Case study

Maria is a volunteer who drives a mini-bus for a charity working with disabled children. She undertakes volunteering activities for the charity most weeks and sometimes several times per week and has done so for the last 12 years. She expects to be offered volunteering work every week and has always been offered work every week except when she has been on holiday. When she goes on holiday, she tells the Volunteer Co-ordinator in advance. When she is not on holiday, she feels under an obligation to drive the bus whenever she is asked, although there have sometimes been occasions when she has been unable to do so because of occasional family commitments, such as weddings and parties.

Maria is paid out of pocket expenses. She wears a uniform and has had a full DBS check carried out. She has been on numerous training courses provided by the charity over the years, including training to update her first aid skills.

In 2015, Maria travelled to the Canary Islands on behalf of the charity to look after disabled people. Her air fare expenses were reimbursed for this trip.

As Maria is unemployed, she has often attended as a volunteer on a daily basis.

There are particular rules to which volunteers are expected to adhere, and volunteers have been warned in the past that disciplinary action may be taken against them if keys to the charity mini-bus are not correctly returned at the end of a driving duty.

Maria has been provided with the charity’s Volunteer Handbook, which refers to “absence from volunteering”. It states: “If you have to be absent from your agreed task for any reason, please give the person to whom you report as much notice as possible, but where this is not possible, you should call within 30 minutes of your agreed start time”.

Maria, like all volunteers at the charity, is expected to abide by the charity’s policies, such as the charity’s health and safety policy. This is expressly stated on his application form.

Maria attended a staff quiz night last month in the local pub. A lot of free alcohol was provided. Towards the end of the evening a male volunteer, Adam, approached Maria, said “You look bloody gorgeous tonight” and tried to grab her and kiss her on the lips. She told him to get lost, and immediately left the pub, but felt very shaken by this. The next day she told the Volunteer Co-ordinator, who said that Maria should leave it with her. A few days
later she was told by the Volunteer Co-ordinator that Adam would no longer be volunteering for the charity.

Maria still felt very shaken and was no longer enjoying her volunteering. She stopped attending and has been to see her GP who has referred her for counselling and is talking about putting her on anti-depressants. She writes to the Chair of trustees of the charity saying that she wants to raise a formal grievance about Adam’s behaviour towards her, and the impact that it has had on her. She also says that she is unhappy about how this has been handled by the charity.

Questions

Do you think that consideration (payment) is being provided by the charity in exchange for Maria’s volunteering work? (You should consider expenses, training and the trip abroad.)

Probably not, as the expenses are out of pocket only, and the trip abroad was in the course of her volunteering. The grey area here is the training provision, as we do not know that “numerous training courses” she has attended have all only been training that was necessary for her volunteering role.

Is the fact that Maria is a frequent volunteer, sometimes working daily, significant?

Not in itself, although it may give rise to a starting presumption that there may be mutual obligations to offer and to undertake work. However, the more frequently someone volunteers, the greater the risk that the relationship could start to take on characteristics of employment unless this is carefully managed.

Do you believe that there are mutual obligations in this scenario?

In reality no, because although Maria feels under an obligation to carry out her volunteering, she has in fact declined to do so from time to time.

What is the significance of the various policies to Maria?

It is to be expected that volunteers would be included within a Health and Safety policy. Volunteers being expected to follow particular “rules” is probably fine (assuming that these are rules about how they carry out their duties, not rules requiring them to carry out duties).

However, the fact that volunteers have been warned in the past that disciplinary action may be taken against them if they do not return the mini-bus keys suggests that the charity is treating them like employees and provides some evidence in support of an argument that Maria is actually employed. Equally, a specific requirement for a volunteer to call within 30 minutes of their agreed start time if they are going to be absent is quite prescriptive and again more akin to an employee requirement (although it is acknowledged that a volunteer can be absent “for any reason”).
These policy anomalies are not going to be sufficient in themselves to give rise to an employment relationship but may provide corroborative evidence. These policies should have been better expressed (and implemented) by the charity to avoid this risk.

**What factors in this case are consistent with there being a contract of employment?**

As above, potentially the training provided and some of the policies. The level of reliance the charity appears to place on Maria’s services could be viewed as consistent with her being under a contract of employment. The fact that she is at a “staff” quiz night when the incident with Adam occurs might also be indicative of her being treated in the same way as employed staff, depending on whether all other volunteers were also invited to this event, and it was intended for “staff” in the broadest sense.

It is sensible to avoid employment-like language around volunteer involvement – e.g. ‘role profiles’ instead of ‘job descriptions’, and clarifying what is meant by terms such as ‘staff’. The language we use around volunteers would not in itself change the legal nature of the relationship if there is no hint of consideration or mutual obligation between the parties. However, where such elements potentially exist employment-like language could be taken as a sign that the relationship was intended to be contractual.

**How should the charity respond to Maria’s grievance?**

They should take it seriously and offer to meet with her to listen to her concerns, act on those concerns, and give her feedback about what steps they have taken in response to her concerns. They should not, however, treat it as a “grievance” in accordance with their employee grievance policy, as she is not an employee and should not be treated in the same way as an employee.

It is reasonable to have policies in place to help deal with issues raised by or about volunteers, but they should be distinct from those for paid workers, and explicitly there to meet an ethical rather than legal obligation to fairly resolve disputes – NCVO have example ‘problem solving procedures’ on their website.

**Will Maria be able to bring a claim for sexual harassment? If not, do you think that she ought to be able to do so?**

It seems unlikely that she will be able to establish worker status - in particular because of the absence of any valuable *consideration* for her services (unless the training she has received does prove to have been unrelated to her driving role). If she does not have a contractual relationship with the charity, then she will not be able to bring a claim under the Equality Act 2010. As to whether she ought to be able to do so, as a volunteer, this is an issue under consideration at present in the consultation process being run by the Government Equalities Office.
Would the situation be different if Adam had been a paid member of staff, or if this had happened while they were volunteering together, rather than being at a social event?

No, because the reason that Maria is not legally protected is because of her legal status as a volunteer, not because of Adam’s status or because of the nature of the event where this happened.

The charity may be held to be vicariously liable for the acts of Adam even as a volunteer (as the test for responsibility for the discriminatory acts of others is very broad indeed). Employers are also increasingly held responsible for issues that arise between colleagues in social situations that have a connection to work, not merely within the workplace and during the working day. However, the factors discussed in the previous question are what are going to present Maria with difficulties here in bringing a claim for sexual harassment.