legal and policy framework of volunteerism. The comparative study suggests that countries should, where necessary, revise laws or enact separate legislation in order to promote volunteerism, protect volunteers, and remove legal impediments.⁵⁶ They produced a Guidance Note on Drafting and Implementing Volunteerism Laws and Policies which was published in 2011. It builds on the previous research and provides guidance on the process of drafting and implementing volunteerism laws and policies that support social, political, and economic development. The EU could also provide guidelines for EU countries who wish to adopt legislation considering aspects such as: how volunteerism could be distinguished from other types of legally recognized or regulated relationships.⁵⁷ A key issue here is that the role of the volunteers should be to complement the work of paid staff or add value to it but, not to replace it. It also considered how volunteers could be protected while they are performing voluntary activity (e.g. insurance coverage) the means of preventing volunteering having a negative effect on entitlement to unemployment and other social benefits and also how international volunteering could be facilitated.⁵⁸

Volunteers from outside Europe

In order to support charitable work, the Home Office in the UK allows non-EU nationals to come to the UK to do voluntary work, but there are strict conditions about what they can and cannot do. Volunteers can come to the UK as workers if the work is completely voluntary, the work is for a registered charity or an approved organization in the UK and there are satisfactory arrangements for the volunteer to stay in the United Kingdom without assistance from public funds. A voluntary worker can remain in the United Kingdom for a maximum of 12 months.⁵⁹

There are certain criteria which must be complied with. Firstly, they must do fieldwork directly, by providing assistance to the clients/customers of the charity (for example, vulnerable or homeless people, mentally or physically impaired and the elderly). Secondly, a voluntary worker should not be employed by the charity or hold a job which a worker resident in the UK would normally be paid to do. Thirdly they must not receive pay for the work

⁵⁶ The ECNL spoke on the legal and policy environment affecting volunteers at the Global Volunteer Conference which took place in Budapest, on 15-17 September 2011. The conference was organized by the United Nations Volunteers (UNV) program and the International Federation of Red Cross/Red Crescent Societies.

⁵⁷ See below.

⁵⁸ *Id.* P. 16.

⁵⁹ There is no limit on the number of times a volunteer can come to the UK as long as they have no plans to live permanently in the UK.

they do although, they can receive reasonable expenses and subsistence payments.⁶⁰

Classification of voluntary workers

The volume and diversity of voluntary workers in every Member State in the EU makes them difficult to classify. However, it makes sense to have different types of voluntary workers each with different legal status ascribed. This is somewhat based on the current legal position. However, it is also aspirational as to what the legal position should be.

Firstly, *contract/voluntary workers*⁶¹ would simply work under a contract of service and be entitled to all the rights that employees have. This would be dependent on mutuality of obligation between the parties, the formality and regularity of the work arrangement and some element of consideration being received by the volunteer. Secondly, *agreement/voluntary workers*⁶² who are subject to a volunteering agreement and who in this writer's view should be treated as workers and be entitled to all the rights that workers get including protection under equality law.⁶³ It would be reasonable given the importance of clarifying expectations on both sides for there to be a legal requirement that these agreements should be in place and in writing. Of course there might be disagreement about who should fall into this category.⁶⁴ It should be anyone who is not an employee as defined by case law but is not working on a casual basis.⁶⁵

Finally, *casual/voluntary workers* would normally be appointed on an ad hoc and short term basis. Again arriving at agreement about which type of volunteer falls within this category might be difficult. In Sweden the

⁶⁰ People who enter the UK in other immigration categories can apply to stay as voluntary workers if they meet all the immigration regulations. They can apply to extend their stay as a voluntary worker up to a maximum of 12 months.

⁶¹ *Chaudri v Migrant Advisory Service (MAS)* IT Case Number: 43438/94 (11 October 1994).

⁶² *Gradwell v CVS Blackpool, Wyre and Fylde* (1997) COIT 2404314/97; *South East Sheffield Citizen's Advice Bureau v Grayson* (2004) IRLR 353.

⁶³ Interns would be a case in point (as argued by the TUC in their recent campaign) see below

⁶⁴ See MARK RESTALL, *VOLUNTEERS AND THE LAW* 19 (2005). The position in Sweden is as follows: since there is no law to establish the legal status of volunteers, they have no legal right to social benefits. Their entitlement is determined on their legal status within other categories, such as students or the unemployed.

⁶⁵ The Austrian Council for Volunteering describe volunteering as having the following features: voluntary, but within a strict framework; for the benefit of the community or a third party rather than one's own ...family's... or ...household's benefit; work rendered without any relevant consideration in the form of pay for a gainful activity; of a given duration or regularity; non-binding within regard to receiving further training, internship or work within an organisation; undertaken usually within the scope of an institutional organisation, platform, initiative, or group, but falling outside the civic or military duties of a citizen; and includes both informal (family, neighbourhood) and formal (groups, associations, institutions, etc.) work. Study on Volunteering in the European Union Country Report Austria p 3 http://ec.europa.eu/citizenship/pdf/national_report_at_en.pdf.

distinction between formal and informal (ad-hoc) workers is made based on who employs them. “A clear distinction is made between, informal work which is said to be unorganized and voluntary work, which is carried out under the auspices of an organization.”⁶⁶ While this distinction is not without its flaws, it could be a useful indicator of which category applies. Volunteers who help communities in developing nations might fall into this category as might volunteers involved in environmental projects.⁶⁷ They would not be eligible for any employment rights except health and safety protection.

IV. INTERNS

Internships are often sought by graduates and school leavers who are looking for work experience. Working as an intern often allows workers to try out a variety of different jobs to find the right one for them. Internships in the UK are often referred to as sandwich placements which are work experiences that are performed by students as part of their degree.⁶⁸ Some students who are not required to go on a sandwich placement or are not selected often apply direct to employers for internships and they commonly take place during the summer. Employers are happy to offer internships because they cost them little or nothing and allow them an extended period over which to assess potential candidates for a job. In the current labor market where graduates have the work experience offered by an internship they are often deemed more desirable job candidates to employers than others without that experience.⁶⁹ A survey in the UK of 2,794 adults⁷⁰ found that the take up of unpaid internships may have grown tenfold in the last two decades. The survey also found that 20% of 18-24-year-olds had done an unpaid internship as compared with 2-3% of those aged over 40. With respect to interns in the UK, their precise number is unknown but a recent study estimated that in 2010 about 130,000 students ended up working as interns.⁷¹

⁶⁶ RESTALL, *supra*, note 62. Study on Volunteering in the European Union Country Report – Sweden p 4.

⁶⁷ Amnesty use ad hoc volunteers for fund-raising and public awareness campaigns. www.amnesty.org.uk.

⁶⁸ They may or may not be credit bearing.

⁶⁹ In 2011 the TUC, (backed by the Government and several major employers' institutes) published the first code of practice for high-quality internships.

⁷⁰ YouGov survey was published in December 2012 and commissioned by the National Union of Students.

⁷¹ A study by the IPPR and Internocracy was released in July 2010 and it suggested that the true number of unpaid interns in the UK was around 130,000. They arrived at the number from the results of a study by the Chartered Institute of Personnel Development (CIPD).

Legal Rights

Disputes between employers and interns have prompted several court cases which have resulted in much confusion as to the employment rights of interns and their entitlement to pay. Some interns will be regarded as workers and accordingly will have several important employment rights. These include: protection from unlawful deductions; the national minimum wage; 28 days' paid holiday; the right not to work more than 48 hours per week; the right not to be discriminated against and rest breaks.

However the majority will not be regarded as employees or workers and like some voluntary workers, will be regarded as trainees or have no status whatsoever and have no employment rights. These might include one-year placements completed as part of a university degree and voluntary placements conducted for charitable organizations. The Government has referred 100 companies for investigation by HM Revenue and Customs after a campaign group, Intern Aware told UK ministers they might be breaking the law through their use of unpaid interns.⁷²

Some employers have come under fire for not offering remuneration under some of their internship schemes. Organizations such as the Trades Union Congress and Intern Aware have been lobbying for a change in British internships to make interns aware of their employment law rights. This is especially important where they are entitled to the minimum wage, paid holidays etc.

In *Vetta v. London Dreams Motion Pictures Ltd*⁷³ the respondents had engaged a Ms Wyatt as a self-employed production designer who, in turn, took on the claimant as an intern on an 'expenses-only' basis to work as her assistant. The expenses were paid by the respondent. The claimant argued she was not a volunteer but a worker due to the nature of the work she carried out and the fact that the work was not part of a training program. The Employment Tribunal agreed that she was a worker and was therefore entitled to the national minimum wage and any accrued holiday she had not taken. There was a similar outcome in the recent case of *Hudson v TPG Web Publishing*.⁷⁴ Ms Hudson, who had worked for TPG Web Publishing's My Village magazine for about two months, was awarded £1,024.98 in damages for unpaid wages and holiday pay. This was despite the fact that the advert for the internship she applied for had expressly stated that it was an unpaid position.

As these cases illustrate, the question often is whether an intern can be classified as a worker and be entitled to the minimum wage or as a volunteer (who is under no obligation to perform the work and has no formal

⁷² Peter Walker, *Unpaid Interns: 100 Firms Being Investigated by HMRC* GUARDIAN, April 12, 2013 www.guardian.co.uk.

⁷³ ET/2703377/08.

⁷⁴ ET/2200565/11 (unreported) Central London Employment Tribunal.

arrangement with the employer) and has no such entitlement. Ms Hudson the intern in this case had agreed to participate in a six month unpaid internship. However, she sued her employer for the national minimum wage after she found herself working long hours, being given considerable responsibilities and deadlines and even managing other staff. The court agreed that her status was that of a worker and awarded her compensation equivalent to pay at the National Minimum Wage for her time on placement. The court identified a number of factors that it considered important, including whether an intern is left unsupervised, has to work to deadlines, or has to manage other staff.⁷⁵ The cases cited are only employment tribunal decisions but, they do establish an important principle namely, that the more responsible a position held by an intern is, the more likely he or she will be regarded as a worker. If this line of reasoning is challenged in the future it seems likely it will be upheld by a superior court.

In the United States where the concept of interns originated, similar considerations apply. In *Glatt v Fox Searchlight Pictures*,⁷⁶ a Federal judge⁷⁷ ruled that interns on two film production crews, including one from the Academy Award-winning film *Black Swan*, were employees entitled to payment of wages. The court held that by not paying the interns the employers had violated the minimum wage requirements in the Fair Labor Standards Act 1938. The *Glatt* case illustrated that many interns are not trainees and therefore do not fall under the exception to the general rule that all workers must be paid for their work. The judge in the case made it clear that to qualify as a trainee, an intern would have had to receive training similar to that provided in an educational facility and must have done work primarily for his or her own benefit rather than for their employer. Also, the work of the intern should not be the same or similar to the type of work the business would have otherwise had to employ someone else to undertake. The U.S. Department of Labor has developed six criteria for differentiating between an employee entitled to minimum wage and a learner/trainee who could be unpaid. The criteria for a learner/trainee are: even where the training is carried out in the workplace and utilizes the facilities of the employer it is similar to that which would be provided in an educational or training program; the training is for the benefit of the student; the student does not displace an employee; he or she works under the close supervision of an employee; the employer provides the training but, derives no immediate advantage from the activities of the student; the student is not entitled to a job at the conclusion of the training period and the employer and the student understand that he or she is not entitled to wages for the time spent training. It is not necessary for all six

⁷⁵ See more at:

<http://www.insidcareers.co.uk/career-advice/unpaid-internships-are-they-legal/#sthash.V1a1Sps5.dpuf>.

⁷⁶ Case No. 11-cv - 6784 in the U.S. District Court, Southern District of New York.

⁷⁷ District Judge William Pauley.

factors to be present however, in order for the individual to be considered a trainee; the experience should be more like a training/learning experience than a job. It seems likely that the *Glatt* decision will lead to many more claims from interns in the US who do not receive payment for what they do.⁷⁸

V. CONCLUSION

For the current UK Government the situation is clear: “volunteers don’t have a contract of employment, so don’t have the rights of an employee (sic) or worker.”⁷⁹ For some voluntary workers, this lack of legal status and employment rights is not a problem because, they readily accept that this is the basis under which they provide their services.⁸⁰ However, for others, they can be blissfully unaware of their legal position and only become cognizant of it when they try to exercise contractual or statutory rights. For those persons that are aware that they have no employment rights but are not happy about it they simply need to accept it at the present time. Whatever the case, the situation is pretty bleak for most voluntary workers and interns when things go wrong and they are dismissed or subjected to discriminatory behavior. A similar approach to the legal regulation of interns under employment law is taken by the judiciary and legislators in the United States. However, the *Glatt* decision in the US⁸¹ does offer the prospect for interns to be paid in the future which is a major development. As shown in Scotland and in the rest of the UK⁸² many voluntary workers are drawn from some of the most vulnerable groups in the society and the need for their protection is perhaps greater than the need for the protection of typical employees or workers.

It is argued that by defining the types of volunteers involved in volunteering more closely and clarifying their legal status could ensure that

⁷⁸ Other European countries have large numbers of interns who are mainly unpaid and unprotected. For the position in Germany and the Netherlands see European Alternatives website www.euroalter.com/european-campaign-for-the-rights-of-interns.

⁷⁹ Gov.UK Guide, Volunteer: Placement Rights and Expenses. www.gov.uk/volunteering/volunteers-rights. This view is shared by the TUC.

⁸⁰ Especially if they are in full time employment elsewhere which is often the case with skills based volunteers.

⁸¹ Considered above.

⁸² The *Helping out Report (2007)* is the result of the most comprehensive survey to date and was carried out by NatCen and the Institute for Volunteering Research, on behalf of the Office of the Third Sector within the Cabinet Office. *Helping out (2007)* was written by Low, N., Butt, S., Ellis Paine, A. and Davis Smith, J and published by the Cabinet Office. It showed that a higher proportion of women (64%) volunteered than men (54%) in the UK. The research also found that volunteering rates were not significantly different between ethnic groups, ranging for all current volunteers from 66% of people of mixed ethnicity through to 45% for others. Furthermore, the research revealed that people who were active in their faith volunteered more (67%) than people of no religion (55%). *Study on Volunteering in the European Union Country Report United Kingdom* p 4.

those persons whose work is effectively that of employees or workers as defined by the Employment Rights Act 1996⁸³ are able to benefit from statutory employment rights. The classification of voluntary workers as *contract/voluntary workers* who work under a contract of service, *agreement/voluntary workers* who are subject to a volunteering agreement and *casual/voluntary workers* normally appointed on an ad hoc and short term basis could prove useful. However, employers in the voluntary sector have a vested interest in promoting the status quo and deciding who falls within the different categories will be a contentious issue for courts and tribunals. The CIPD in a survey in 2010 found that 280,800 employers planned to use interns. Of those 18% admitted they would not pay them a wage and 28% said they would pay less than the National Minimum Wage (NMW). The fact that volunteers and interns in Europe and throughout the world are in a similarly weak position does not justify the level of inaction on the part of the Government/s and judiciary in the UK.

⁸³ Section 230.