



## Guidance Note:

CSD-1381B

Seeking authority for payment (not exceeding £50,000 per annum) for contracted employment of a trustee, ex-trustee or connected person

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#### 1. When might our approval be necessary?

Our policy on employing trustees, former trustees, or connected persons in paid posts within a charity is set out in our booklet CC11 Payment of Charity Trustees, available on our website.

The main rule is that a trustee may not profit from his or her trust, and should not place him/herself in a position where personal interest and duty to the charity might conflict. In the case of employment of a trustee or former trustee, it could appear that personal interest might have affected the decision to employ the person, or that the appointment was due to the person having been a trustee.

In the case of a trustee's spouse or partner or another 'connected person' becoming a paid employee, then if they are **financially interdependent**, the trustee could be said to profit from the employment. In law, this can be a trustee benefit, requiring explicit authority. Trustees should be aware of the possible need for authority, and the need to ensure no improper influence has been brought to bear in the charity's decision to employ the individual. Any arrangement with a connected person should be open and transparent, so that it can be seen to be made in the charity's interests. (Note: **Connected person** for this purpose means any close relative who has a financial link (or 'interdependence') with a trustee and includes the spouse or partner of a trustee, or a member of a trustee's family – ie a child, parent, grandchild, stepchild, grandparent, brother or sister. It also includes someone who is a business partner of a trustee).

Without explicit authority in the charity's governing document or from us, the person **may** be liable to repay the salary and any other benefits received. (This could arise in the event of a legal challenge from a third party – either within our outside the charity – or even as the result of a Commission inquiry).

This is technically the position even where a trustee resigns as soon as the decision to appoint him/her to the post has been made. This is again because the employment may have been acquired by reason of the trusteeship, even though that trusteeship is no longer continuing.

We therefore recommend that trustees check their charity's governing document to see if there is a suitable power which would allow the employment. The trustees' proposals must fit within the terms of any authority, and it must comply with any conditions attached to the power. If there is no suitable authority, we will be prepared to provide one where we are satisfied the arrangement is in the interests of the charity and that the charity will be receiving value for money.

(Our procedure for authorising the arrangement involves completion of the declaration form discussed in section 4 and related parts of this guidance).

However, there is no need for any approval from us where it is clear that there can be no question of the employment involving any conflict of interest and duty, or of the person gaining any 'inside track' or unfair advantage to secure the employment – see next section.

## 2. When is our approval not necessary?

**Trustee or ex-trustee:** In addition to where there is already a suitable power in the charity's governing document, we are clear that no authority is needed where a trustee:

- resigns **ahead** of a properly conducted open recruitment process; and
- has had **no** involvement in a decision to create or retain a post for which he or she has subsequently applied; and
- has had **no** involvement with devising the recruitment process or advertising, or with setting the terms and conditions of that post; and
- has **not** lobbied or canvassed for the post, or otherwise identified him/herself to the remaining trustees as the most suitable candidate for it (this includes where the person concerned has been leading or heavily supporting arguments in favour of their employment, and/or actively canvassing the support of other trustees for the creation or retention of the post).

If these conditions are met, it is likely the employment will be viewed as being transparent and 'above-board', and that the post has not been created (or retained) simply to meet the needs of the person concerned. The trustees will need to determine the qualities, qualifications and experience required for the post on offer, to advertise appropriately, and to consider each candidate on merit.

**Connected person:** It is emphasised that authority is only required where there is a definite financial dependency between the parties. If no such link exists, then no approval is needed – though any potential conflict of interest still needs to be managed (see **A Guide to Conflicts of Interest for Charity Trustees** under **Guidance for Trustees** on our website). If trustees are in doubt about the need for authority, we recommend they contact us for advice.

## 3. Scope of this Guidance Note

This guidance describes the procedures to follow when not all of those conditions can be met, and where there is no authority for the arrangement in the charity's governing document. It does **not** apply where payment:

- for the employment will exceed £50,000 per annum; or
- is for services that may be provided under the power given in s73A of the Charities Act 1993 (see CC11); or
- is for acting as a trustee (see CC11); or
- would result in the majority of trustees benefiting (see CC11).

We recommend trustees read the guidance note before deciding to employ a trustee, ex-trustee or connected person, and **before** completing the declaration form.

## 4. Using the Declaration and Application Form

Trustees should apply for approval before the first payment is made; using the declaration and application form **CSD 1381C** available on the Apply for it page of our website will help to ensure that all the necessary information is included.

Provided the declaration is properly completed, and there are no factors which would call the arrangement into question (such as demonstrably excessive payment for the term of employment), we will authorise the proposed payments on the basis that there is a clear advantage to the charity, and that the payment represents value for money.

We cannot authorise payments which have already been made; ie where the trustee or connected person has already started employment with the charity. But provided trustees are satisfied that continuing the employment is clearly in the interests of the charity, they can still use the form. Again, unless there are good reasons for not doing so (such as a track-record of unauthorised payment or excessive levels of payment), we will authorise the **future** payments.

In that circumstance, trustees will remain technically liable to account (ie liable for repayment) to their charity for any unauthorised sums already paid out of charity funds, but we will not require any repayment where we are satisfied the arrangement is clearly advantageous to the charity.

The declaration form asks the trustees to either confirm that an open recruitment process has been used, or declare that there are good minuted reasons why they have decided to proceed without one. Brief details of those reasons should be supplied.

It is important to note that we can only accept the form if it has been properly and accurately completed by the trustees **other** than the person who is, or will be, employed.

On receipt of the completed form, we expect to be able to make a decision on the basis of the facts and assurances provided in it, so that we can provide the necessary authority without further discussion. In some cases, we may need to seek further information or clarification from the trustees.

## 5. Summary of conditions to be met when deciding to employ a trustee or ex-trustee

Trustees should ensure their collective decision can be justified as being **clearly in the interests of the charity and a good use of the charity's resources**. They should be satisfied on the following points – which they **must** record in the charity's books:

- the contracted employment of a trustee, ex-trustee or connected person is in the interests of the charity, and paying for it will have no adverse affect on the charity's ability to carry out its stated objects;
- the amount is reasonable in relation to the employment, and the charity can afford it;
- the trustee, ex-trustee or connected person is fully able to carry out the task;
- a majority of the trustees is acting without payment by the charity;
- the trustee concerned (including a trustee connected with a person being employed by the charity) will withdraw from any meeting of the trustees at which the paid employment is discussed, and must not be counted for the purpose of deciding whether a quorum is present at such a meeting;
- the payment(s) will be declared in the charity's accounts; and
- the trustees have submitted the charity's annual report, accounts and annual return within the required timescales.

Further guidance on these conditions can be found in the next section.

Trustees need to keep a proper record of compliance with the conditions, in case of challenge by a third party. So long as the trustees can formally record compliance at a meeting, and keep evidence of that on the charity's records, we are satisfied our requirements are being met, and that charity assets are being safeguarded.

If the trustees are not satisfied that all the conditions apply, they must **not** employ the person concerned. If there is any doubt whether the payment is in the interests of the charity, we would be unable to give our authority.

## 6. The conditions in detail

The declaration requires trustees to confirm they have complied (or will comply) with these conditions. These assurances are central to the process of obtaining our authority quickly, and we would encourage trustees to take advice if they have any doubts about their ability to meet the conditions. The following factors in particular should be carefully considered:

- 6.1 Interests of the charity
- 6.2 Clear advantage to the charity
- 6.3 Excluding the conflicted trustee from the decision making process
- 6.4 Where an employee is to continue as a trustee
- 6.5 An appropriate recruitment process
- 6.6 Level of payment to be affordable and reasonable
- 6.7 Accountability
- 6.8 Majority of trustees not to benefit
- 6.9 Authorised signatory

### 6.1 *Interests of the charity*

The payment must be in the interests of the charity. This means the job to be carried out is genuinely required by the charity and the person concerned is well qualified to deliver it. It also means the trustees must be satisfied the arrangement will not adversely affect the charity by, for example, harming its reputation or levels of support and funding.

### 6.2 *Clear advantage to the charity*

It must be in the interests of the charity to employ the trustee, ex-trustee or connected person, rather than someone unconnected with the charity. The test here is whether that person will be able to provide a better deal for the charity than an outsider, so that the charity clearly benefits from the arrangement. The benefit may arise because of a lower cost to the charity, or because the person will do a better job, or from a combination of the two. Where there is no clear benefit or advantage to the charity, the trustees should employ someone unconnected with the charity.

### 6.3 *Excluding the conflicted trustee from the decision making process*

It is important that a trustee who stands to benefit takes **no part** in the process of deciding that the charity needs the post in question, or in the selection/recruitment process, other than as a candidate. This is because we rely on the trustees who do not face a conflict of interest to make objective decisions in the interests of the charity. (See section 9 for action where the person concerned has been involved in the process).

### 6.4 *Where an employee is to continue as a trustee*

Trustees must balance the advantages and disadvantages of employing a trustee who is also to continue as a trustee. An obvious disadvantage is that the person concerned faces a conflict of interest when the trustees are required to make decisions concerning the employment, or with significant issues surrounding it. Again, the usual way of managing this is for the trustee concerned to be absent from discussions or decisions of the trustees involving the paid employment. This can mean the person who may, in all other respects, be best qualified to contribute to such discussion, is the very person prevented from doing so. There is a need to balance the benefits to the charity of securing the employment at an advantageous rate against the disadvantage of having to do without the advice of the trustee concerned.

### 6.5 *An appropriate recruitment process*

It will always be in the interests of the charity for the trustees (excluding the trustee standing to benefit) to consider selecting the best person for the job from a field of candidates on the basis of **fair and open competition**. If the successful candidate **is** a trustee, then our consent **may** be needed before any payment is made. Where the trustees decide that this type of selection process is **not** appropriate, they should record their reasons in the minutes. Details of the fair and open competition procedure, or reasons for **not** following it, should be given where requested in the declaration form. Generally, it may

be more difficult to argue it is in the interests of the charity not to recruit using fair and open competition where salaried full or part-time jobs are involved. Trustees must be satisfied an appointment has been agreed by them in good faith, and was not created or tailored to benefit the person named in the declaration. Even in the case of short term contracts for relatively small sums, there is still a need to consider the best method of selection.

#### 6.6 *Level of payment to be affordable and reasonable*

Any paid employment should be clearly affordable, and should not put the charity in a position where delivery of services to beneficiaries or its ability to carry out its purposes will suffer as a result.

And if payments are found to be **more than is reasonable** for the work to be done, there may be implications for the employee's entitlement to it.

Using charity funds to pay someone more than is reasonable may constitute a breach of trust, with the consequence that the employee might have to make a repayment to the charity. Where such payments are regular, prolonged and substantial, there could even be implications for the charitable status of the organisation. To continue to be exclusively charitable, all the powers a charity has must be used solely in the interests of its proper beneficiaries, and not those of its trustees. Excessive levels of payment might suggest one of the charity's purposes is to provide an unjustifiable profit to someone other than a proper beneficiary. Such a purpose is not charitable, with the result that the organisation can no longer be regarded as exclusively charitable.

#### 6.7 *Accountability*

Where it is normally required to submit its annual accounts, report and return to us, the charity will need to be up-to-date with its obligations. The deadline for returning these is within 10 months of the end of the charity's last financial year. The trustees will also need to be aware that the payments will need to be properly recorded in the charity's accounts when they become due. If the charity is behind with its accounting obligations, the trustees should send the latest accounts to the Commission with the completed declaration.

(Note: Charities with an annual income of £10,000 or less are not normally required to submit annual accounts, report and return. Charities in this category should send us a copy of their latest accounts with their application.)

#### 6.8 *Majority of trustees not to benefit*

The declaration should only be signed if the number of trustees receiving some form of benefit from the charity will continue to be in a minority **after** the payment is authorised. The declaration expressly states that the proposal will **not** result in a majority of the trustees benefiting. If the trustees are unable to meet this requirement, they may still be able to seek our authority – see section 9.

#### 6.9 *Authorised signatory*

The trustees can appoint one or more of their number to sign the form, or they can appoint someone who is not a trustee, but who is otherwise able to act on behalf of the charity – for example, an employee, volunteer or adviser. The important point here is that the person signing the form must not also be a person who stands to receive payment from the charity, or who will otherwise face a conflict of interest as a result of the payment.

### 7. **Accuracy of declaration and record keeping**

Because we provide our authority on the basis of the declaration, it is clearly important that it is accurate and that the trustees are able, if asked, to provide records (such as minutes of meetings) to show that the matters covered by the declaration were properly discussed and decided.

From time to time, we may examine in detail a sample of declarations where we have provided authority. Where trustees are unable to provide supporting documentation to demonstrate the accuracy of the

declaration, we may withdraw our authority (under s89(3) of the Charities Act 1993) within 12 months, and treat the payments as unauthorised.

We may also seek prosecution of trustees if it is clear that they have supplied us with misleading information in contravention of s11 of the 1993 Act.

## 8. Forms of authority provided by the Charity Commission

- 8.1 No prohibition in the governing document on payments
- 8.2 Prohibition on payments in the governing document

### 8.1 *No prohibition in the governing document on payments*

The form of authority depends on the terms of the governing document. Where the governing document does not prevent trustee payments, we can give authority by issuing an Order attached to the completed declaration. This takes effect when we authorise it with our seal. When trustees receive the sealed document, they should keep it in a safe place with the other key records belonging to the charity.

### 8.2 *Prohibition on payments in the governing document*

Where the charity's governing document prohibits payments to trustees, the declaration should **still** be completed. We will not however be able to provide the authority on the declaration itself: instead, we will either have to make a Scheme or, in the case of a charitable company, to provide consent under s64 of the Charities Act 1993 to an amendment to the memorandum and articles of association to enable such payments to be made.

For **unincorporated charities**, a formal Scheme application is required. To streamline this process, the declaration form also functions as an application for a Scheme. **The only additional information which trustees must send us with the declaration is the names and addresses of those trustees who were not party or privy to the decision to authorise the application for our authority.**

For **charitable companies**, the **only additional information which trustees must send us with the declaration is the draft special resolution containing the new power to pay or otherwise benefit trustees**. It is this resolution to which we provide consent under s64 of the Charities Act 1993.

## 9. Circumstances in which the declaration cannot be used

- Where the proposed payment is in excess of £50,000; or
- if contracted employment will exceed £50,000 per annum; or
- where it is proposed to pay one or more of the trustees for being a trustee; or
- where a majority of trustees are to be paid for any purpose,

it will not be appropriate to use the declaration to apply to us for our authority. Nor will it be appropriate for circumstances where the trustee or ex-trustee concerned:

- canvassed for the post; or
- was involved in devising the job specification or advertising for the post (including involvement in settling the terms and conditions of the employment).

It will also not be appropriate for a sole trustee to use this procedure. In all these instances, the trustees who do not stand to benefit will need to send us a detailed written case, setting out:

- the amount(s) to be paid over what period;
- which trustees are to be paid; and
- why the trustees who will not be benefiting consider that the proposed payments will serve the interests of the charity, what the clear advantages will be, and what steps will be taken to avoid the potential conflicts of interest.

The appendix to our publication **Payment of Charity Trustees (CC11)** sets out further factors for trustees to consider when making a case for the employment of a trustee or ex-trustee.

We will give careful consideration to applications for our authority in these cases and may need to explore matters further with the trustees. This closer level of scrutiny is necessary because it will usually be more difficult to demonstrate that payments in these circumstances will be in the interests of the charity.

If you have a query about this guidance or need further advice about using the power to change purposes or some of the other publications or forms referred to in this guidance, please telephone our Contact Centre on **0845 3000 218** (minicom **0845 3000 219**) or write to or e-mail us at the following addresses:

**Postal address:**

Charity Commission Direct  
PO Box 1227  
Liverpool  
L69 3UG

**E-mail address:**

[enquiries@charitycommission.gsi.gov.uk](mailto:enquiries@charitycommission.gsi.gov.uk)