

## Employment



### Are foster carers employees? It's all in the contract

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#### ***Glasgow City Council v Johnstone & Johnstone UKEATS/0011/18/JW***

The Employment Appeal Tribunal (Scotland) held that foster carers who entered into a special arrangement with the local authority as to the terms on which they would become foster carers, were employees of the local authority. The English case law that foster carers had no contract did not apply on these facts, and the fact that the local authority had not intended to create an employment relationship was irrelevant to the determination of whether that was the objective effect of the contractual relationship between the parties.

#### **Background**

After a period of training, the Claimants entered into an agreement to become foster carers for the Council, titled the “*Connex multi-dimensional treatment foster care Looked after Children (Scotland) Regulations 2009 Foster Care Agreement*” (“The Connex Agreement”). Under the Connex Agreement, the Claimants were paid a “*professional fee of £30 160 per annum*”, “*a separate allowance for the young person of £172 per week*” and “*4 weeks paid holiday a year*” and they were not eligible to undertake any other paid employment. The fee was not paid to ordinary foster carers who had not entered into the Connex Agreement. The Claimants were required to attend meetings and training whether or not they had a child placed with them. Although the Claimants were entitled to turn down a child who had a history of making abuse allegations against their carer, in all other respects Council’s programme supervisor had total control of delivery of services to the foster child.

The Claimants brought a claim to the Employment Tribunal alleging that they had made qualifying disclosures within the meaning of sections 43B and 44 of the Employment Rights Act 1996. Although the Council did not dispute that the Claimants were workers within the meaning of section 230(3) of the Employment Rights Act 1996, it denied that they were employees and therefore denied that they had the right under section 44 not to be subjected to a detriment as the result of making a health and safety disclosure.

The Employment Tribunal held that the relationship between the parties was contractual, and that the contract was a contract of employment. Although some of the terms which governed the relationship between the parties were determined by statute, the legislative framework in which the Connex Agreement operated left many of the details of that relationship to be determined by agreement between the Council and foster carers. The Employment Tribunal held that this contract between the parties was an employment contract, noting in particular the “*very high degree of control*” exercised over the Claimants in their provision of services as foster carers.

#### **The Decision**

Lord Summer held that the Employment Tribunal had been entitled to make those findings, and dismissed the appeal. The Connex Agreement was a combination of terms which duplicated obligations arising in statute, and terms creating obligations which had force as a result of the contract entered into by the parties. Those contractual terms would have

no effect but for the agreement between the parties, and therefore the relationship between them was “*typically contractual*” (paragraph 17). The Council exercised a very high level of control over the Claimants which was typical of an employment relationship (applying the well-known *Ready Mix Concrete* test).

The Employment Tribunal had also been entitled to hold that the Claimants were employees. They were paid for their work, which Lord Summers noted was the essence of an employment relationship. It is worth noting the approach taken to remuneration in this case, given the weight placed on it by both the Employment Tribunal and Employment Appeal Tribunal. Lord Summer noted that “*the nature of the payment might well make a difference to the question of whether the contract was one of employment*” (paragraph 44). This is consistent with the analysis of remuneration in the recent English case of *Varnish v British Cycling Federation* UKEAT/0022/20/LA(V), in which the Employment Appeal Tribunal held that the valuable benefits received by the Claimant were “*provided to the Claimant in order to enable her to train and compete at the highest levels; they were not the Claimant’s remuneration for doing so*” (paragraph 54). In contrast, Mr and Mrs Johnstone were clearly remunerated for their work as foster carers in a manner typical of an employment relationship.

However, the decision was expressly limited to the relationship which existed under the Connex Agreement. Lord Summer noted that “*if the local authority narrates the terms upon which they are willing to authorise the foster parents to be foster carers and these terms involve exercising control over the foster parents provision of services, it will be a matter of fact in every case to determine whether the degree of control is sufficient to constitute a relationship of employment.*” (paragraph 23). He expressly declined to consider the status of ‘ordinary’ foster carers.

Lord Summer also rejected other possibilities as to the status of foster carers offered by the Council: there was no authority that they were office holders (paragraph 25), and there was no inconsistency in holding that an employment relationship was created where it was accompanied by a variety of statutory duties (paragraph 47).

Although noting that he was not bound by the position under English and Welsh law, Lord Summer explained in detail how his conclusions cohered with the line of authority following *W v Essex County Council* [1998] 3 WLR 534. In *W v Essex County Council* the foster parents had entered into an agreement whose terms were laid out in statute and therefore was not a contract. In the present case the agreement entered into was permitted by statute, but the statute did not define the terms of the agreement and it was a contract freely entered into. That distinction meant that the English case law did not compel the Employment Tribunal to find that the Claimants had no contract and were not employees.

Finally, Lord Summer disposed of a submission that the fact that “*the Council had not appreciated that the use of a contractual agreement had the potential to alter the legal character of the relationship between a foster carer and the Council.*” (paragraph 48). It was irrelevant whether the Council had intended to alter the Claimants’ status; the Tribunal was required to determine the objective effect of the agreement between the parties.

## Comment

It is trite to say that decisions on the basis of employment status are particularly fact-sensitive. It is unlikely that this authority will be directly applicable in many cases; even those with similar contractual arrangements will need to be considered afresh. Lord Summer’s analysis demonstrates that even in contexts where there is settled authority as to the employment status of those providing particular kinds of services, new arrangements as to the means by which those services are provided give rise to the possibility that that an employment relationship will be created.

More specifically, this case shows that even where the foundation of the relationship between the parties is based on statute, an analysis is required as to whether the statute exhaustively determines the nature of that relationship, or whether key terms are left to be agreed between the parties. If there is room for an agreement, then it is likely that a contract will have been formed. The existence of a contract then opens the door to an argument that the contract is one of employment. It is not sufficient to state that the relationship arises out of a statutory arrangement, the question is whether the statute determines all of the obligations which exist between the parties.

*Sam Way has a busy and varied practice in all areas of employment and discrimination law, representing both Claimants and Respondents in preliminary hearings, final hearings and on appeal.*