

REVIEWING THE REGISTER: UNEMPLOYMENT

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It has sometimes been said that secrecy is the calcium which forms Whitehall's bones. If this were really true the prospect of being part of an open and extensive consultation process would surely be enough to instil fear into the heart of any civil servant. This article outlines the process of preparation for such a consultation and the handling and implementation of its results.

The Starting Point

In 1997 I was asked to form part of a team which was charged with looking into the relief of unemployment and its relationship to charitable status as part of the Charity Commission's wider Review of the Register. Unemployment and urban and rural regeneration were to form the first specific areas which the Commissioners were to consider, together with the Framework to the Review which has since generated a considerable amount of comment both in these pages and elsewhere.

The involvement of charities in addressing the adverse effects of unemployment is far from novel. Our team were therefore not surprised when an initial search against the Register of Charities identified some 638 organisations registered as charities with "employ", "unemploy", "job" or "work" in their title or which were listed in the Commission's previous classification as "for the relief of the unemployed".

From the list of charities which our search of the Register revealed we analysed a sample number in order to pinpoint the nature and spread of both the objects registered and the activities currently being pursued by their trustees, where those latter details were readily available from the information in the Charity

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Commission's possession. Organisations which formed part of our sample include those which provide education, training and practical support to unemployed individuals. This list also includes bodies which are directed to policy formulation and research; workshops and training opportunities for people with a variety of disabilities and organisations which seek to promote and develop the social responsibility of business in a civil society.

Once we had identified those charities which were engaged in the relief of unemployment our next step was to analyse charity law and its application to the relief of unemployment as a charitable purpose. Unemployment has not previously been accepted by the English courts or the Commissioners as a discrete charitable purpose although the problems which unemployment has caused to Society have been widely recognised and the number of charities already involved to a greater or lesser extent in its relief represent a clear reflection of this. As part of the process of legal analysis we also sought relevant parallel decisions from other jurisdictions where these seemed appropriate.²

Our analysis of the law was set out in the Discussion Document which was issued as part of the consultation process in April 1998,³ a brief outline of which appears in the succeeding paragraphs of this Article. In short this reflected the continuing need for any organisation to exhibit both a charitable purpose and public benefit in order to be recognised as charitable under English law. We were very surprised to see comment from some quarters which appeared to indicate that the Commissioners were intending to use the Review process as an opportunity to reinvent the law.

Despite the archaic language of the preamble to the Charitable Uses Act of 1601 it was remarkable to be able to recognise how closely linked to the relief of unemployment some of those purposes listed were and how it might be possible to respond flexibly to them in a different social context on the verge of a new Millennium. Amongst those purposes listed were the relief of poverty and the maintenance of schools and universities, the education of the orphans and the:

² The principal decisions considered were the USA. Internal Revenue Ruling 74-587 and *Re Tennant* [1996] 2 NZLR. 638 (a decision of the High Court of New Zealand). We have also considered the French civil law associations and foundations engaged in relieving unemployment which have either been "recognised as being of general public utility" or established under the legislation promoting company sponsored foundations, which began with the Law of 23rd July 1987.

³ Whilst the Discussion Document is no longer available on the Commission's Website, copies can still be obtained from The Review Team, Charity Commission, Woodfield House, Tangier, Taunton, Somerset TA1 4B. Tel: (01823-345-429). The legal analysis appears at pages 3 to 6 of the Discussion Document.

“...supportation, aid and help of young tradesmen, handicraftsmen and persons decayed...”

Prior to the Review the Commissioners had approached the problems of unemployment by indicating a readiness to accept for registration as charities those organisations directed to the relief of unemployment which restricted their benefits to the provision of specific types of charitable assistance to unemployed people seeking employment. This approach was reflected in the production of a list of acceptable purposes which addressed the relief of unemployment together with an indication of a willingness to extend that list on as flexible a basis as was possible within the law.

A more direct approach to unemployment as a charitable purpose was signalled by Lightman J in *IRC v Oldham Training and Enterprise Council*.⁴ The learned judge was not prepared to accept that Oldham TEC was a charity because the provision of support services and advice to new businesses allowed the organisation to promote private interests regardless of any consequential benefits to the wider community. Consequently those benefits were too remote from the activities and any private benefit could not be regarded as merely incidental. Lightman J was, however, prepared to comment that:

“...as an example, if the object of setting up the unemployed in trade or business was not charitable as being for the relief of poverty, it would fall within the fourth head of charity. It is a matter of general public utility that the State should be relieved of the burden of providing them with unemployment and social security benefits, and this object is within the spirit, if not the words, of the Statute of Elizabeth, which includes among its list of charitable objects ‘the support, aid and help of young tradesmen and handicraftsmen’.”

This approach signalled to the Review team an opportunity for the Commissioners to accept the relief of unemployment as a charitable purpose in its own right and to utilise the Review process as an opportunity to put flesh on its bones by providing practical guidance to organisations wishing to operate in this field.

Prior to recommending criteria to the Commissioners to accept as a basis for consultation with the sector we sought the views of Commission staff and other Government Departments in order to ensure that any recommendations were both legally sustainable and operationally practicable. The Commissioners adopted a constructive approach to the recommended criteria proposed and to including within

the Discussion Document reference to those areas which appeared to generate the most difficulty in terms of practical application. These latter points were principally the question as to whether it would be necessary to exclude benefits from those unemployed people whose unemployment was voluntary and the more difficult question of the poise between public and private benefit - in what circumstances would it be possible to recognise that benefits to private businesses were incidental to the attainment of the charitable object of relieving unemployment?⁵

Original Recommendations and Consultation.

In their original form for consultation the recommended criteria for organisations to qualify for recognition as charitable for the relief of unemployment were stated as being:

- they must be established for the primary purpose of relieving unemployment for the public benefit, *provided that* they are established for the benefit of persons seeking employment but who are unable to obtain work by reason of:
 - (1) their lack of job opportunities; or
 - (2) their youth, age, infirmity or disablement, poverty, social or economic circumstances;
- their activities must be directed to the relief of unemployment generally or to a significant section of the community in a way which can be demonstrated objectively; and
- any benefit to private interests must be strictly incidental to their primary purpose.

The three month consultation period from the end of April to the end of July 1998 proved to be a fascinating and stimulating experience, and in many ways a humbling one! It provided a tap into the vast and varied experience of the sector and an opportunity for a face to face exchange of views, sometimes on a fairly frank basis. Apart from local consultation and review forums in London and Northern Ireland our postbag contained a stimulating cross-section of views reflecting a variety of

⁵ The principal authorities relied upon include *IRC v Yorkshire Agricultural Society* [1928] 1 KB. 611; *Incorporated Council of Law Reporting for England and Wales* [1972] 1 Ch 73 at 103; and *IRC v Oldham Training and Enterprise Council* [1996] STC 1218.

agendas. These were generally favourable to the recommendations proposed. There were some dissenting voices, however, which ranged from the opposing propositions that all unemployment organisations should be charitable to the suggestion that there should be no further extension to charitable status in any circumstances; there were also views expressed that the Review process should be used for a total revision of Charity law - none of which fall within the Commissioners remit.

We are very grateful for all the responses received to the public consultation. The consultation process has resulted in a number of specific outcomes in the approach which has been taken by the Commissioners to the final form of the guidance which they have now provided in respect of the relief of unemployment. It may be helpful to summarise these briefly.

(1) Voluntary/Involuntary Unemployment

In the Discussion Document the Commissioners had discounted the need to limit benefits to unemployed people whose unemployment was involuntary. The Commissioners had indicated that in practice it would be difficult to provide a benefit to someone who was unwilling to receive it.

There appeared to be no good reason why, for example, a number of charities providing “refresher” courses or access to higher education to support women returning to work could not be registered either additionally or alternatively with an object aimed at relieving unemployment amongst those women. There appeared to be no justification as to why benefits should not be provided in such circumstances simply because the initial departure from the workplace was voluntary. The consultation response provided overwhelming support for the Commissioners’ approach and no reference to any distinction accordingly appears in the final form of the criteria for recognition as a charity, objects of any charity or guidance produced.

(2) The “Proviso” to the First Limb of Our Recommended Criteria:

The proviso was originally recommended as a means of practical identification of the proposed beneficiaries so as to ensure that any benefits provided are directed to and commensurate with a charitable need.⁶ The formula, with its reference to potential beneficiaries by way of their lack of job opportunities or youth, age,

⁶ See, for example, *Joseph Rowntree Memorial Housing Association Ltd v Att-Gen* [1983] 1 All ER 288.

infirmity etc, was loosely based upon the Recreational Charities Act 1958. It was hoped that this might make for familiarity and ease of practical operation as well as ensuring that benefits could not be provided under this head, for example, to people who were already in employment and were simply seeking a job change.

Some commentators, however, viewed the proviso as either confusing or unworkable in practice, unduly restrictive or requiring additional reformulation so as to be helpful. In this latter category there were those who wished to include within the beneficiary class unemployed people whose situation is so bad that they are socially excluded and not actively seeking work.

As a result of these points the Commissioners have accepted that the proviso is removed from the first limb of the Commissioners' recommended criteria as an essential part of those criteria. Instead, whilst it should usually be possible to "link" the beneficiaries to an unemployment charity by way of the groups listed in the proviso, the Commissioners will be prepared to consider other formulations for measuring provision where it is felt by promoters applying for registration that the proviso is inappropriate. It is anticipated that this will usually be the case in the circumstances already identified where the potential beneficiaries are socially excluded.

(3) The Requirement for the Second Limb of the Test:

There was concern expressed in some quarters that it was unduly restrictive to include within the criteria a requirement that the activities of organisations applying for registration:

“...must be directed to the relief of unemployment generally or to a significant section of the community in a way which can be demonstrated objectively.”

It was suggested that this requirement would have the undesirable practical effect of excluding some local groups or projects from registration as charities.

We think that the implication of this requirement has been misunderstood. It is clear that a charity for the relief of unemployment will fall, as a charity of general public utility, within the fourth head of charitable purposes within the classification in *Pemsel's* case.⁷ There is therefore a requirement to show sufficient public benefit

⁷ *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531. This was the approach suggested by Lightman J in *IRC v Oldham Training and Enterprise Council* [1996] STC 1218.

(which will not be presumed).⁸ The insertion of the second limb of the test is therefore a restatement of general legal principle for a charity of this type.

In the list of activities which are set out at (4) below there are included a number of activities which could readily be undertaken by local groups who wish to set up a charity.

(4) Guidance

It was a common theme of many commentators' responses that practical examples should be provided of the types of activity which charities could properly undertake. A number of commentators also provided their own examples. This approach was welcomed by the Commissioners who have accepted the following activities as their initial list:

- The provision of advice and training to unemployed individuals concerning employment, self-employment and the establishment of co-operative enterprises and the provision of CV writing, job search and job club facilities for them;
- The provision of practical support to unemployed people by way of accommodation, childcare facilities or assistance with travel;
- The provision by charities of land and buildings at below market or subsidised rents to businesses starting up;
- The provision of capital grants or equipment to new businesses;
- The payment by a grant-making charity to an existing commercial business to take on additional staff from among unemployed people.

The Commissioners have provided comment on each of the listed activities in their guidance to assist trustees in the practical application of that guidance.⁹

Perhaps the most novel of those activities listed above is the final one. The approach

⁸ There is considerable case law in support of this approach, including the discussion by Lord Somervell in *IRC v Baddeley* [1955] AC 572 at 615.

⁹ The guidance is available from the Commission's Website:
<http://www.charity-commission.gov.uk>.
It is also now available in booklet form as Commission publication RR3.

adopted in respect of the payments made to existing commercial businesses reflects the fact that payments can be made to private individuals provided that such payments are ancillary to and a necessary part of the achievement of a charitable purpose.¹⁰ In this latter case it has been agreed with HM Inland Revenue that the appropriate approach will be for the trustees of charities to agree with the commercial business how to calculate the economic cost of employing and training such staff. Any payments made should not reflect more than that economic cost. The cost of employing staff will obviously vary widely depending on the nature and training to be provided.

If trustees of unemployment charities wish to undertake additional activities other than those which appear on this list they will be expected to seek the Commissioners' advice under section 29 of the Charities Act 1993 prior to proceeding any further.

It is intended to revise and extend the list in the light of experience and future developments in the job market.

Conclusion.

It is difficult to estimate the number of additional charities which may fall to be registered as a result of the Review of unemployment, although there will clearly be some, given the list of acceptable activities which have now been provided and the potential for further extensions to this list. Existing charities active in this field may wish to alter their objects or add additional ones to encompass unemployment although there will be no compunction on them to do so. No existing charities should be removed from the Register as a result of the Review of unemployment. This is certainly not the first stage of a major "charity cull", as appears to be the belief of some in the sector.

The Review of unemployment clearly reflects a greater transparency of approach to the application of charity law to an area of great social importance. I have enjoyed being both part of the team which reviewed this topic and part of the Review process.

¹⁰ See, for example, the decision of Fox J. in *CIR v White* (1980) 55 TC 651 which was expressly approved by Lightman J in *IRC v Oldham Training and Enterprise Council* [1996] STC 1218.