

**EMPLOYMENT APPEAL TRIBUNAL**  
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal  
On 23 October 2019

**Before**

**THE HONOURABLE LORD SUMMERS**

**(SITTING ALONE)**

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GLASGOW CITY COUNCIL

APPELLANT

1) MR JAMES JOHNSTONE  
2) MRS CHRISTINE JOHNSTONE

RESPONDENTS

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JUDGMENT

**FULL HEARING**

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## APPEARANCES

For the Appellant

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For the Respondent

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## **SUMMARY**

### **CONTRACT OF EMPLOYMENT WORKER, EMPLOYEE OR NEITHER**

The EAT upheld the decision of the ET Judge and accepted that the agreement entered into between the Claimants and the Council was contractual in character and in particular contained elements indicative of a contract of employment. This conclusion was based particularly on the payment of a fee of £32,000 p.a to the Claimants in respect of fostering services. This sum had the appearance of remuneration as opposed to a sum supplied to cover the Claimants' costs. This conclusion was also based on the degree of control exercised by the Council over the Claimants in the delivery of fostering services. Since one of the characteristics of a contract of employment was that one party exercised a significant degree of control over the other party, the high degree of control exercised by the Council suggested that the Council were in law the employers of the Claimants.

The EAT declined to form any view on what the position might have been had the carers been what were described as "ordinary" carers. It was not necessary for the disposal of the appeal to reach such a conclusion.

## **THE HONOURABLE LORD SUMMERS**

1. In this appeal, Glasgow Council (hereafter “the Council”), seek to persuade me that the Employment Judge erred in holding that the relationship between the foster carers (hereafter “the Claimants”) who have brought this case and the Council who placed children with them, was contractual in character. The Council sought to persuade me that the relationship was based on statute and that because of this the relationship was non-contractual. In the alternative, the Council argued that if the Council had contracted with the Claimants that the contractual component extended only to those features of the relationship that were not governed by statute. The Council are a “local authority” under the **Looked after Children (Scotland) Regulations 2009** (hereafter “the 2009 Regulations”).

### **Preliminary Matter**

2. Before analysing the submissions, I should record that during the hearing of the appeal, Mr Napier QC addressed the issue of whether the Claimants were “workers” within the meaning of s 230(3) of the **Employment Rights Act 1996**. He intimated that while he did not formally concede that they were “workers” he did not oppose the Claimants’ submission that the Claimants were workers. This led to a further question as to whether any practical purpose was served by the appeal. As it appeared to me, if the remedies sought were available to the Claimants in their capacity as workers then the question whether they were also employees under a contract of employment could not alter the outcome of the case. After a brief adjournment during which parties considered their position, it was submitted to me that the appeal should continue. I thereafter took the case to avizandum. Having reflected on matters, I sought further clarification from the parties through the clerk to the EAT as to whether in the light of **IMI Yorkshire v Olender** [1982] ICR 69, I should refuse the appeal as it appeared to me that, notwithstanding the submissions made to me, the issues argued could have no practical consequences for the parties. As a result, I was provided with further written submissions by both parties. I am grateful for their written submissions. A variety of considerations were laid before me. In my view, the critical one is that relied on by Mr Napier QC. He pointed out that the Claimants assert that they have made qualifying disclosures under sections 43B and 44 of the **Employment Rights Act 1996**. Section 43B defines a “qualifying disclosure”. This includes (Section 43B(1)(d)) a reference to a disclosure that tends to show that “the health or safety of any individual has been, is being or is likely to be endangered.” Section 44 gives

details of what is covered by the reference to “health and safety”. By Section 44(1), it is provided that it is an “employee” who has the right not to be subjected to detriment on the ground of making a health and safety disclosure (cf. section 48(1)). I am satisfied having regard to this consideration and to the terms of Section 230(1) that whether the Claimants are “employees” is a live issue between the parties. I do not require in these circumstances to rehearse the other considerations placed before me by the Council and Claimants.

### **The Factual Background**

3. In this connection, I refer to the careful and detailed findings of fact narrated by the Employment Judge between paragraphs 2 to 33. For my purposes, I require only to draw attention to those that I consider are significant for the disposal of the appeal.

4. The Claimants saw an advert in 2010 that stated, “Glasgow needs foster carers to join us in our new treatment fostering service for young people (aged 11-17)”. It offered a “professional fee of £30 160 per annum with significant tax benefits” and “a separate allowance for the young person of £172 per week” and “4 weeks paid holiday a year” (finding in fact 2). This advert related to a new model of foster care to be provided by an organisation called Connex MTFC, a joint venture between the Council and the NHS. The model differed from that used for ordinary foster care arrangements (finding in fact 3). The first point of difference was that unlike ordinary foster carers, a MTFC carer was not permitted to be in any other paid employment. It was a full-time commitment (cf. finding in fact 8, lines 5-10 and finding in fact 26). The second point of difference was that they received the professional fee referred to in the advert. This was not paid to ordinary foster carers. This was paid whether or not a child was placed with them. They were required to attend meetings and training irrespective of whether at the time they had a child placed with them. They received a foster allowance if a child was placed with them. This was the allowance paid to ordinary foster carers (finding in fact 4). Thirdly they were permitted to take their holidays without the child placed with them. Ordinary foster carers were expected to take the child with them (finding in fact 5). Their application was considered by a panel appointed in terms of Regulation 22 of the **Looked after Children (Scotland) Regulations 2009** (finding in fact 8).

5. In findings in fact 9-10, the Employment Judge makes a series of findings about the Oregon method which was to be applied by the foster carers. The Claimants were put through an intensive training programme and after completion of training, signed a document called a UKEATS/0011/18/JW

“Connex multi-dimensional treatment foster care Looked after Children (Scotland) Regulations 2009 Foster Care Agreement” (hereafter the “Connex Agreement”) (Core Bundle Supplementary Bundle p 171). The Claimants are identified as “counterparties”, terminology redolent of an arrangement based in contract, and the Agreement is dated 15 and 16 March 2011. It is stated to come into effect on 11 April 2011 and to endure until the foster carer ceases to be registered with “Connex Multi-Dimensional Treatment Foster Care” (finding in fact 12). The agreement sets out the obligations of each party. It is sufficient to say that there are numerous obligations contained in the agreement. The cumulative effect of these obligations is that the Council arrogated to itself a high level of control over the provision of services to children placed in the Claimants’ care. I note that clause 3.4 provides information about the use of the “child or young person’s allowance”. It is clear that its purpose is to defray the costs of having a child on placement. It follows that the professional fee is by contrast a form of remuneration for the services provided by foster carers. The income tax arrangements in that connection are set out in clause 3.7. In finding in fact 14, the Employment Judge sets out clause 3.8 of the agreement. It is a detailed account of how fees are to be paid and the services to be provided in return. The agreement gives the “PS and SSW” (Programme Supervisor and Supervisor/Social Worker) a discretion as to whether the Council should meet any increase in house insurance premium arising from the provision of the fostering services (finding in fact 13). The agreement contained provisions setting out the way in which the Council would keep the foster carers provision of services under review and their obligations towards the children placed in their care (finding in fact 15, page 12 lines 6-30). Finding in fact 19 explains that the foster carers were obliged to supply a daily report on any child in their care.

6. At finding in fact 21 (page 15 line 30), the Employment Judge notes the terms of the Connex MDTFC payment policy. The policy states that the foster carers are self-employed. In my estimation, this indicates that the author of the document considered that foster parents under the scheme were in a contractual relationship with the Council. This understanding explains the Council’s direction that foster carers should be responsible for Income Tax and National Insurance contributions exigible on their remuneration. Such an understanding is at variance with the submissions that Mr Napier QC made on behalf of the Council as to the true legal status of foster carers (set out hereunder).

7. At finding in fact 27, the Employment Judge finds that the arrangement with the foster carers entailed some degree of flexibility. They were not compelled to take any child that the UKEATS/0011/18/JW

Council proposed to place with them. Thus they were permitted because of Mr Johnstone's circumstances to turn down a child who had a history of making abuse allegations against her carer. In other connections, however, the Council in the person of the programme supervisor had total control over the delivery of services to the foster child (finding in fact 30).

### **The Statutory Framework**

8. The Council argued that the role of a foster carer was statutory and non-contractual. In order to analyse this submission, I start with a consideration of the Regulations that are the basis for the Council's power to enter agreements with foster carers. The **Looked After Children (Scotland) Regulations 2009** provides as follows -

**"24. Agreements with foster carers**

**Where a local authority make a decision to approve a person as a foster carer that authority must enter into a written agreement with the foster carer regarding the matters and obligations in Schedule 6 and any other matters or obligations as the authority consider appropriate."**

9. Schedule 6 to the **Looked After Children (Scotland) Regulations 2009** provides as follows:

**"Matters and obligations in Foster Care Agreements**

- 1. The support and training to be given to the foster carer.**
- 2. The procedure for the review of approval of a foster carer.**
- 3. The procedure for handling of complaints against foster carers.**
- 4. The procedure in connection with the placement of children, and in particular—**
  - (a) the matters to be covered in foster placement agreements and the respective obligations, under any such agreements, of the local authority and the foster carer;**
  - (b) the financial arrangements which are to exist between the local authority and the foster carer, including any special financial arrangements in relation to particular categories of children who may be placed with the foster carer;**
  - (c) the local authority's arrangements for meeting any legal liabilities of the foster carer arising by reason of a placement; and**
  - (d) the procedure available to foster carers who wish to make representations to the local authority which placed the child.**
- 5. The foster carer's obligation to give written notice to the local authority forthwith, with full particulars, of—**
  - (a) any intended change of address;**
  - (b) any change in the composition of the household, any other change in personal circumstances, any other event affecting either the foster carer's capacity to care for any child placed or the suitability of the household and any criminal convictions arising between approval and subsequent reviews; and**
  - (c) any further request or application of a kind mentioned in paragraph 11 of Schedule 3.**
- 6. The foster carer's obligation—**
  - (a) not to administer corporal punishment to any child placed with them;**
  - (b) to ensure that any information relating to a child placed with them, to the child's family or to any other person, which has been given in confidence in**

connection with a placement is kept confidential and is not disclosed to any person without the consent of the local authority;  
(c) to comply with the terms of any foster placement agreement, to care for the child placed with the foster carer as if the child was a member of that person's family and in a safe and appropriate manner and to promote the child's welfare having regard to the local authority's immediate and longer-term arrangements for the child;  
(d) to notify the local authority immediately of any serious illness of the child or of any other serious occurrence affecting the child; and  
(e) where the placement is terminated, to allow the child to be removed from their home by the local authority."

10. The words "written agreement" appear in Regulation 24. The words "written agreement" ordinarily signify a contractual document. An examination of the paragraphs, however, reveals that some of the terms are not ones that arise from the law of voluntary obligations. Likewise, the word "obligation" (see paragraphs 5 and 6) often signifies an obligation in contract. But some, at least, of the obligations are duties arising from statute law. The obligation not to administer corporal punishment emerges from the **Criminal Justice (Scotland) Act 2003** s.51. The obligation of confidentiality emerges, at least in part, from the **Data Protection Act 2018** and its predecessors. Although a foster carer agrees to these terms when he or she signs the agreement, I consider that their force does not arise from the willingness of the foster carer to be bound by these terms but from their status as statutory duties. I accept a contract which mirrors the general law may have independent contractual effect (see Gloag on Contract (2<sup>nd</sup> ed.) p 6) but in the context of this "agreement", I consider that these terms are designed to inform the foster carers of their duties. In my view, this is the proper implication from the presence of other terms in the written agreement that are designed to inform the foster carer of the procedures and mechanisms that exist to enable a fostering service to operate efficiently and fairly (see below). The terms provide information rather than representing a contractual agreement. In this situation, I do not consider there was any intention to create a set of separate contractual obligations to parallel statutory duties. Another example of this is the obligation under paragraph 6(e) to co-operate with the local authority should it be necessary to remove a child. The power to remove a child exists independently of this obligation under the **Foster Children (Scotland) Act 1984** s. 12(1). It permits a court order to be obtained if the local authority wishes to remove a child. The purpose of the obligation appears to be designed to inform the foster carer of the local authority's expectation rather than to formulate an obligation in contract. I consider it unlikely that this term was designed to give rise to an action for delivery of a child which would be the concomitant contractual remedy if this was an ordinary contractual agreement.



11. In addition, I note that paragraphs 1-3 create a duty on the part of the Council to include certain pieces of information in the agreement. The information covers the support and training to be given to the foster carer, the procedure for the review of approval of a foster carer and the procedure for handling of complaints against foster carers. This indicates that the agreement is in part designed to provide information to the foster carer that will be of use to him or her. These are “matters” which would not normally be regarded as lying within the province of the law of contract. They are designed to inform the Council of the matters they should include in the agreement and are enabling in character.

12. There are other terms however that are not duplicates of duties arising in statute or procedures devised to provide support to and regulation of foster carers.

13. Paragraph 4(b) provides that the written agreement must set out -

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

14. This paragraph does not specify the content of the financial arrangement. It appears to be an enabling power. Although the word “ordinary” foster carer does not appear in the Regulations, paragraph 4(b) acknowledges that local authorities may enter into “special financial arrangements”. This is an acknowledgement that both ordinary and special financial arrangements may be created. I take it that the arrangement entered with the Claimants in this case is an example of a “special” financial arrangement. The Connex Agreement is therefore an arrangement that the Council was entitled to enter under statutory powers.

### **Is the Arrangement with the Claimants Contractual?**

15. In this case, I must look to both the words of paragraph 4(b) within their statutory context and the terms of the agreement entered between the parties in order to determine whether the arrangement was contractual. The content of the paragraphs in Schedule 6 vary. Some are prescriptive and specify the term that is to appear in the agreement. The terms of this character however are ones that I consider to be non-contractual for the reasons outlined above. In assessing whether or not there is a contract and specifically a contract of employment I consider the financial arrangements in paragraph 4(b) and the powers of control and mutuality of obligation under paragraph 4(a) are capable of giving rise to a contract of employment. The **2009 Regulations** do not prescribe the financial arrangements. The financial terms are

formulated by the local authority and sent by the local authority to the foster carers. Their arrangement cannot work without their agreement to the terms. This indicates that the arrangement is contractual. The terms are not prescribed by statute.

16. I note that the **2009 Regulations** do not require the agreement to appear in a single document. Thus, there is reference to a Foster Care Agreement and also a Foster Placement Agreement (e.g. paragraph 6(c)). I am content to assume that the Mainstream Foster Care Agreement should be read alongside the Connex Agreement so that the terms agreed represent the agreement desiderated by the **2009 Regulations**.

17. The Connex Agreement and the Mainstream Foster Care Agreement (Core Bundle p. 183) contain terms relating to fees, holidays, tax etc. (finding in fact 12) all of which are typically contractual and typically relate to employment. I consider that but for mutual agreement there would be no obligation to pay the sums agreed and no obligation on the part of the foster carer to accept any placement.

#### **Are the Claimants Employees of the Council?**

18. It is of course insufficient for the Claimants to show that they had a contract with the Council. In assessing the further question of whether these terms are indicative of a contract of employment, I note that the terms dealing with remuneration and holiday entitlement are typical of a contract of employment. In Harvey on Industrial Relations and Employment Law there is a discussion of the nature of contracts of employment. The author of the relevant section states that the “essence of the relationship... is the undertaking by one to serve another in return for a wage” (AII 4A 139). This aptly describes the arrangement between the Claimants and the Council. A lesser feature of a contract of employment is “indemnity for the costs, claims and expenses incurred in carrying out duties” (AII 4A 145). In this connection, see finding in fact 13. This likewise encourages me to conclude that a contract of employment was in existence.

19. Another feature of the arrangement that points towards a relationship of employment is the degree of control that the Council exercised over the Claimants. Although the Mainstream Foster Care Agreement contains a variety of terms that exert a degree of control over the Claimants, the Connex Agreement exerts significant additional control. In particular they were required to give up other employment, although that requirement was partially relaxed for Mr Johnstone. They were required to attend training on a regular basis and when a child was  
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placed with them report daily to the Council. In this connection I refer to the conclusions of the Employment Judge in paragraph 64. He adumbrates the various ways in which control was exerted by the Council over the Claimants.

20. A typical feature of employment is the acquisition of control by one party over another party in the performance of their duties; see **Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 1 All ER 433. McKenna J desiderated that an employee “agrees expressly or impliedly, that in the performance of that service he will be subject to another’s control in a sufficient degree to make that other master” (see generally Harvey on Industrial Relations and Employment Law AI B 8). This factor points to the existence of a contract of employment. I note that unlike “ordinary” foster carers the Claimants were paid a substantial fee and not just expenses. Unlike “ordinary” foster carers they were permitted to take a holiday and were not required to take the child with them.

21. I accept that in assessing whether these factors supported the existence of a contract of employment, the Employment Judge was entitled to conclude that the arrangement involved mutuality of obligation and a “very high degree of control” over the Claimants in the provision of services. I accept that the various factors adumbrated in paragraph 64 point to the sort of control desiderated in **Ready Mix**. In this situation, I consider the Employment Judge was entitled to conclude that the relationship between the Claimants and the Council was that of a contract of employment.

22. These terms are not prescribed in statute. They appear in agreements that the local authority was empowered to enter. Paragraph 4(a) of the **2009 Regulations** states that the agreement must contain -

**“the matters to be covered in foster placement agreements and the respective obligations, under any such agreements, of the local authority and the foster carer”**

23. I consider 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 matter of fact in every case to determine whether the degree of control is sufficient to constitute a relationship of employment. The foster placement agreements describe the way in which the service provided is to be delivered.

I expressly decline to consider whether the level of control exercisable under an “ordinary” foster care arrangement brings the contract within the scope of a contract of employment.

### **Other non-contractual possibilities**

24. Although there may be cases where the parties would not wish to have a contract and do not consider that the arrangement should be understood as a contract, this case does not appear to fit into that category. The Council’s documentation refers to tax and NI as well as self-employment. Such a state of affairs indicates a perception that the arrangement was contractual. In any event in a case involving financial matters and the provision of services I consider that the true character of the agreement is to be ascertained objectively and not merely by a consideration of what the parties considered the position to be.

25. It was not submitted to me that the relationship is *sui generis*. There was a faint suggestion that foster parents might be seen as office holders but the cases and textbooks do not mention this possibility. The holders of office belong to categories long recognised in law e.g. judges, priests, ministers of religion. I am reluctant to entertain the possibility that foster carers are office holders in the absence of any support from any case or statute. There is nothing about the provision of services to children that precludes their provision under a contract of employment. Residential establishments employ staff to provide care to children. Nor does the fact that the services are provided in the home preclude the existence of a contract of employment. Many employees work at home. I acknowledge that the relationship between the child and the foster carer is one of special delicacy and ought to mirror that between a parent and his or her own child (**NUFPC v Certification Officer** [2019] IRLR 860 at paragraph 46). I accept that parents do not look after children because they are employed to do so. But the relationship under scrutiny in this case is the relationship between the Council and the Claimants. I do not accept that there is a necessary repugnancy between a relationship of employment with the Council and a caring relationship between a foster carer and a child. The degree of control the Connex Agreement gives the Council over the relationship between a foster parent and a child suggests that there is no exact analogy with the relationship between a parent and child.

### **The Position in England**

26. I was urged by Mr Napier QC to avoid reaching a conclusion that would be at variance with the law in England and Wales. He acknowledged that I was not bound by the English  
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authorities he cited but argued that the conclusions of the English courts should be kept in mind and treated as a guide. I accept that the English cases are not binding on me. They are not binding in a formal sense since they involve different statutory provisions. They do not involve an interpretation of the 2009 Regulations. Nor are they binding on me inasmuch as they depend on an assessment of English contract law. In this case, I must apply Scots Law in determining whether a contract exists. I do not consider that it is necessary that I should identify a speciality of Scots Law. I consider that I should simply examine the Scottish law of contract and form a view as to whether it supports the existence of a contract. It is not appropriate to assume that English law and Scottish law are the same, see *The Law of Contracts and Related Obligations* 3<sup>rd</sup> ed. D M Walker p 7 para. 1.17 for an account of the differences between Scottish and English contract law. The English cases are available as a valuable source of comparison and guidance but not as binding authority. I also note that the English cases cited to me differ on their facts. I consider that I should bear in mind the possibility that the English cases are to a degree fact-specific.

27. The leading authority in England on the question of whether the relationship between a local authority and a foster carer is one of employment is **W v Essex County Council** [1998] 3 WLR 534; [1998] 3 All ER111. There, foster carers had been allocated a 15-year-old boy. While in their care, he sexually abused their own children. The Council had falsely represented to the foster carers that the boy was not a sexual abuser. They sued the Council on a number of grounds including breach of contract. The foster carers had signed an agreement to become foster carers. Stuart Smith LJ deals with the case based in contract from paragraph 47 onwards. At paragraph 50 he states -

**“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 W.L.R. 636 , 643f.”**

28. He then refers to **S v Walsall Metropolitan Borough Council** [1985] 1 WLR 1150; [1985] 3 All ER 294 at paragraph 51 and states -

**“The contents of the agreement are strictly laid down in the regulations and cannot be varied. The remuneration is set by the statutory scheme and cannot be freely negotiated.”**

29. Both Judge and Mantell LJ agreed with his disposal of the contractual argument but did not discuss the issue.

30. Stuart-Smith LJ's first reason for rejecting the argument that the foster parents had a contract with the local authority was based on ordinary principles of English contract law. In this connection he relied on **Norweb Plc. v Dixon** [1995] 1 W.L.R. 636.

31. In **Norweb**, it was argued that if a person is compelled to offer services to another, the arrangement entered cannot be characterised as contractual (p 641G-H). In that case the electricity supplier was compelled by statute to provide services providing certain statutory criteria were met and had no discretion not to supply. Dyson, J stated -

**“In my judgement the legal compulsion as to both the creation of the relationship and the fixing of its terms is inconsistent with the existence of a contract (p 643 F-G).”**

32. I accept that this would also be the case in Scots Law. But in the present case, the findings in fact indicate that the foster carers chose to enter the agreement having been trained by the Council and having had an opportunity to scrutinise the terms of the agreements offered. I do not consider therefore that the reasoning of Dyson J in **Norweb** has any application to the facts of the present case. The agreement was not foisted on the Claimants.

33. Stuart-Smith LJ's reasoning also relies on the principle of freedom of contract. He considered that there was compulsion both as to the creation of the relationship and the fixing of its terms. In this situation he concluded that there was no contract. Freedom of contract is certainly one of the key philosophical principles underlying the law of contract; see e.g. Chitty on Contracts 33<sup>rd</sup> ed. (Volume 1 p. 25, paras. 1-030-1-031). But it must be open to doubt whether this principle is infringed where a party freely accepts an offer even where the offer is on fixed terms.

34. This observation perhaps discloses the essential difference between the present case and **W v Essex County Council**. In that case, the foster carers sought to persuade the court that there was an implied contractual term that paralleled the duty of care in tort to refrain from placing with the foster carers a child that posed a threat of harm to the foster carers' own children. In assessing the existence of that term, the Court's attention was focussed on the overall statutory scheme and not on financial terms far less issues of control. Stuart-Smith LJ's analysis takes its colour from an assessment of the statutory apparatus as a whole. He

considered that it was inappropriate to describe the consent of a foster carer to a set of terms fixed by statute as contractual consent.

35. Speaking generally I would observe Scots Law uphold contracts that are freely entered even though their terms are not open for negotiation (McBryde *The Law of Contract in Scotland* 3<sup>rd</sup> ed. p 142 6-09). Offers on standard terms may be accepted and then enforced as binding contracts (see McBryde *The Law of Contract in Scotland* 3<sup>rd</sup> ed. p 172 6-97). As I understand it, the Law of England is to the same effect. That being so, I consider that Stuart-Smith, LJ's words should be read in the light of the case before him. As with this case, it would appear that many of the terms in the arrangement in **W v Essex County Council** were not truly contractual in nature. Some of the terms were of an administrative nature designed to describe how the parties' relationship would be conducted. Some were duties derived from other statutes. While the arrangement is described as an agreement, I doubt whether the agreement created a contract. The scheme already existed in statute and the foster carer's consent should I think be understood as an agreement to abide by the terms of the statutory scheme. Unlike the present case, there was no package of conditions designed to provide remuneration. Nor was there any consideration of the degree of control exercised by the local authority over the foster carers.

36. Stuart-Smith LJ also relied on **S v Walsall Metropolitan Borough Council**, another Court of Appeal authority. There, the plaintiff was a child who had been injured when with foster carers and the question was whether the Council were responsible for the foster carer's actions on the principle of agency. The child did not argue that the foster carers were employees of the Council. The Court of Appeal examined the **Children Act 1948** and the **Boarding out of Children Regulations 1955 (1955/1377)**. The Court concluded the relationship between the Council and the foster carers was governed "solely" by the statutory scheme. The Court therefore accepted that unless the statutory scheme constituted the foster carers as agents, it was not possible to go outside the scheme to create a relationship of agency. Oliver LJ's reasoning proceeded on the basis that the statute and the 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." (p.1154F). He stated 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" (p. 1155 E).

37. It is instructive to consider the background to **S v Walsall Metropolitan Borough Council**. As Oliver LJ states, the **Boarding out of Children Regulations 1955** contains a detailed statutory scheme for the provision and regulation of foster care. In a schedule at the rear of the **1955 Regulations** is a “Form of Undertaking”. It contains seven brief undertakings that to some extent mirror the paragraphs in Schedule 6 of the **2009 Regulations**. But there are no provisions about financial matters. The degree of control exercised over foster carers is limited. Oliver LJ understandably approached the **1955 Regulations** as a comprehensive statutory code. I do not consider these provisions are to be compared with the detailed provisions of the Connex Agreement in this case. To the extent therefore that Stuart-Smith LJ’s reasoning depends on **S v Walsall Metropolitan Borough Council**, I do not consider that it provides guidance relevant to the disposal of the present case.

38. In **W v Essex County Council** the Court considered the **Foster Placement (Children) Regulations 1991**. By that stage, the undertakings referred to in the **1955 Regulations** had been replaced by agreements. Schedule 2 covers the matters to be contained in a Foster Care Agreement. Schedule 3 covers Foster Placement Agreements and refers at paragraph 2 to the duty to set out the financial arrangements. The matters to be covered in the agreements are very similar to the matters that appear in schedule 6 of the **2009 Regulations** with which this case is concerned.

39. The remainder of Stuart-Smith LJ’s disposal of the contractual case (p 113 E-H) is absorbed with other matters. He explains why in his judgement it was important to notice that the Code of Practice was not binding in law and why it was not possible to imply the terms contended for. The present case does not involve a Code of Practice or implied terms.

40. **W v Essex County Council** was followed in **Rowlands v Bradford MDC** [1999] 3 WLUK 523. My bundle of authorities does not contain this decision. Its effect is summarised in other cases however. It is a decision of Stuart-Smith, Potter and Brooke LJ. It does not add anything to **W v Essex County Council**. I have considered **Lambert v Cardiff CC** [2007] EWHC 869 (QB). It too follows **W v Essex County Council** (paragraph 116). His Honour Judge Hickinbottom (as he then was) adopted the reasoning of Stuart-Smith LJ. He expressed the view that if the provisions of an agreement with a local authority contained provisions required by the statutory scheme such an agreement was not a private law contract. He concluded –

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**“The relationship between authority and carers is not regulated by private law, but by the comprehensive statutory scheme, of which these agreements formed part (para. 117).”**

41. I have had regard to the recent decision of **NUPFC v Certification Officer** (above). In this case, the Employment Appeal Tribunal was concerned with whether the claimant, a union set up to represent the interests of foster carers, was entitled to be registered under s 2 of the **Trade Union and Labour Relations (Consolidation) Act 1992**. To qualify for registration, the organisation had to consist “wholly or mainly of workers” within the meaning of s 1 of the **1992 Act**. Under s.296 of the **1992 Act** a worker was an individual who works under a contract. The President considered himself bound by the decision in **W v Essex County Council** and rejected the appeal on the basis that foster care agreements were not contracts. He did however go on to offer a number of obiter comments in support of **W v Essex County Council** (paragraphs 37-40, 43). The President was also referred to the decision of the Employment Judge in the present case. He stated -

**“In our judgement the facts of that case provided a clear basis for taking a different approach to that taken in the W line of authority.”**

42. I have also had regard to **Bullock v Norfolk County Council** [2011] 1 WLUK 370.

### **Conclusion**

43. Nothing in these cases persuades me that the Employment Judge was wrong. **W v Essex County Council** does not require me to hold that the agreements reached in this case were non-contractual.

44. Where the English cases involved the so called “ordinary” foster care arrangement, it would appear no fee or salary was provided. I am not inclined to think that the distinction between fees and expenses is crucial however to the question of whether there is a contract. Thus an agreement to pay expenses stands on the same position as an agreement to pay a fee. But the nature of the payment might well make a difference to the question of whether the contract was one of employment. A financial arrangement that involved the payment of fees might indicate that there was no remuneration for services rendered. Whether or not the sums paid were or were not commensurate with a contract of employment would involve an enquiry into the facts. Here, the Employment Judge decided that the Claimants were being paid for their services and were subject to the control of the Council. This enabled him to conclude that

there was a contract of employment. Nothing in the English authorities requires that conclusion to be disturbed.

### **An Alternative Approach**

45. Mr. Napier QC invited me to entertain the possibility of a hybrid arrangement. He argued that those elements of the Claimants' arrangement that derived from statute could be regarded as being on a statutory footing and as non-contractual. By contrast he argued those parts that were "add ons" could be regarded as contractual. As I have indicated however the position is more complex than that. The contractual documents cover a wide variety of issues some of which overlap with statutory matters. There was no detailed breakdown of the contractual arrangements setting out what elements of the arrangement were statutory and which were contractual and which were both.

46. As I have explained, I agree with Mr Napier QC that the arrangement in this case is a combination of terms fixed by statute and terms fixed by contract. As I have also explained, there is the possibility of overlap between these two categories. Where there are terms which are fixed by statute and also expressed in contractual form, it will be necessary to decide whether the duties and obligations in question can sound in both statute and contract. To decide that issue would require detailed submissions on the terms in question. The possibility arises that some terms are fixed wholly by statute so that the use contractual terminology may not be eloquent of an intention to enter into contractual relations. It may be that statutory duties and contractual obligations can operate in parallel. No submissions were made to me in that connection. I have concluded that I do not require to say more about the issue.

47. In this case, the key issue is whether the terms that set out the Claimants remuneration and the terms that provide the Appellants with control over the Claimants are principally contractual as opposed to statutory. I consider that they are. I am inclined to think that the terms arising under paragraph 4 (b) are contractual. I am inclined to think that the terms in the Connex Agreement are contractual. But in the absence of submissions designed to identify the boundaries of the contract I am unwilling to be more precise. In my judgment, the Employment Judge was correct to conclude that the arrangement contains all the elements of a contract of employment. In my opinion, the contract of employment is accompanied by a variety of statutory duties. Some of these appear to overlap with contractual obligations.

**Plea ad misericordiam**

48. Mr Napier QC advised me that the Connex Agreement was not drafted by lawyers and 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. As I understood him this submission was designed to persuade me that if the Council lacked the intention to enter into a contract of employment I should not be readily persuaded that one had come into existence. I was also given to understand that if the Claimants succeeded there could be serious repercussions. The legal status of foster carers in general would become uncertain. It was submitted that since a variety of important and burdensome statutory responsibilities attend the employment relationship, this would be undesirable. I do not consider however that I should be influenced by the possibility that the Council may have inadvertently altered the status of the Claimants. My task is to consider the position objectively. I have sought to make it clear that there are certain specialities about the present case. I have not sought to address the position of the ordinary foster carer. In my opinion none of these considerations affect my decision.

**Disposal**

49. In these circumstances I refuse the appeal and remit the case back to the Employment Judge to proceed as accords.