

CLAS CIRCULAR 2010/06 (23 April 2010)

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CHARITIES & CHARITY LAW

Equality Act (Sexual Orientation) Regulations 2007

In *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales & Anor* [2010] EWHC 520 (Ch) (17 March 2010) Mr Justice Briggs, sitting in the Chancery Division, has overturned the Charity Tribunal's ruling in the Catholic Care case.

Readers may possibly recall that Catholic Care had fallen foul of the Equality Act (Sexual Orientation) Regulations 2007 by refusing to provide adoption services to same-sex couples. Regulation 15 had given a period of grace until the end of December 2008 but that had expired. However, Regulation 18 gave a saving to charities, always provided that the charity acted in pursuance of a charitable instrument and the restriction of benefits to persons of a particular sexual orientation was imposed under the provisions of the charitable instrument – so Catholic Care sought the Charity Commission's consent to replace the objects clause in its Memorandum of Association with a new objects clause, including the statement that the charity 'shall only provide adoption services to heterosexuals and such services to heterosexuals will only be provided in accordance with the tenets of the Church'.

The purpose of all this was to bring Catholic Care under the protection of Regulation 18 – but the Commission refused consent to the change. The charity's appeal to the Charity Tribunal was dismissed, in part because the Regulation 15 time-limit had expired and Catholic Care's stance was now unlawful. Further, Parliament's purpose in allowing a temporary period of adjustment would be negated if Catholic Care were permitted simply to continue with identical activities under Regulation 18 once the time-limit in Regulation 15 had expired.

However, Mr Justice Briggs concluded that the Charity Tribunal's interpretation of Regulation 18 had been wrong. The question as to whether or not Catholic Care should be permitted to adopt its proposed objects should be remitted to the Charity Commission to decide, 'directing itself in law in accordance with the principles set out in this judgment' (para 111).

[Source: *BAILII* - 17 March 2010]

EMPLOYMENT

Clergy as employees: *Macdonald v Free Presbyterian Church of Scotland*

Whether or not a cleric is considered as 'employed' varies from denomination to denomination. Lord Justice Pill explained in *New Testament Church of God v Stewart* [2007] EWCA Civ 1004 at para 42 that the Court of Appeal's decision that Stewart, a minister, was employed by the New Testament Church of God did not 'involve a general finding that ministers of religion are employees. Employment tribunals should carefully analyse the particular facts, which will vary from church to church, and probably from religion to religion, before reaching a conclusion'.

Following that line of reasoning, an Employment Appeal Tribunal has upheld the ruling of an Employment Tribunal that a minister of the Free Presbyterian Church of Scotland is *not* an employee for the purposes of employment rights and could not, therefore, have been unfairly dismissed. Lady Smith, a judge of the Court of Session sitting alone, so held in *Macdonald v Free Presbyterian Church of Scotland* [2010] UKEAT S/0034/09/BI. She confirmed that there were no hard-and-fast rules about what features a relationship had to have before it amounted to a contract of employment. However, apart from a minimum of mutual intention to create a legally-enforceable relationship there would usually be sufficient control over the worker's activities so as to categorise him or her as a 'servant'; and the worker would be working in return for a salary rather than on own account. On that basis, she agreed with the Free Presbyterian Church that its ministers, elders and deacons are office-holders rather than employees.

Confusingly, Lady Smith also quoted without comment the Employment Judge's declaration in paragraph 104 that 'it is accepted the Church of England recognises Ministers are employees' – which is just plain wrong: see the [Ecclesiastical Offices \(Terms of Service\) Measure 2009](#) section 9(6): 'Nothing in this Measure shall be taken as creating a relationship of employer and employee between an office holder and any other person or body'. What her judgment suggests, however, is that there is no general rule about whether or not an individual cleric is employed. Each situation depends partly upon the ecclesiology of the particular Church in question and partly on the specific circumstances of the individual case.

[Source: *BAILII* – 11 February 2010]

Equality Act 2010: update

The [Explanatory Notes](#) to the [Equality Act 2010](#) have now been published. The most important parts of the Act from the Churches' point of are section 10 (religion or belief), Section 14 (combined discrimination: dual characteristics), Schedule 3 Part 6 (marriage and gender reassignment), Schedule 9 Part 1 (occupational requirements and Schedule 11 Part 2 (Schools: exceptions – religious or belief-related discrimination). But the whole Act needs careful study.

[Source: *OPSI* - 23 April 2010]

ODDS & ENDS

Cheque clearing: update

It may be helpful to give members an update on the situation in relation to the projected ending of the cheque clearing system.

In advance of the last meeting of CLAS, the Governors had a meeting with the Paul Smee (Chief Executive of the Payments Council) and Helen Doyle (Senior Policy Consultant): the Payments Council is the body responsible for setting the strategy for payments in the UK and for ensuring the integrity of the system. The Board consists of representatives of the clearing banks, together with four independent directors (who have a power of veto over decisions) and an independent Chairman.

The Payments Council published a National Payments Plan in 2008 which included a proposal to set a target end-date for the UK cheque clearing system and that has now been set for late 2018. The need to set a target end-date was triggered by the fact that cheque usage has been declining at around 10 per cent per year and will have fallen by more than fifty per cent by 2018. It should be noted that in Ireland, which has been experiencing a similar decline, the Irish Government has already announced that cheques will be discontinued in 2016.

The current infrastructure was created for much greater volumes of cheques and it is becoming increasingly difficult to maintain its integrity. The choice is therefore between a managed decline and simply leaving the system to decay. The Payments Council feels that a managed decline is preferable because:

- inaction could leave consumers and businesses unable to pay by cheque in some situations and without an acceptable alternative available to them;
- a managed decline means that in developing alternatives account can be taken of the needs of those who are dependent on cheques; and
- setting a target date challenges the sector to come up with viable alternatives.

In 2016 a decision will be taken on whether or not to go ahead with the target end date. In order to go ahead with the 2018 closure there will have to be alternatives available for all significant types of payment where cheques continue to be used; and these alternatives will need to be accessible *and being used*. Currently, the Payments Council is focusing on three areas in particular: small businesses, charities and the elderly. Elderly users are probably the most difficult to satisfy, and the Council has been in discussions with Age UK about the problem. The Council believes that there are solutions which may already be able to meet the needs of many SMEs. Key points under consideration are:

- to identify the areas in which there is no current alternative to cheques;
- whether or not there is a continuing need for a paper-based payment instrument; and

- whether paper could continue to be used without a clearing system.

Paul Smee told the Governors that the Payments Council was anxious to consult representatives of the various groups that would be affected by the change because if the project was to be brought forward the Council had to understand users' needs.

Subsequent to that meeting the Payments Council decided to set up a Voluntary Sector Liaison Group and invited the Secretary of CLAS to join it. At the first meeting on 22 April various points were raised:

- bank staff do not always know how to deal with the diverse needs of charities and they needed to be trained adequately so that they know how to help their customers to migrate away from cheques.
- charity volunteers are often elderly: issues faced by the elderly in switching away from cheques will therefore be faced by charities as well, and the issues facing the two groups should not be considered in isolation from one another.
- many small charities have limited or no access to IT: this may also apply to access among donors and may affect their ability and/or willingness to continue to make charitable donations in future – donors may simply stop donating altogether rather than switch to an alternative method of donation.
- banks will need to amend their current processes or implement new solutions to deal with difficulties that charities may encounter in switching to alternative payment methods: for example, systems to mitigate the potential for data-entry errors resulting in incorrect payments when using electronic payment systems rather than cheques.
- the fact that very small charities (typically with annual incomes of less than £20,000) often do not appreciate or understand how major developments apply to them.
- the possible differential impact of the demise of the cheque in rural or remote areas, particularly where IT infrastructure may be limited (eg by poor mobile network signals and/or lack of access to broadband internet access).

The Secretary's contacts with the Payments Council thus far indicate that Paul Smee and his colleagues are listening carefully to customers and are anxious that any replacement for the current system should be robust and widely available. We will monitor the situation very carefully and keep members posted about developments.

[Source: *CLAS Summary* – 22 April 2010]

PROPERTY AND PLANNING

Community Infrastructure Levy

The [Community Infrastructure Levy Regulations 2010](#) came into force on 6 April 2010.

[Source: *OPSI* – 7 April 2010]

National Churches Trust survey 2010

The [National Churches Trust](#), formerly the Historic Churches Preservation Trust, is conducting a nationwide online survey to obtain a better understanding of the condition and use of Christian places of worship across the country. The survey is aimed at buildings of every Christian denomination and of all ages and conditions in order to understand how they are maintained, repaired, funded and used by their local communities.

The online survey, which will remain online until **mid-June**, offers guidance, useful tips and technical support to help participants. The Trust hopes that all churches, chapels and meeting houses in the UK will take part in the survey in order to ensure that the results of the questionnaire are as complete as possible.

The responses will help the Trust to build a convincing fact-based case for supporting these buildings, to promote their value as places of worship and important community resources and provide arguments for developing sustainable long-term funding. It will also help the Trust to tailor the support and advice that it provides.

To participate in the online survey, please [click here](#). The survey is designed to be easy to use and to be filled in quickly. It is not necessary to complete all the answers in a single session – they can be saved and returned to later. Where a parish or ecclesiastical district has responsibility for more than place of worship the Trust would like a separate set of responses for each of them.

[Source: *National Churches Trust* – 16 April 2010]

“Qualified surveyors”

A rogue full-stop appeared in the hyperlink in an earlier Circular to the OTS consultation on the definition “qualified surveyor” for the purposes of disposal of charity land. The documentation is available at [here](#). The consultation closes on **7 June 2010** and responses can be e-mailed to surveyors.consultation@cabnet-office.x.gsi.gov.uk. Thanks to Sheila Duncan for pointing this out.

TAXATION

VAT: option to tax

HMRC has cancelled and replaced VAT Information Sheet 07/10 which contained an error. [VAT Information Sheet 08/10](#) contains some minor amendments in relation to the option to tax in relation to land, buildings or civil engineering works that came into effect on 1 April 2010.

[Source: *HMRC What's New* – 8 April 2010]

VAT: postal services

In *TNT Post UK* [\[2009\] EUECJ C-357/07 \(23 April 2009\)](#), the European Court of Justice confirmed that Royal Mail, as the operator providing the public postal service in the UK is the only postal body in the UK eligible to exempt postal services from VAT. However, it further ruled that the exemption from VAT applies *only* to the public postal services and does *not* apply to supplies where the terms have been individually negotiated between the customer and Royal Mail. HMRC has considered how UK VAT law should be amended to bring it into line with that decision and – as announced in [Budget Note 48](#) – has concluded that **certain postal services previously treated as exempt from VAT will become liable to VAT at the standard rate with effect from 31 January 2011**. The Government intends to make the necessary legislative changes in a second Finance Bill 2010 to be introduced as soon as possible in the new Parliament. Further details are available in [Revenue & Customs Brief 19/10 - VAT: postal services - claims for input tax](#).

In broad terms, the proposed changes will mean that any service which is individually negotiated or not subject to any price and regulatory control will become liable to VAT at the standard rate. This includes, but is not limited to:

- all individually negotiated services;
- *Parcelforce* services;
- door-to-door (unaddressed mail); and
- mail-room services.

Services which Royal Mail is *obliged* to provide under or pursuant to the terms of its licence (and which are therefore subject to price and regulatory control) will remain exempt from VAT, always subject to there being no individual negotiation of terms. These include:

- services covered by Royal Mail's Universal Service Obligation (including stamped mail);
- regulated services; and
- access to its network for private postal operators.

The cover price of stamps will not have VAT added to them and some contracts for postal services will also remain exempt. However, *any member that has a bulk postal agreement*,

either with Royal Mail or another supplier, needs to be careful that, wherever possible, it still benefits from exempt services.

The Charity Tax Group (with whom CLAS cooperated on the issue of CIL) is worried that many charities will not know whether or not the exemption should apply to the contracts that they have. The Group is setting up a working-party on VAT on postal services in the hope of having an input into HMRC's consideration of the issue and to help develop appropriate guidance for the sector.

[Source: *HMRC What's New* – 31 March 2010]