

X v Mid Sussex Citizens Advice Bureaux and others [2011] EWCA Civ 28.

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Approximately eighteen million people give their time to volunteer in some way each year. It was no insignificant matter then when the question of whether volunteers are protected by discrimination legislation fell to be decided by the Court of Appeal at the end of last year in the case of *X v Mid Sussex Citizens Advice Bureaux and others*.

The facts

X, who for the purposes of the hearing was assumed to be disabled, applied to be a volunteer with the Mid Sussex CAB for 4 to 5 hours per week. She was given a volunteer agreement which was described as being *"binding in honour only ... and not a contract of employment or legally binding"*. She was told that she was under no obligation to attend work but that it was anticipated that there would be a level of trust and a hope that the expectations reflected in the agreement would be honoured. She undertook a nine month training period. Thereafter, as a voluntary advisor, she carried out a wide range of advice work duties. No formal attendance records were kept but X frequently did not attend on the days she was expected. No objection was ever taken to this. X was then asked to cease to attend as a volunteer. X argued that the reason she was asked to cease volunteering was for a reason connected with her disability.

Although she did not have a contract with the CAB, X argued that she was protected from disability discrimination either by domestic law under the Disability Discrimination Act 1995 (“the 1995 Act”) or by European Law under the equal treatment Framework Directive (“the Directive”).

The law

The 1995 Act makes it unlawful for an employer to discriminate against a disabled person whom it employs by dismissing them or subjecting them to any other detriment. It further makes it unlawful for an employer to discriminate against a disabled person in the *“arrangements which he makes for the purpose of determining to whom he should offer employment”* (a “Relevant Arrangement”). However, although the 1995 Act refers to “employment” (and “Employer” and “Employee”) no reference is made to the term “volunteer”.

The Directive states that its purpose is to set out a *“framework for combating discrimination... as regards employment and occupation...”* It goes on to say that discrimination against all persons *“in relation to conditions for access to employment, to self-*

employment or to occupation...” and “*access to all types and to all levels of... vocational training*” is unlawful.

The argument

X’s principal argument was that her position as a volunteer represented an "occupation" within the meaning of the Directive. She argued that, because the principle of non-discrimination was so fundamental to EU law, it had to be the case that the Directive was intended to apply to volunteers. If that was right, she argued that she should benefit from the anti-discrimination protections in the Directive, either directly or by interpreting the 1995 Act in accordance with the Directive so to make discrimination against disabled volunteers unlawful. For its part the Equality and Human Rights Commission (who supported X’s claim as an intervener) argued that X was involved in "vocational training" and that, by dismissing her, the CAB had denied her access to such training in contravention of the Directive. X further argued that it was from amongst its pool of volunteers that the CAB often selected its full time employees. As such she argued that her post of volunteer was a “Relevant Arrangement” and that her dismissal represented an act of discrimination under the 1995 Act.

It was understood that, although X’s case concerned disability discrimination, were she to succeed in her claim it would establish the principle that volunteers would also be protected from other forms of discrimination including discrimination on the grounds of racial or ethnic origin, sex, sexual orientation, religion and belief, and age.

The Court’s decision

The arguments that volunteering for the CAB represented “vocational training” under the Directive or a “Relevant Arrangement” under the 1995 Act were dismissed on the facts. To be vocational training, the purpose of the activity must be to train for a job. It was not the purpose of the CAB when it appointed volunteers to provide training. Volunteers were not training for a job; rather they were doing a job. The Court found that the purpose of engaging volunteers was to secure advisors to provide advice; not to create a potential pool from which permanent employees could be drawn. Furthermore, the pool from which permanent employees were chosen was far wider than just volunteers, as all paid positions were advertised externally.

As to the question of whether X’s volunteering role was an “occupation” within the meaning of the Directive, the Court found that the term was unlikely to encompass unpaid positions. Rather “occupation” was likely to refer to a class or category of paid jobs.

But, even if that understanding was wrong, the Court was convinced that the Directive was never intended to cover volunteers because:

1. It was far from obvious that it was desirable to include volunteers within the scope of the discrimination legislation. Indeed, a proposal from the European Parliament that the Directive should be amended to include “unpaid and voluntary work” had been rejected by the European Council; and
2. It was inconceivable that the draftsman of the Directive would not have dealt specifically with the position of volunteers if the intention had been to include them.

Accordingly X's claim failed.

The implications and advice

First, organisations employing volunteers should seek to avoid any suggestion that they are creating a Relevant Arrangement. If it is your intention that some volunteers will eventually become paid employees you should ensure that that is not the sole reason for engaging them and that when advertising for paid positions you also advertise externally.

The “vocational training” argument brings into focus the increasing trend for organisations to engage unpaid interns, with an emphasis on training. Would interns be able to argue that they are covered by the Directive? The answer is probably not, since the Court thought the scope of the Directive was limited to those in paid work. However, the Court's consideration focused on the term “occupation” whereas elsewhere the Directive does expressly state that discrimination with regards “*access to all types and to all levels of... vocational training*” is unlawful. There is therefore an argument that even unpaid interns might be covered by the Directive, at least as far as *access* to an internship is concerned, even if they would not be covered in post. In the circumstances the cautious approach would be to avoid any discriminatory practices in the selection and engagement of interns.

The main finding, and a matter of significant relief to most charities, is that volunteers are not covered by discrimination legislation. Central to this finding is the issue of pay. If volunteers are paid this could be evidence of a contract, which in turn could mean that a volunteer is at least a “worker” in law. Such a finding would not only give the volunteer rights under discrimination legislation but would also give them other rights, including the right to the minimum wage, rights relating to working time and the right to paid holiday.

And the story doesn't end there. If an organisation goes further and begins to have certain expectations of, and exerts a sufficient degree of control over, its volunteers then its volunteers could even be considered “employees” in law, which would give them the benefit of certain other rights, including unfair dismissal and redundancy rights. This expectation and control does not need to be expressly stated (e.g. in a written contract) but can be inferred from the way a volunteer is treated in any given case.

The traditional advice of how to ensure that volunteers do not acquire employment rights remains unchanged by this decision, for example:

- Only reimbursing volunteers for out of pocket expenses;
- Only provide training where necessary and relevant;
- Consider a volunteers agreement which expressly states that it is “*not legally binding*” or words to that effect;
- Don't fix minimum working hours or notice periods;
- Don't apply HR policies and procedures to the volunteers;
- Don't discipline volunteers.

However, whilst taking such steps will help, ultimately whether a volunteer has acquired worker or employee status is a matter of law and subject to analysis on a case by case basis. If in doubt seek professional legal advice.

It remains to say that whilst the case of X reaffirms that volunteers do not appear to benefit from discrimination law, it is always better to avoid practices that could be seen as unfair or discriminatory. Not only is this important from a reputational perspective but any organisation which dealt with volunteers unfairly would be unlikely to retain its volunteers for very long.

Finally, although this case was decided under the 1995 Act, the position is likely to be the same under the Equality Act 2010.

If you would like to talk to us about the issues raised by this note, please contact:

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