



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4103972/2016 & 4103973/2016

Preliminary Hearing Held at Glasgow on 1 and 2 June 2017

Employment Judge: I McFatrige (sitting alone)

Mr James Johnstone

**First Claimant
Represented by:
Mr O'Neill
Advocate**

Mrs Christine Johnstone

**Second Claimant
Represented by:
Mr O'Neill
Advocate**

Glasgow City Council

**Respondents
Represented by:
Mr Napier
Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimants were employees of the respondents and the Tribunal has jurisdiction to hear the claims. The matter should now proceed to a final hearing.

REASONS

1. The claimants in these conjoined cases have both raised claims with the Tribunal in which they claim that they suffered detriment on account of making qualified disclosures in terms of Sections 43B and 44 of the Employment Rights Act. They also claim that they suffered unlawful deduction of wages. The background is that both claimants (who are husband and wife) were appointed as foster carers and acted as such for the respondents over a period. The respondents denied the claims but also raised a preliminary point to the effect that the Tribunal did not have jurisdiction to hear the claims on the basis that the claimants were neither employees nor workers providing a service to the respondents. The respondents pointed to a substantial line of case law which had previously found that foster carers could not be either employees or workers providing services to their sponsoring local authority since the relationship was not one governed by a contract. A Preliminary Hearing took place on 16 September 2016 and reference is made to the Note issued following this. The case came before me for a Preliminary Hearing to deal solely with the question of whether or not the Tribunal had jurisdiction to hear the claims. I required to determine whether there was a contract between the parties and if so whether the claimants were either employees of the respondents, workers providing a service to the respondents or neither. If there was no contract or the claimants were for some other reason neither workers nor employees then the claim should be dismissed. At the Hearing I heard evidence from both claimants albeit Mrs Johnstone's evidence was simply to the effect that she agreed with the testimony of her husband. I also heard evidence on behalf of the respondents from Irene Cronin, Program Supervisor with the respondents' team Foster Care and Ann Gilchrist Assistant Service manager at 'Families for Children', part of the respondents' Social Work Department. A joint bundle of productions was lodged. On the basis of the evidence and the productions I found the following essential factual matters relative to the matter before me to be proved or agreed.

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Findings In Fact

2. In or about 2010 the respondents saw an advertisement entitled Multi-Dimensional Treatment Foster Care in Glasgow. A copy of this advertisement was lodged (page 75). The advertisement stated

5 *“Glasgow needs foster carers to join us in our new treatment fostering service for young people (aged 11-17).”*

Below that were a number of bullet points. It listed a number of qualities that were being looked for and then stated

- 10 *“We will offer*
- *the opportunity to make a real and lasting difference to a young person’s life*
 - *a professional fee of £30,160 per annum with significant tax benefits*
 - 15 • *a separate allowance for the young person of £172 per week*
 - *24/7 support from an experienced team*
 - *a comprehensive training package to support the placement and to enable you to develop your skills*
 - *4 weeks’ paid holiday a year”*

20 At that stage Mrs Johnstone had been considering becoming a foster carer. She and her husband discussed the matter and contacted the telephone number. They received a response in terms of the generic response letter which was lodged (page 79).

- 25 3. The respondents, Glasgow City Council, have a responsibility to provide fostering services. They have provided these over the years in terms of a number of models. The particular advertisement related to a new model of foster care which was to be provided by an organisation known as Connex MTFC. This is a joint
- 30 venture between Glasgow City Council and the NHS. I should say that although the scheme was operated with input from NHS I understand that it has been agreed between the parties that the appropriate respondent in the case would be Glasgow City Council since they were in charge of whatever arrangements were

with the claimants. The particular model which was being promoted at that stage was a model first introduced in the United States and known as the Oregon model. This was being promoted in 2010 and subsequently by Dr. John Marshall who was seen by the claimants as the guiding light behind the setting up of a programme operating to the Oregon model in Glasgow. In order to promote the model there were a number of different features to the arrangement which were different from those which the respondents are used to applying to their other foster carers.

4. The first point was that being an MTFC carer was viewed as being a full time commitment and MTFC foster carers were not expected to be engaged in any other paid employment. When the claimants applied they discussed matters with members of the staff involved in running the scheme. They were advised that both of them would have to give up their employment. Although the application was made jointly and the appointment was made jointly Mrs Johnstone was seen as the primary foster carer. A further difference between the MTFC carers and ordinary foster carers was in the amount of allowance and the way that this was paid. An allowance was paid to MTFC carers of around £32,000 per annum. This was to be payable whether or not the carers actually had a child placed with them. When the claimants did not have a child placed with them they were still required to attend meetings and training. If and when a child or children was allocated a foster allowance would additionally be paid in respect of the child. The theory behind this I understood to be that the foster allowance was paid to cover the costs of looking after the child whilst the payment of £32,000 per annum was seen as a payment to the foster carers. Traditional (non MTFC) foster carers would be paid the foster allowance when they had a child living with them but would not receive the £32,000 per annum payment

5. With regard to holidays MTFC carers were to be allowed four weeks' paid holiday per annum. This was holiday which they would take on their own and the child would be left with respite carers during this time. This contrasts with the position of ordinary foster carers where the expectation was that the foster carer would take any child allocated to them on holiday with them.

6. At around the time the claimants expressed interest in the scheme an article appeared in the Herald which was lodged (page 152-154). This quoted extensively from Dr John Marshall who was a director of the Multi-Dimensional Treatment Foster Care (MDTFC) team at the time. He described the role as “elite foster carers”. He stated that he envisaged that they would be attracted by three things. These were

“The opportunity to be trained in an internationally recognised programme, the 24/7 support from a cross-disciplinary team and the fair allowance.”

He is quoted as going on to state

“The foster carers are key components of the therapeutic intervention so it reflects their professional role. He says of the payments which are more generous than the allowances offered to traditional foster carers in the city.”

7. Both Mr and Mrs Johnstone jointly applied to become carers under the scheme. They made it clear that they were applying under this scheme and not as ordinary foster carers. The respondents sent the claimants a booklet on MDTF care at around the time they were applying which was lodged (pages 79-94).

8. Their application was considered by a panel. This was the same panel as would consider the applications of other foster carers who were not MDTF carers. The application was considered in terms of The Looked After Children (Scotland) Regulations 2009 and in particular regulation 22 which deals with the approval of foster carers. The panel met on 27 January 2011 and recommended that the application be approved. Suzanne Miller who at that stage was Head of Children’s Services with Glasgow City Council Social Work Services fulfilled the role of agency decision maker and formally accepted the recommendation in a letter which is not dated but appears to have been around the same time. Annexed to the letter was a copy of what appears to be notes which were prepared by the

panel in relation to the panel's recommendation. These are dated 21 and 25 February 2011 and were lodged (pages 99-102). This makes it clear that part of the arrangement was that Mrs Johnstone required to leave her job and commit full time. She had been a Teaching Support Assistant. Mr Johnstone at this point had a small cleaning business which he would work two to three days per week. He was advised that he could continue to do this but was not allowed to increase his commitment to this business above those two to three days per week.

9. The Oregon method is provided by MTFC under licence from a company in Oregon, USA. The method is regulated and manuals are produced which require to be complied with. There are basically two methods by which an organisation can deliver the Oregon plan. One of these is to become accredited which is what MTFC did. This involves a long, extensive process of audit by the Oregon franchisor. Once a company is accredited the level of day to day supervision is reduced. The alternative is not to become accredited but to be licensed to provide the Oregon method on an annual basis. This involves considerably more day to day supervision.
10. The booklet provided to the respondents sets out the background and on page 84 states

"When we use the term 'treatment' what we mean is that we aim to help a young person make significant changes to the behaviour which is causing them difficulty. We do this by the careful implementation of a range of behavioural management techniques and as the foster carer you would be at the centre of this treatment plan. All young people are different, therefore the programme for each young person will take into account their individual needs and will devise a programme which targets the things they find most difficult. All programmes are based on a points system which rewards good behaviour and sets consistent limits and predictable consequences for negative behaviour.

In Glasgow Multi-dimensional Treatment Foster Care (MTFC) is delivered in partnership between Glasgow City Council and NHS

5 *Greater Glasgow and Clyde Board and offers very intensive and structured support to young people aged 11-17. MTFC originated in the United States and has been positively evaluated in numerous independent trials. Research has shown that this way of working makes a real difference to the life chances for our most troubled and vulnerable young people. No other model of intensive fostering has been so thoroughly evaluated and now Treatment Fostering operates successfully in many sites throughout the world, including England and Wales. The Glasgow scheme will be the first of its kind in Scotland.*

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The leaflet goes on to state that the young people being placed with MTFC carers were among the most vulnerable and challenging in Glasgow. They noted that previously MTFC programmes had shown that even the most difficult young people could be helped to change direction (page 86). Page 87 is headed

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“How does MTFC differ from mainstream fostering.”

It states

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“MTFC is different from mainstream fostering in that it offers a structured programme which the young person agrees to follow. It is the role of the foster carer to encourage and support the young person to stick to the programme, with the close support of the programme team. The programme team consists of a Programme Supervisor/Clinical Psychologist, Foster Care Supervisor/Social Worker, Young Person’s Therapist, Family Therapist, Young Person’s Skills Trainer, Teacher and an Administrator. In MTFC the foster carer is an essential member of the team and as such will receive daily support from the programme team and will attend weekly team meetings where support, advice and intervention is offered by the programme team and other carers. Carers can also call for support at any time, day or night. Unlike in mainstream fostering a number of additional resources are made available to the foster carers, young person and their family.”

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11. The claimants both attended an intensive training programme at which they were trained in the scheme. They required to provide references and checks. Both of the claimants required to attend meetings even although it was agreed that Mrs Johnstone was the principle foster carer.

12. Training commenced at some point around 27 January 2011. Following the conclusion of this training a foster care agreement was signed by the parties. This document was lodged (pages 103-114). It is signed by Mr and Mrs Johnstone on page 112 and their signature is said to be dated 15 March. It was signed by the Supervising Social Worker and the Programme Supervisor on 16 March and 21 March respectively. The agreement is headed

*“Connex multi-dimensional treatment foster care
Looked After Children (Scotland) Regulations 2009
Foster Care Agreement.”*

It states that it is between Connex MTFC which is stated to be a partnership between NHS and Glasgow City Council Social Work Services. The two claimants are said to be the counterparties. It notes that the fostering panel approved them on 27 January 2011. It notes their approved address. It states:

“This agreement is from 11/4/2011 until the foster Carer ceases to be registered with Connex Multi-dimensional Treatment Foster Care if this precedes the above date.”

It then goes on to provide various obligations which are presented in table format. The department’s obligations are on the left hand side and the foster carer obligations on the right hand side. Section 2 deals with training and carers’ meetings and at 2.3 it is noted that the Connex MTFC team will provide and facilitate a weekly foster carers’ meeting. It is noted that foster carers must attend these meetings weekly and that foster carers are expected to carry through any advice or decision given by the PS or SSW regarding the treatment of the young

person (PS is Programme Supervisor and SSW is Supervising Social Worker). In section 2.4. the foster carers are obliged to participate fully in training courses and foster carers' meetings. Section 2.5 states that prior to their first placement the carers must attend clinical training on the MTFCA programme used by Connex MTFC. Section 3 deals with finance and insurance. Section 3.1 states that the social work department provides appropriate and prompt payments to all foster carers as outlined in the social work department's fostering allowance policy and the Connex MTFC scheme. Section 3.2 states that the social work department will provide essential furniture and equipment to the carers. Section 3.4 notes that the Connex MTFC service will provide clear guidelines to the carer regarding how the child or young person's allowance should be managed including guidelines regarding pocket money and savings account for children in placements. The foster carers are obliged to ensure these guidelines are met. It is noted that *"the children allowance is for all costs related to having a child on placement including clothing, additional monies for household bills related to having a child on placement, child's leisure and recreation school related costs."*

13. In Section 3.5 it is noted that *"the social work finance department will supply foster carers with details of earnings from foster care fees shortly after the end of each tax year. The social work finance department will not make any tax deductions from payments."* The foster carers' obligations are said to be to pay Income Tax on the fee payments that are made to them and are responsible for doing this directly with their local tax office. In section 3.7 it is noted that carers should inform their home insurance companies that they are fostering, it is noted that the PS and SSW should consider whether any increase in premium should be paid by Connex MTFC.

14. Section 3.8 relates to the MTFC fee. It is probably as well to set out the contents of each box in full.

"The department obligations are

3.8 The Connex MTFC will commence at either the date of the decision maker's approval letter following the fostering panel recommendation or

the date post panel that the foster carer is available for a Connex MTFC placement or date as agreed by the PS.

3.9 On receipt of resignation any outstanding fee will be paid in full.

3.10 During bouts of minor illness foster carers will be expected to retain day to day care of the child, please refer to the Connex MTFC payment policy in regards to payments while sick.

3.11 If you cannot take a placement due to a child protection investigation the social work department will continue to pay the full Connex MTFC fee until investigation is concluded.

3.12 The PFs will ensure that a suitable placement is identified. Fee payment continues whilst carers are part of the MTFC project. Fees and allowances will be subject to review and may change over time.

3.13 Foster carers are entitled to 28 days' paid holiday. The year begins 1 April until 31 March each year. Short breaks will be in accordance with the child's care plan. However there will be a minimum expectation that there will be a short break every four to six weeks. There is no planned respite on level 1 in MTFC. All short breaks will be discussed with the PS. The foster carer will receive the professional fee when the child is on a short break.

Relevant allowance for travel and mileage can be claimed as per the department's regulations for mileage plans.

So far as the foster carer obligation is concerned these are

3.8 The foster carers will resign from their current employment (if applicable) in order to be available to take their first and subsequent Connex MTFC foster placements once approval from the decision maker has been received and agreement from the PS to commence.

3.9 Foster carers wishing to resign must give their resignation in writing giving a minimum of one month's notice. Any overpayment will be repaid timeously.

3.10 The foster carers should alert the Connex MTFC at the earliest opportunity of any health concerns and provide appropriate medical evidence from their GP. Foster carers are advised to take out

appropriate insurance to cover loss of earnings. Please refer to the Connex MTFC payment policy in regard to payments while sick.

5 *3.11 The foster carers should co-operate fully with the safeguarding investigation and work with the social work department in the safeguarding process.*

10 *3.12 Only in exceptional circumstances a foster carer could turn down a placement with reasonable justification but would need to engage fully with the PS and SSW in a careful explanation of the reasons for this opinion. After discussion, if the PS did not feel the response was appropriate this could lead to a Foster Carer review.*

15 *3.13 Foster carers are required to notify the SSW of intention to make holiday arrangements as soon as possible. This request needs to be submitted with six weeks' notice. Please see foster carers' annual leave local policy for further details."*

- 20 15. Section 4 relates to recording and notes that the foster carer will comply with the Connex MTFC recording guidance and that this will include completion of the PDRs on a daily basis. All confidential information is to be secured in a lockable cabinet. The foster carer is required to keep a separate file for each child placed and keep all information recorded in a safe and secure place. Section 6 states at 6.1 that

25 *"The Connex MTFC will via the fostering panel give clear terms and conditions of registration to any carer considered. Despite this it would appear that there were no other terms and conditions of registration other than the document at 103-113."*

Section 6.1 notes under foster carer's obligations that

30 *"Foster carers are approved on the basis that they will not foster for any other agency whilst approved as carers for the Connex MTFC and social work department. No foster carer may register for approval with more*

than one approving agency Connex MTFC allows for only one child in placement.”

5 Section 6.2 provides that there is an annual review and that this document is presented to the fostering panel after the first year and then every subsequent third year. There then followed detailed provisions regarding potential difficulties in placements, the duty to promote welfare, education, health, leisure activities, safe caring and identity issues in respect of the children in care. Section 14 notes that foster carers require to understand the importance of listening to views of children
10 and ensure that their views and opinions are sought on a regular and frequent basis and not taken for granted. Section 15 provides that

*“Foster carers will ensure they attend a statutory review of children placed with them. They will prepare for these meetings and participate
15 fully in them. The foster carers need to prepare a written report for all looked after and accommodated children (LAAC) reviews. They will be supported with this where necessary. They will not cancel a review meeting.”*

20 There are then provisions regarding keeping contact with the young person’s family. With regard to complaints it is noted that the foster carer will comply with the social work department’s complaints procedure. There is also a provision that if the foster carer has any issues they should raise this with their PS and if they are not satisfied with this response they can write to the Families for Children Service
25 Manager. Section 18 notes that the Supervising Social Worker will have to carry out regular health and safety checks in the foster carer’s home and that the foster carer will permit this as well as meetings with all members of the foster carer’s household. Section 19 deals with the Connex MDTF short break carer’s role. This was not a role carried out by Mr and Mrs Johnstone.

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16. The document signed by the respondents at 103-113 is different from the agreement usually signed by foster carers with Glasgow City Council who are not

part of the MTFC scheme. A copy of this style document was lodged at pages 115-125.

5 17. In addition to the contract document itself the claimants were provided by the respondents with a document headed MTFC policies which is the document lodged at 131-138. This makes detailed provisions regarding when annual leave can be taken, the availability of respite care. It also deals with the various weekly sessions which young people have with the individual therapists and skills coaches. The sessions would usually take place during the day however it is clear that when they
10 did not the claimants needed to take the young person to the session.

18. It is noted on page 135 that

15 *“In recognition of the demands and challenges of being an MTFC carer, it is viewed as a full-time commitment, for both full-time and respite carers. As such MTFC foster carers are not expected to be engaged in any other paid employment.”*

20 The policy also goes on to state that availability was key and that it was the carer’s responsibility to declare any change in their circumstances which may have an impact on their availability. They stated that changes needed to be authorised by the PS. It was also stated that there should be no children under 16 living in the family home. Paragraph 7 on page 135 stated that there would be a full meeting which would be held weekly and that all carers required to attend this unless they
25 were on annual leave or respite. Paragraph 8 stated

“Carers are expected to ring in their PDR on a daily basis. PDRs should not be emailed.”

30 19. The PDR (Parental Daily Report) is a key part of the “Oregon method” which the MTFC applied. Each day a dedicated administration worker would call the claimants. The claimants would be required to go through a list of 30 behaviours from the previous day and provide a mark for each of them. For example if the

5 young person had gone to bed on time this would be marked as a yes. If the young person did not go to bed on time then he would be marked either a 1 or a 2. 1 would be if there had been some stress associated with the matter and 2 would be if there had been a great deal of stress associated with the matter. The list of behaviours was set by the respondents. The key part of the process was that based on the PDR the respondents in the form of the Programme Supervisor would make decisions regarding the parenting of the child.

- 10 20. Various other policies were lodged. These included the Connex MDTFC payment policy on page 197-199. This confirms that the annual payment is £32,000. This is paid to each foster care unit (whether the unit comprises two approved or a single carer). Paragraph 5 states

15 *“Foster carers are paid their fee monthly if they have a child in placement or are ready to receive a child. The Programme Supervisor for Connex MTFC can advise on whether they are ready to receive a young person.”*

- 20 21. In addition to this a child related allowance is paid when a young person is in placement. This allowance was £177.38 per week in 2009/10. This allowance is also paid to mainstream foster carers who are not in the MDTFC programme. As stated on page 197 the amount is said to be *“representative of the expected costs of looking after the young person including food, clothing, transport, hobbies, pocket money and a contribution to household running costs.”* The child related allowance is only paid when the young person is in placement and is not paid to the substantive placement during periods of holiday or short breaks when it will be paid to the alternative Connex MTFC foster carer or short break carer. The policy also provides mileage rates and additional grants which are paid at times of the young person’s birthday, Christmas and holidays. Once again it states that carers are classed as self employed and are therefore responsible for payment of their own Income Tax and National Insurance contributions. On page 199 it notes that during times of minor sickness carers will be expected to retain day to day care for the young person with extra support from the team if required. If as a result of
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illness they are unable to look after a Connex MTFC placement the payment of both the professional fee and the child related allowance will be suspended until the placement resumes. At the point of the child leaving the placement due to the carer's sickness the carer will be paid a sickness fee of £187.80 only for up to eight weeks. There is provision regarding the requirement for a medical certificate.

22. Also on page 199 it notes that

"If a young person is removed by Connex MTFC or social work services or the approval is suspended because of allegations regarding the suitability of the carer the full professional fee will continue to be paid until the investigation has been concluded and a decision has been reached regarding the carer's continued status by the fostering panel."

23. On 20 October 2011 Dr John Marshall the Project Director at that time wrote to the claimants and the other MTFC carers regarding practical arrangements for making payments. He indicated that there was a difficulty in that the respondents were an NHS hosted service yet carers were being paid through social work and that this could be complex. He indicated that there could at times be delays in payment due to him not being in the office but undertook that payments would be made. He also indicated that he was *"waiting on a response from social work management on loyalty payments and finders bonus for carers (which for the record I am keen on but do not decide on this)."*

24. Reference to loyalty payments and finder's bonus relates to a feature of foster care in general which has grown up over the last few years. In recent years certain voluntary sector or private organisations have also become active in the field of foster care. They accept placements from local authorities. Well known examples are Kibble and Swiis. Effectively there is now competition for foster carers. The claimants' perception was that the respondents wished to keep the terms and conditions for foster carers highly competitive to avoid foster carers transferring to Kibble or Swiis. One way of doing this is that for all foster carers (not just MTFC) local authorities will sometimes offer a loyalty bonus which is paid every two years

or so to foster carers who continue to accept placements from the respondents. They also offer a finder's bonus whereby if an existing foster carer suggests the name of someone who is eventually recruited as a foster carer then they receive what is in effect a referral fee. During the course of the claimants' involvement with MTFC a scheme was introduced whereby a loyalty bonus became payable every two years and a finder's bonus of £500 would be paid if the claimants introduced someone who was found to be suitable for MTFC fostering.

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25. In addition to the weekly meeting which dealt with care issues the claimants were expected to attend a business meeting every three months.

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26. The claimants took on their first placement in or about 2011. They subsequently received other placements. At some point Mr Johnstone gave up his cleaning business. He took on part time work as a sessional care worker in a residential children's home. He did this after discussion with the respondents. It was agreed that he would only be permitted to do this work for one or two days per week. He would not be permitted to increase the number of days he did without consent of the respondents.

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27. The claimants' understanding of the position was that they could not refuse a placement however the matter was slightly more complex than that. Generally a placement would be suggested and the claimants would be asked to comment on this. Their comments would be taken seriously and if the nature of the comment was such that it appeared the claimants were unwilling or had a good reason for not wishing a particular placement then that placement would not necessarily take place. An example of this was on an occasion when a placement was suggested to the claimants. The young person had a history of making allegations of abuse against her carer. By this time Mr Johnstone was doing other work which brought him into contact with young people. He indicated that if such an unfounded allegation were made against him this would cause him particular difficulties in his other work. Whilst in terms of the arrangement with MTFC the MTFC allowance would continue during the period of any investigation his pay from his other work

might not. On having this pointed out to them the respondents took this on board and the placement did not take place.

- 5 28. During periods when the claimants did not have a placement they were still paid their annual allowance of £32,000. They were still required to attend weekly meetings during this period even if they did not have a child on placement. They understood they could be required to attend training even if they did not have a child on placement.
- 10 29. In 2015 the respondents required to be re-certified as a provider of the Oregon system. A substantial audit was carried out over a period and on 11 August 2015 TFC consultants wrote to the respondents confirming that they had passed. The document is of interest in that it sets out how the Oregon system works. It was lodged (pages 163-171). It is clear from this that the Programme Supervisor is a
15 lynchpin in the system and that the foster carers are required to comply with his rulings. The MTFC manuals were lodged, they show the strategies which require to be adopted by foster parents such as the claimants. They required to set up house rules, notice behaviour, encourage good behaviour by the young person and apply a points and level system. The detail of what the carers require to do in terms of noticing co-operative behaviour is set out on pages 481-482. Pages 483-
20 484 show some methods of encouragement to be used, page 485 lists the incentives to be used and pages 486-487 explain the points and level system to be used. Page 488-493 show the amount of points to be awarded and for what in level 1 which is the early period of placement. Pages 494-500 shows the amount
25 of points to be awarded in level 2 and page 501 shows the approach to be taken at level 3. Pages 502-507 give further examples. The system is an extremely rigorous one. The young person starts off at level 1 where privileges are very restricted. He earns additional privileges by showing good behaviour. He can then move up to level 2 and then level 3. At any stage he can be taken back a level if
30 his behaviour changes for the worse.
30. A key point is that at all stages the Programme Supervisor is in charge. Whilst the foster carer may suggest that although the young person on placement has

behaved in a certain way then they should still be allowed a certain privilege, the decision at the end of the day is one for the Programme Supervisor and if the Programme Supervisor decides that matters should proceed in a way which is different to the recommendation of the foster carer then the Programme Supervisor has his way. At all times it was emphasised to the claimants that fidelity to the Oregon model as set out in the handbook was essential. It was required to be adhered to at all times so that the Glasgow MTFC programme could pass the Oregon certification requirements.

31. The claimants' perception was that they were heavily supervised by the respondents. Their understanding of the position from conversation with social workers involved in the scheme was that if they did not comply with the MTFC method then they would be "*taken before a panel*". Mr Johnstone indicated that it was well known within foster care in Glasgow that being "*taken before a panel*" meant that one would be taken before the foster panel with a view to being de-registered. He saw this as equivalent to a disciplinary process. As at the date of the Tribunal the claimants had not been taken before any panel and were therefore still registered as foster carers however they had been advised that they were no longer part of the MTFC programme. The effect of this was that their annual allowance had been stopped. They did not currently have a placement and as a result were not receiving the allowance which would be paid to them to cover the costs of a child on placement. Their understanding was that it was likely they would be "*taken before a panel*" within the near future and that they would be moved from the list of approved foster carers.

32. The claimants were aware of another couple who had been involved in the MTFC programme. They too had had their payment under the MTFC scheme stopped. They had then subsequently been de-registered by the foster care panel. A document was lodged (637) in respect of this particular carer which was said to be the form used to start and stop payments of the allowance of £32,000 to foster carers. This showed that the decision could be made by the Programme Supervisor. The position regard to those carers is that they had been accepted as MTFC carers through a non-standard route having initially been approved in

another area where the MTFC scheme had subsequently folded. They were approved to join the scheme and allocated a placement in January but by the end of February they had requested the child be removed. Following discussion they had indicated that they wished to resign as MTFC carers. Given that they had resigned and there was no suggestion that they would accept future MTFC placements the respondents ceased payment of the allowance. This was done some months before they were taken to a panel and de-registered.

33. As at the date of the Tribunal, Glasgow City Council have approximately 600 foster carers, the vast majority of these are traditional foster carers. There are nine in the MTFC programme.

Observations on the Evidence

34. I considered that all of the witnesses were giving truthful evidence as they saw it. Whilst there were some superficial differences between the evidence given by Mr Johnstone and the evidence of the respondents' witnesses it appeared to me that this was reflective of the different perspectives from which they viewed the same events. I considered that all were credible and reliable once this was borne in mind.

Discussion and Decision

35. Both parties submitted full written submissions which they supplemented orally. Given that the submissions are in writing I will not attempt to summarise them but will refer to them where appropriate in the discussion below.

36. Both parties were agreed that the first issue which I required to determine was whether or not there was a contract between the parties. The respondents' agent took me through the fairly lengthy list of authorities which have dealt with this issue in the past. The starting point was the case of ***S v Walsall Metropolitan Borough Council [1985] 1 WLR 1150***. In that case the question was whether foster parents were the agents of the defendant Council who had placed the child in care. The

5 court reviewed the statutory provisions and it was held at paragraph 1154f that the statute and subsequent regulations “*provide a statutory code and they underline the fact that the whole of this area is covered by a complicated and detailed statutory scheme.*” Oliver LJ later on said that the “*relationship between the child and the local authority and indeed between the child and the foster parents is one which is regulated simply and solely by the provisions of the statutory scheme.*” This reasoning was specifically applied to the relationship between the foster parents and the Council in the case of ***W and Others v Essex County Council and another [1998] 3 WLR 534.*** This case involved a claim of negligence made by the carers against the Council. The court held that to impose a common law duty of care to foster parents by local authorities or social workers would cut across the statutory system for the protection of children at risk and would not be just and reasonable and that the fostering agreement was not contractual but was regulated by the provisions of the statutory scheme. The decision was subsequently applied by the Court of Appeal in the case of ***Rowlands v City of Bradford Metropolitan District Council (EAT RF 98/0492/3).*** In that case the Employment Appeal Tribunal had earlier held that the relationship between the local authority and a foster carer was one of employment within the meaning of Section 78 of the then Race Relations Act 1976. The definition contained in the Race Relations Act at that time was similar to that of employment in the Employment Rights Act in that Section 78 of the Act stated

25 “*Employment means employment under a contract of service or an apprenticeship or a contract personally to execute any work or labour and related expressions shall be construed accordingly.*”

30 37. Earlier on in the case the Employment Tribunal and the Employment Appeal Tribunal had rejected the Council’s submission that the relationship of foster carer and Council was not one of contract. Subsequent to this the Court of Appeal had issued its decision in the above mentioned case of ***W and others v Essex County Council.*** When the ***Rowlands*** case came before the Court of appeal Lord Justice Stewart-Smith overturned the earlier decision of the Employment Appeal Tribunal and specifically followed his reasoning in the case of ***W and others v Essex***

County Council. He referred with approval to paragraph 50 of that case where he had stated

5 *“There are, in my judgment, a number of reasons why the plaintiff’s claim in contract must fail. First, although the specialist foster carer agreement had a number of features which one would expect to find in a contract, such as the payment of an allowance and expenses, provisions as to National Insurance, termination and restriction on receiving a legacy or engaging in other gainful employment and other*
10 *matters to which the Judge referred I do not accept that this makes the agreement a contract in the circumstances of this case. A contract is essentially an agreement that is freely entered into on terms that are freely negotiated. If there is a statutory obligation to enter into a form of*
15 *agreement the terms of which are laid down, at any rate in the most important respect, there is no contract: see **Norweb PLC v Dixon [1995] 1 WLR 636.**”*

This line of authority was also followed more recently in the case of **Bullock v Norfolk County Council UKEAT 0230/10** which is a decision of the EAT. In that
20 case there was an extensive discussion of law in this area. In that case Ms Bullock claimed that she had a right to trade union representation pursuant to Section 10 of the Employment Rights Act 1999 at a meeting of a fostering panel which was to consider withdrawing her approval as a foster parent. The EAT stated that the Employment Tribunal was bound as was the Employment Appeal Tribunal by the
25 judgments of the Court of Appeal in the aforementioned of **W v Essex County Council [1998] 3 WLR 534** and **Rowlands v City of Bradford Metropolitan District Council [1999] EWCA Civ 1116** to hold that the relationship between foster carer and local authority was non-contractual.

30 38. As it was put by the EAT, it is a pre-requisite that a worker as defined in Employment Rights Act 1996 works under a contract. The EAT considered that the ET had correctly found that the claimant did not work under a contract.

39. In that case the ET had held that the factual position was as follows:

5 “9. *The relationship between a foster carer and a local authority is heavily regulated and few aspects of the agreement/arrangement between the Council and the claimant exist outside the statutory framework.*

10 10. *The first agreement that is entered into is the Foster Care Agreement (FCA) that is a generic document only one FCA is signed for a period of fostering although FCAs can be updated from time to time and re-signed.*

15 14. *The terms, but not necessarily the detailed content of every clause in the FCA is dictated by the 2002 Regulations and the parties are not free to draw up an agreement which does not include all these terms.*

20 17. *As well as the FCA the Council has to enter into a Foster Placement Agreement every time it places a child with a foster carer. This is required by Section 34(3) of the 2002 Regulations and the terms of the FPA are governed by Schedule 6 of the 2002 Regulations”.*

25 40. The respondents’ representative pointed out that the existence of this EAT Judgment was of some importance in the present case. Whilst the judgments previously referred to of the Court of Appeal were highly persuasive they are not binding on an Employment Tribunal sitting in Scotland. On the other hand the constitutional position is that Judgments of the EAT, which is a UK Court, are binding on Employment Tribunals sitting throughout the UK including in Scotland
30 albeit the respondents’ representative accepted that this would be the case “*absent any speciality of Scots Law*”. The position of the claimant was that the facts in the present case were sufficiently different from the factual background in the previous cases referred to that all of these cases could be distinguished. The second point

made by the claimants' representative was that given that the Scottish law of contract is different from the English law of contract there was indeed a "*speciality of Scots Law*" which applied in this case.

5 41. I shall deal with the issue of whether or not the facts of this case could be distinguished from the facts of the previous case first since if the facts on the present case can be so distinguished that the ratio of the previous cases does not apply then it is not necessary for me to make a finding as to whether or not there is any speciality of Scots Law which would make it appropriate for me to decide not to follow the **Bullock** case.

10 42. The respondents' representative very helpfully set out the regulatory regime. The regulations currently in force are the "Looked After Children (Scotland) Regulations 2009". By Regulation 22 provision is made for the approval of foster carers. It sets out what is required and the procedure to be followed. That procedure is that the fostering panel recommends approval but the approval itself comes when that approval is actioned by the local authority. In this case the formal approval was made by Susan Miller the respondents' Head of Children's Services who is described as Agency Decision Maker. This is the document lodged on page 97-99.

15 I generally accepted the respondents' analysis to the effect that the documentation showed that the claimants were approved as foster carers following the approval of the panel. There had been some suggestion in the claimants' evidence that there was a two-stage process and that one document was approval of the claimants as generic foster carers and the second document amounted to their approval as

20 MTFC carers. The documentation does not bear this out and I considered that Mr Johnston was honestly mistaken in this regard.

25 43. Regulation 25 of the 2009 Regulations obliges the respondents to enter into a written agreement with a foster carer and that agreement must be with regard to the matters and obligations in Schedule 6 "*and any other matters or obligations as the authority consider appropriate*".

30

44. On the basis of the evidence the only written agreement which was entered into between the parties was the Connex Multi-dimensional Treatment Foster Care Agreement lodged at pages 103-113. It was clear from the evidence that Glasgow City Council do have a separate generic Foster Care Agreement which is signed by mainstream foster carers however this was never signed by the claimant. It appeared to be clear that the Connex agreement at page 103 was the “*agreement*” the parties were required to enter into in terms of Regulation 25. I should say that I also accept the claimants’ submissions that the “contract” or agreement between the parties includes reference to various other documents which were lodged such as the appendices (194-199) and the policies (131-138). For the sake of conciseness however I shall continue to refer to the “Connex Agreement”.
45. The respondents’ representative helpfully sets out the terms of Schedule 6 in his submissions and notes that these are extremely similar to the English regulations. I accept that the two regulations are indeed very similar.
46. Although I did not understand this to be a main plank of the claimants’ case I would therefore reject any suggestion that I should find that there was a specialty of Scots law based purely on the fact that the previous authorities deal with the English fostering regulations rather than the Scottish fostering regulations. I accept the respondents’ contention that they are in fact very similar at least so far as the contents of what is required to be in an agreement is concerned. I do however consider that there is a factual difference between the position in this case and what appears to have been the position in the earlier cases. In the ***Bullock*** case it is noted that “*few aspects of the agreement/arrangement between the Council and the claimant exist outside the statutory framework.*” I would agree with the claimants’ representative that that is not the situation in the present case.
47. It is clear that the Connex Agreement refers to many matters which are not contained in Schedule 6 and go considerably beyond the scope of Schedule 6. In his written submission the claimants’ representative suggests that the rights and obligations set out in the contractual bundle are specific to the relationships

between the claimants as MTFC foster carers and the respondents and that they are not required by or set out in any statutory provision. I would agree with this.

- 5 48. One of the principal differences highlighted by the claimant is that there is no right contained in the 2009 regulations or other statute either for foster carers to be paid. In this case they are entitled to be paid at the rate which an MTFC carer is entitled to be paid and this obligation only arises because of and in terms of the Connex Agreement. In addition the extremely detailed obligations which are laid on the claimants in respect of the need for a daily PDR, the need to attend weekly
10 meetings and the need to act as part of the therapeutic team under the direction of the Programme Supervisor at all times are all matters on which the regulations are silent.
- 15 49. The Connex Agreement is set out in the form of reciprocal obligations and liabilities. I find it difficult to accept that the intention of the parties was that these matters were ones which could not be enforced in the way that any other contract can be enforced. It appears to me that the parties intended to be bound by these terms in contract.
- 20 50. It also appears to me that the parties and more especially the respondents have not behaved on the basis that the Connex Agreement is simply a statutory framework.
- 25 51. It is clear from the evidence of Mr Johnstone and indeed the evidence of the respondents' witnesses that in context of a mainstream fostering agreement the sanction on a foster carer who is not performing as he or she should is ultimately de-registration. As Mr Johnstone described it they would be "*taken before a panel*" and de-registered. In the traditional foster carer arrangement the foster carers are not paid other than when they have a child on placement and if the local authority
30 do decide that a foster carer is in breach of the terms of the agreement or not performing as they should then there is no particular difficulty with removing any children from placement and thereafter simply waiting the several months it might take to bring that carer before a panel. The Foster Carer has no right to payment

when he or she is not looking after a child and this approach does not give rise to any difficulty.

52. If it were the case that there was no intention on the part of the respondents that the Connex agreement had the same status as a “mainstream “ foster carer agreement then that is what they would do in the case of a Connex MTFC carer. If the agreement did not give rise to mutually enforceable rights and obligations quite apart from the statutory fostering scheme there would be absolutely no authority by which the respondents could stop payment to an MTFC carer who was not performing as they should. The only option open to the respondents would be to take that carer before a panel with a view to having their registration removed. It was clear from the evidence that this is not what happened either in the case of the claimants or in the case of the other MTFC carer who was referred to. In the case of the other MTFC carer the respondents’ witness was quite candid. She indicated that the decision as to whether or not to stop payment would lie with her as Programme Supervisor. As she put it the carers had made it clear that they were not prepared to accept any further placements and given that they were not prepared to do the work they were not entitled to payment. The respondents have behaved in a similar way in relation to the claimants.

53. It appears clear to me that if the respondents are to have a right to cease making the payments then the only possible basis for this is that the Connex agreement is a contract of some sort.

54. Whilst Schedule 6 refers to the agreement containing:-

“4(b) the financial arrangements which are to exist between the local authority and the foster carer including any special financial arrangement in relation to particular categories of children who may be placed with a foster carer”

The right to stop payment where an MTFC carer breaches the MTFC rules and/or refuses to accept a placement is not something which is contained in the

agreement. The agreement states that the carer shall be paid from a certain date and that the agreement will continue *“until the foster carer ceases to be registered with Connex Multi-dimensional Treatment Foster Care if this precedes the above date.”* It appears to me that the only interpretation that can be placed on the respondents ceasing to pay the claimant and the other carer who had indicated they were not prepared to accept any more placements was that there was some contractual arrangement over and above the statutory scheme. The respondents were applying the well known principle of no work, no pay. The claimants were still registered as Connex MTFC carers as at the date of the Tribunal. The other carers referred to remained registered as MTFC carers for some months after payment stopped right until the time when their registration was revoked.

55. In my view the claimants’ argument succeeds on its first leg in that there are clear factual differences between the situation in the present case and the situation set out in the previous case law. It may very well be the case that if one is looking at a mainstream foster carer then the correct legal analysis is that there is no contractual nexus between the parties. In this case however given the very specialist nature of the Connex MTFC scheme and the many matters in the agreement which are not covered by the statutory scheme then it appears clear to me that the parties intended to enter into a contractual relationship over and above the relationship imposed by the statutory scheme and did in fact do so.

56. Just in case I am wrong in my view that the facts of this case distinguish the situation from the line of authorities cited by the respondents I shall deal briefly with the further point made by the claimants’ representative. The claimants’ representative referred to Stewart-Smith LJ’s Judgment in the **Norweb** case and in particular the section which stated

“A contract is essentially an agreement that is freely entered into in terms that are freely negotiated. If there is a statutory obligation to enter into a formal agreement the terms of which are laid down at any rate in their most important respect, there is no contract.”

5 It was the claimants' position that this whilst it may well be part of the English law of contract is not part of the Scots law of contract. I was referred to Lord Hope's Judgment in the case of ***Percy v Board of National Mission of the Church of Scotland [2005] UKHL73 2006 SC (HL)***. It was the claimants' position that Lord Hope's analysis of the Scottish approach to the issue of whether or not there is a contract did not include any consideration of this aspect since it is not and never has been part of Scots law.

10 57. I was also referred to various other cases which dealt with the relationship between a church minister and their church. It could generally be taken from these cases that where a patrimonial right or interest is concerned the courts will be slow to find that they cannot interfere to vindicate that right.

15 58. I also noted the general point being made which is that whilst in England there are technical rules which required to be complied with before an agreement has the status of a contract such as the need for consideration there are no such rules in Scotland. The law in Scotland refers to voluntary obligations and the question is whether the parties have voluntarily agreed to be bound or not. I was referred to the Sheriff Court case of ***Dow v Tayside University Hospitals NHS Trust [2006] SLT (Sheriff Court)***. It was ruled that the relationship between the patient and his NHS doctor is not a contractual one but rather the implementation of a statutory duty imposed on the board and a statutory right given to the patient to receive it. Like the claimants' representative I can see nothing in this case which precludes the existence of a contract at Scots law. It is simply not the case that the
20 claimants' rights and obligations are governed solely or mainly by the statutory scheme. That may well be the case for ordinary mainstream foster carers but it is not the case for the claimants.
25

30 59. Having accepted the claimants' general proposition that it is no part of the Scots law of contract that without the power to negotiate individual terms there is no contractual relationship I would have considered that even if I had not found that the facts in this case could be distinguished from the authorities there was a

specialty of Scots law which would make it unsafe for me to apply these authorities in the present case.

- 5 60. Having established that the claimants were working under a contract I required to consider whether this was a contract of service in which case they are employees. If they were not employees I would require to decide whether or not they were workers or whether they were neither.
- 10 61. I should say that it was the respondents' position that I should confine my judgment to deciding whether or not the claimants were workers since all of the claims which they are making in the current case are claims for which worker status is sufficient. Having considered the matter I do not believe that it is appropriate for me to do this as I believe it is necessary for me to decide what kind of contract the claimants were working under. Was it a contract which gave them the status of employee or
15 the status of worker or the status of neither?
- 20 62. The respondents' position was that if a contract did exist then the contract was to be seen purely in terms of the obligations recorded in the agreement so far as these fell outside the matters covered by the list found in Schedule 6. The respondents' position was that any contractual agreement would relate only to the obligations to participate in the Connex MDTFC Scheme. In my view that is not the appropriate analysis. My finding on the facts is that the parties' relations were bound by the agreement between them. The agreement or contract was made in the shadow of Section 6 and, as well as being a contract the agreement is also an
25 agreement which falls within the terms of Section 6.
- 30 63. It was not suggested to me that the claimants could not be workers or employees on the basis that the contract was with the two of them jointly. It is clear that individuals who work under such joint contracts can still be employees.
64. Looking at the contract as a whole I would agree with the claimants' primary submission that, applying the test set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968]1 All ER 433 QBD***,

the claimants in this case were employees. I agree with the claimants' representative that the fact that the agreement states that they are self-employed for tax purposes is of little weight. Similarly I agree with the respondents that the fact that one of the documents refers to the £32,000 per annum payment as a salary is not in any way conclusive. What is of considerable weight is the mutuality of obligation and the very high degree of control which is exerted over the claimants in carrying out their duties. It appears that the respondents are under a duty to offer work and the claimants are under an obligation to do it. Even when the claimants did not have a child placed with them they were obliged to attend meetings and training. I considered that it was an express term of the contract that the claimants had to accept a placement and could only turn it down in exceptional circumstances. I did not consider that the evidence which was given by the parties relating to the discussions which would take place before a placement in any way altered the contractual position. Ms Cronin in her evidence indicated that it was part of her personal style that she would never seek to impose a placement on someone albeit the agreement would give her that power. In evidence she said *"It is more about how I work. I would never say to a carer – you are taking the placement, I would have given choices. I would see it as the Johnstones having a discussion and saying the placement is not a match for us."*

65. The claimants are clearly obliged to personally do the work and in exchange they are paid £32,000 per annum. They are allowed paid holidays. It is clear that the respondents made it a condition of the agreement that neither of the claimants take other work without their consent and indeed I accepted the evidence to the effect that Mrs Johnstone was told she required to work full time for the respondents and not take any other work whatsoever. The degree of day to day control through the parental daily report and the weekly meetings was extremely significant and the claimants had no real discretion as to how they carried out the work they were to undertake. I also note that in terms of the agreement the respondents provided certain furniture such as beds to the MTFC carers. It appeared clear to me that the degree of control was such that the claimants were employees working under a contract of service. The other provisions of the contract were entirely consistent with this being a contract of service. One of the provisions of the contract was that

the claimants would remain registered as approved foster carers but this is not in any way inconsistent with them being employees. My judgment therefore is that both claimants were employees.

5 66. Just in case it is not absolutely clear from the foregoing reasons I should say that in finding for the claimants in this case I am not in any way making a finding about the status of ordinary mainstream foster carers. What I am saying is that on the basis of the facts in the current case, the claimants were employees of the respondents.

10 67. The claim should now proceed to a final hearing.

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Employment Judge: Ian McFatridge
Date of Judgment: 27 July 2017
Entered in register: 01 August 2017
and copied to parties

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