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1. General

This guidance note explains how a charity may make such payments by charities that

We recommend that you consider the following guidance when your charity is planning to make any ex gratia payment. We are sure that the proposed payment by your charity will be lawful in the circumstances.

Further guidance about ex gratia payments is available on our website.

In this note, any reference to:

- a "charity" means any charity registered as a charity with the Charity Commission;
- "trustees" means the trustees of a charity;
- a "payment" means a payment of money, or a transfer of any property/asset to another, or a transfer of any legal right or entitlement, by a charity.

2. What is an ex gratia payment?

A private individual may in any way give away any money, property, or other asset or legal entitlement as they wish.

A charity on the other hand has a duty to use any of its funds, property, and other assets in support of its charitable objects and deal with its property, and only in the ways which are permitted by the charity's governing document.

However, there are sometimes circumstances in which trustees believe that they are under a moral obligation to make a payment, but where they have no power or legal obligation to do so. In the Snowden case, it was held that there should be an exception to the general rule that trustees should not make such a payment if they consider that they are under a moral obligation to do so. The case consequently created that exception.

Therefore, where trustees believe that they are under a moral obligation to make a payment, but where they have no power or legal obligation to do so, it will only be where they consider that they are under a moral obligation to do so. We have outlined below in this note the circumstances in which trustees should be permitted to do so.

3. Examples of ex gratia payments

The following situations are examples of circumstances in which trustees might wish to make a payment where it is not strictly required by the charity's governing document, but they feel that they have a moral obligation to do so:

- (1) A testator, whose will provides for a payment to a family member and the remainder

ex gratia" payment, when and how such payments are made. Amendments to the law on ex gratia payments have been proposed.

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of the estate to the charity, increasing the family income to comply with the requirements of the will.

and-written amendment to the will which is ineffective since it does not comply with the requirements of the will.

(2) A testator whose will directs the trustees to change the beneficiaries before the amendment is made.

of the estate to the charity instructs the trustees to make an additional legacy, but dies before the will is executed.

(3) The charity wishes to pay an employee that to which he or she is entitled.

retirement a pension in excess of the amount to which he or she is entitled.

(4) On the winding-up of the charity, the trustees make payments to employees in excess of what is required by employment law.

trustees wish to make redundancy payments that would be required by employment law.

(5) The charity might wish to make a payment where the donor reasonably but mistakenly believed that the charity was obliged to make a donation of that amount to the donor in poverty. The trustees might be obliged to make a payment by returning the money to the donor.

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This is not an exhaustive list of circumstances where trustees might feel that they have a moral obligation to do so. There may also be other, quite different, circumstances where trustees feel they have a moral obligation to do so.

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4. What types of payments might be made?

What types of payments?

Some types of payments might be confused with ex-gratia payments. A *non-ex gratia* payment is one where any of the following circumstances apply:

ex gratia payments may easily be confused with ex-gratia payments. Some examples would be ex gratia payments for legal fees. We have indicated below where any of the following circumstances apply:

(1) A payment made to an employee in recognition of long service or some other benefit to which the employee is not legally entitled. The charity has no legal obligation to make such a payment and the trustees do not consider that they have any moral obligation to do so.

an employee in recognition of long service or some other benefit to which the employee is not legally entitled. The charity has no power or authority to make such a payment and the trustees do not consider that they have any moral obligation to do so.

Nevertheless, it may be in the interests of the charity to make such a payment. The charity would need to consider whether such a payment is in the interests of the charity (as defined in the Charities Act 2006) and if so, it would be lawful.)

consider that it would be "expedient in the interests of the charity" that it would still be necessary to make such a payment to be lawfully made. The Charity Commission under Section 105 of the Charities Act 2006 may consider a payment as one which is "expedient in the interests of the charity" if it is obtained, the payment will then be lawful.

This would *not* be a payment made in the interests of the charity if the charity has no moral obligation to make it.

because only if the payment were *not* made in the interests of the charity would it be a moral obligation to make it.

(2) The charity wishes to pay an employee to resign with immediate effect when the employee is not legally entitled to do so. The charity is acting in that way, but the employee could not reasonably be expected to accept a payment. Such a payment would be lawful.

payment in lieu of notice when they are not entitled to it. The charity is acting in that way, but the employee is not justified in accepting such a payment. The trustees do not consider that they have a moral obligation to make such a payment. Such a payment would not be lawful.

(3) A payment made to an employee who has made a claim and pursued (or might pursue) that claim through an employment tribunal.

employee makes a claim and pursues (or might pursue) that claim through an employment tribunal.

¹ Trustees might take the view that the payment is in the interests of the charity because it would demonstrate that it is a good employer and that fact might make it more likely that the charity will attract high-calibre staff.

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If the payment is in or continued (an “o – and therefore *no* category if the payr a legal basis and th successful or the co

tribunal claim from being launched t will not be a “voluntary” payment However, it will only fall into that ne compromise, i.e. the claim has whether or not the claim would be prohibitive.²

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To be a genuine co in the circumstance original claim to refl succeed in full or at

will have to be a reasonable sum less than the full amount of the inty as to whether the claim would

If it is within the ch and it is a genuine however be a lawfu

constitution to make the payment, t be an ex gratia payment. It will

A payment to settle made under certain will however be a la

ample, a payment to settle a claim will *not* be an ex gratia payment. It

(4) A payment that can an ex gratia payment

g the charity’s purpose will *not* be wful payment.

(5) A payment that ca implied, will *not* be a

isting authority, either express or will be a lawful payment.

Since such payments at Commission authorising o the case of “(1)” above.

ents, no order by the Charity e needed except as explained in

5. The legal regulation of “e

In none of the situations where there is a proposed simply decide to make a requirements.

above (or in any other situations n ex gratia payment) can trustees have to meet the following legal

In order to make an “ex g making of ex gratia paym power to make such paym court, the Attorney Gener payment. The authorisatio Commission that there are be acting immorally by refu

arity’s constitution must allow the d that the charity does have the tain the authorisation of either the ission, before they can make the ere the trustees can convince the t the trustees to believe they would nt.

The trustees might find th time-consuming, that the d particular where the value disproportionate to the valu to make an ex gratia paym overcome, and that barrier degree of protection of cha

ng the necessary authorisation is ne charity’s reputation, and that, in ely low, it involves costs which are The need for authorisation in order amount to a significant hurdle to be amounts to an unnecessarily high //rights.

The need for authorisatio value of £1,000 or more, practice of the Commis Commission’s authorisatio however. It appears that n

ere the proposed payment has a a lesser value because it is the nts below £1,000 without the ctice is not sanctioned by statute, h prefer this practice to be put on

² In this and any other context, trustees should should be ready to refuse requests from emplo

their duty to safeguard charity funds, and they e entitled to.

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some sort of statutory for £1,000 (or higher) threshold

necessarily by introducing a simple of ex gratia payment.³

6. Delegation of the decision

payment

Trustees wish to, and often make ex gratia payments. to judge whether the payment and it is not a good use insignificant decisions. The line with the current law v consider that they have a words, that decision has to they cannot lawfully allow member of charity staff:

ate to certain staff the decision to those staff are in a better position ch payments are often quite small, e involved in what will often be such decisions is, however, not in o decide personally whether they e an ex gratia payment. In other rt of the trustees themselves, and n ex gratia payment by letting a

- (a) decide that s/he fee payment; or
- (b) somehow “deem”:
 - (i) the trustees to ha
 - (ii) the trustees to h

arrange for the charity to make the

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Trustees of many charities the trustees of any charity such decisions (as to mo cases or instead, for some of staff and/or specific me expected in the near future shortcut the process to a situation where the trustee trustees still have to make

ve a moral obligation,

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7. Deregulation of “ex gratia

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The Law Commission pu Charity Law - Law Com N practice in relation to ex following detailed consultat

July 2017 (“Technical Issues in an analysis of the current law and charities. The report was produced ion with a wide range of bodies.

The Law Commission repd gratia payments, and in pa

tions for changes to the law on ex ommendations:

- (1) The introduction of gratia payments wi Commission, the At
- (2) That statutory powe
 - (a) £1,000, in the year of up to £
 - (b) £2,500, in the year of more t
 - (c) £10,000, in th year of more t

allowing trustees to make small ex e prior authorisation of the Charity ourt;

payments up to:

a gross income in its last financial

a gross income in its last financial 250,000;

a gross income in its last financial £1 million; and

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³ However, a large proportion of charities are o ex gratia payments in any particular cases wou threshold higher than £1000 were applicable in

law removing the need for pre-authorisation of es to reject requests for such payments. If a at problem.

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(d) £20,000, in the year of more than

a gross income in its last financial

(3) Those financial thresholds are capable of amendment by way of secondary legislative

of amendment by way of

(4) The statutory power of making such payments should be capable of being expressly excluded by a charity's governing document;

a payments should be capable of being expressly excluded by a charity's governing document;

(5) The test for making such a payment to a particular staff or trustee should be changed so as to allow such a payment to be made as being under a moral obligation, thus allowing for the decision to be made by the trustees;

should be changed so as to allow such a payment to be made as being under a moral obligation, thus allowing for the decision to be made by the trustees;

(6) Trustees should be able to decide to make an ex gratia payment on the recommendation of a particular staff or trustee

particular staff or trustees power to decide to make an ex gratia payment by person and of any value. This power is to be made either:

(i) without Charity Commission approval to make an ex gratia payment in accordance with the above recommendation;

without Charity Commission approval to make an ex gratia payment in accordance with the above recommendation;

(ii) with Charity Commission approval to authorise a decision to make an ex gratia payment;

with Charity Commission approval to authorise a decision to make an ex gratia payment; and

(7) Decisions by the Commission under section 106 should be subject to appeal to the Charity Tribunal.

to authorise an ex gratia payment by the Charity Tribunal.

8. How to apply to the Charity Commission for an ex gratia payment

Authorisation to make an ex gratia payment

Trustees can apply for an ex gratia payment by completing the online application form on the Charity Commission website. The Commission will need to be satisfied that the information and evidence that the Commission will need to make a decision on the matter.

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The Commission will ask trustees to provide the information and evidence that the Commission will need to make a decision on the matter.

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Further details of what the Commission will need to be satisfied that the information and evidence that the Commission will need to make a decision on the matter.

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If the Commission decides to make an ex gratia payment, it will give its authority by order. The order needs to be prepared by the charity and signed by the trustee or independent examiner may also need to see it.

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⁴ This would mean that the test would be an objective one.

subjective one.

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