

**DECISION OF THE CERTIFICATION OFFICER ON AN
APPLICATION TO BE ENTERED ON THE LIST OF TRADE
UNIONS MADE UNDER SECTION 3 OF THE TRADE UNION
AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

RE: Foster Carers Workers Union

Date of decision

10 July 2017

DECISION

I reject the application for the Foster Carers Workers Union ("FCWU") (now known as National Union of Professional Foster Carers ("NUPFC")) to be entered on the list of trade unions which I keep pursuant to section 2 of the Trade Union Labour Relations (Consolidation) Act 1992.

REASONS

1. By an application form received at my office on 18 January 2017, Mr Robin Findlay applied to have the FCWU entered on the list of trade unions that I keep pursuant to section 2 of the Trade Union Labour Relations (Consolidation) Act 1992 ("the 1992 Act").
2. Upon receipt of the application form, my office made an initial assessment of the application against the main criteria for determining whether an organisation meets the statutory definition of a trade union. These are that it is an organisation which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers and employers. In so doing and after reviewing the caselaw it became clear that a central issue that needed addressing was whether foster carers worked under a contract. Following this initial assessment my office entered into correspondence with Mr Findlay of the FCWU. An exchange of emails and phone calls took place with my office and Mr Findlay in which my office highlighted to Mr Findlay the legal definition of a trade union and the fact that in order to meet this definition the organisation would need to be an organisation made up wholly or mainly of workers
3. A formal letter dated 10 February 2017 was sent from my office to Mr Findlay. This referred to an Employment Appeal Tribunal (EAT) decision in *Bullock v Norfolk County Council (UKEAT/0230/10/RN)*. The EAT in this case was bound by the Court of Appeal's judgments in *Rowlands v City of Bradford Metropolitan District Council [1999] EWCA Civ 1116* and *W v Essex County Council [1998] 3 WLR 534* which held that the relationship between a foster carer and local authority was not contractual. Mr Findlay was asked to address the issue as to

whether foster carers work under a contract because an organisation consisting of foster carers cannot qualify as a trade union if foster carers fail to meet the definition of workers contained in the 1992 Act. This issue is, therefore, central to the application.

4. Mr Findlay sought an extension to the deadline to reply to this letter and this was followed by two further requests. In these requests Mr Findlay asked my office to look at the Court of Appeal decision in *Pimlico Plumbers Limited and another (appellant) v Smith (respondent)* [2017] EWCA Civ 51, which relate to workers' status. However, he did not address the central issue referred to in the letter dated 10 February 2017, which is whether the relationship between foster carer and local authority is contractual. When granting an extension request my office reiterated the need for Mr Findlay to address this matter.
5. On 21 April 2017 a formal response was received from both Mr Findlay and TMP Solicitors on behalf of the FCWU (which now referred to itself as the NUPF). TMP Solicitors expressed the view that the judgment in *Bullock* was not good law. However, the letter failed to properly address the contractual issue. In a letter dated 21 April 2017, Mr Findlay confirmed that the organisation's members were all foster carers.
6. On 2 May 2017 my office wrote again to TMP Solicitors asking if the Special Foster Carer Agreements between foster carers and local authorities referred to in *Rowlands* and *Bullock* still existed and, if so, whether there had been any significant changes to their status or content since the *Bullock* judgment. TMP's response, dated 16 May 2017, did not address this central point. Instead, they asserted that "*Bullock is not good law. Rowlands and W have been 'trumped' by the Court of Appeal Case Pimlico Plumbers v Smith*". Additionally, they set out the reasons why the agreements between foster carers and local authorities are "*an enforceable contract between parties as employee or worker..*".

The law

7. An application to be entered on the list of trade unions is made under section 3 of the 1992 Act, which provides as follows:

Application to have name entered in list

(1) *An organisation of workers, whenever formed, whose name is not entered in the list of trade unions may apply to the Certification Officer to have its name entered in the list.*

(2) *The application shall be made in such form and manner as the Certification Officer may require and shall be accompanied by –*

- (a) *a copy of the rules of the organisation,*
- (b) *a list of its officers,*
- (c) *the address of its head or main office, and*
- (d) *the name under which it is or is to be known, and by the prescribed fee.*

(3) *If the Certification Officer is satisfied –*

- (a) *that the organisation is a trade union,*
- (b) *that subsection (2) has been complied with, and*

(c) that entry of the name in the list is not prohibited by subsection (4), he shall enter the name of the organisation in the list of trade unions.

(4) The Certification Officer shall not enter the name of an organisation in the list of trade unions if the name is the same as that under which another organisation -

(a) was on 30th September 1971 registered as a trade union under the Trade Union Acts 1871 to 1964,

(b) was at any time registered as a trade union or employers' association under the Industrial Relations Act 1971, or

(c) is for the time being entered in the list of trade unions or in the list of employers' associations kept under Part II of this Act,

or if the name is one so nearly resembling any such name as to be likely to deceive the public."

8. The definition of a trade union is found in section 1 of the 1992 Act. It provides, insofar as is relevant for present purposes, as follows:

Meaning of trade union

In this Act a "trade union" means an organisation (whether temporary or permanent)

(a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations"

9. The definition of worker can be found in section 296 of the 1992 Act:

Meaning of a worker and related expressions

(1) In this Act worker means an individual who works, or normally works or seeks to work—

(a) under a contract of employment, or

(b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or

(c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

10. The definition of worker under the Employment Rights Act 1996 ("ERA 1996"), which was applied in *Bullock* states as follows:

Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

General Considerations

9. The EAT's decision in *Bullock* considered whether the relationship between foster carer and local authority was contractual.
10. In that case the Judge was bound by the Court of Appeal judgments in *Rowlands* and *W* which held that the relationship between foster carer and local authority was not contractual.
11. Specifically, in *Bullock* the EAT considered whether a foster carer is a worker within the meaning of section 13 of the Employment Relations Act 1999 ("ERA 1999"). It is a prerequisite that a worker, as defined in section 230 ERA 1996, (which is incorporated in the definition of worker for the purposes of the ERA 1999) works under a contract. If there is a contract between the parties the respective rights and obligations under the contract are examined to determine whether it is a contract of employment or any other contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract..."
12. Likewise, it is a prerequisite that a worker as defined in section 296 of the 1992 Act works under a contract. If there is a contract between the parties the respective rights and obligations under the contract are examined to determine whether it is a contract of employment or any other contact "whereby he undertakes to do or perform personally any work or services for another party to the contract..."
13. The EAT in *Bullock* noted that the fact that the Court of Appeal reached their decisions in *W* and in *Rowlands* in different contexts did not affect their relevance and binding effect on the issue before the EAT. The authorities still held that the relationship between foster carers and local authorities was not contractual. It further noted that 'contract' was not given a different meaning in the ERA 1996 or ERA 1999 from that which it ordinarily bears. Likewise, the 1992 Act does not give 'contract' a different meaning from that which it ordinarily bears.
14. In determining whether the relationship between foster carer and local authority was one of contract the EAT in *Bullock* referred to paragraph 50 of Stuart-Smith LJ's judgment in *W* which stated:

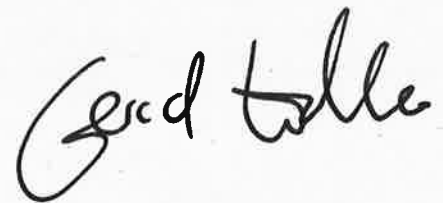
"There are, in my judgment, a number of reasons why the plaintiffs' claim in contract must fail. First, although the Specialist Foster Carer Agreement had a number of features which one would expect to find in a contract, such as the payment of an allowance and expenses, provisions as to National Insurance, termination and restriction on receiving a legacy or engaging in other gainful employment and other 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 agreement the terms of which are laid down, at any rate in their most important respects, there is no contract; see *Norweb Plc v Dixon* [1995] 1 WLR 636, 643F."

Conclusions

15. On the information before me, I must determine as a fact whether the FCWU is a trade union within the definition of section 1 of the 1992 Act. A key feature of this determination is whether foster carers are workers under section 296 of the 1992 Act. As set out above, it is a prerequisite that a worker, as defined in section 296 of the 1992 Act, works under a contract.

16. Although representatives for the FCWU drew my attention to the recent case of *Pimlico Plumbers*, I observe that in this case the Court examined the rights and obligations of the parties under the contract to determine whether it was a contract of employment or any other contract in accordance with section 230(3)(b) of the ERA. This can be distinguished from the judgments in *Bullock* and *Rowlands and W* which found that there was no contractual relationship between foster carers and the local authority since it is a prerequisite that there is a contractual relationship. I do not therefore accept that *Bullock* is not good law or that *Rowlands and W* have been 'trumped' by the judgment in *Pimlico Plumbers* as asserted by the FCWU's representatives.

17. On the information before me it appears that the relationship between foster carers and local authorities continues to be regulated by the Special Foster Care Workers Agreement which has already been examined by the Courts. The cases of *Rowlands and W* (as applied in *Bullock*) are direct authority for the relationship between foster carers and the local authority not being contractual. therefore I remain bound by the existing case law. In those circumstances, I am bound to reject this application for listing.



Gerard Walker
The Certification Officer