



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103972/2016 & 4103973/2016

Reconsideration Hearing (On the Papers) Held at Dundee on 20 October 2017

Employment Judge: I McFatridge (sitting alone)

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Mr James Johnstone

**First Claimant
Represented by:
Written submissions**

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Mrs Christine Johnstone

**Second Claimant
Represented by:
Written submissions**

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25 **Glasgow City Council**

**Respondents
Represented by:
Written submissions**

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RECONSIDERATION JUDGMENT OF THE EMPLOYMENT TRIBUNAL

- 35 1. The decision that the claimants were employees of the respondents and the Tribunal has jurisdiction to hear the claims is affirmed. The matter should proceed to a Final Hearing.
- 40 2. The finding in fact at paragraph 31 that the claimants' annual allowance had been stopped is varied to the effect that the claimants' annual allowance still continues.

The claimants currently do not have a placement but are receiving an allowance and expect to be taken before a panel within the near future.

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REASONS

1. I issued the Judgment in this case on 1 August 2017. On or about 14 August 2017 the respondents applied for a reconsideration of that decision by e-mail. On 22 August 2017 I advised the parties that I had not refused the application in terms of Rule 72. The claimant was requested to provide a response and the parties were asked to confirm whether they were content for the application to be dealt with on the basis of written submissions. Both parties indicated that they were happy for the reconsideration to be dealt with on the basis of written submissions. I have accordingly dealt with the matter on the basis of
- (i) the respondents' application dated by e-mail dated 14 August 2017,
 - (ii) the claimants' written response dated 5 September 2017,
 - (iii) the respondents' further response to this submitted 18 September 2017,
 - (iv) the claimants' final submissions dated 26 September 2017, and
 - (v) the respondents' final submissions dated 7 October 2017.

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Terms on Which Reconsideration is Sought

2. The respondents considered that I had incorrectly recorded the evidence in several respects. Having considered my notes of evidence and the judgment I would respond to the various points made as follows.
- (1) The respondents indicate that the finding in paragraph 4 to the effect that both claimants were asked to give up their employment was incorrect. My recollection of the evidence is that paragraph 4 is correct when it states that foster carers were not expected to be engaged in any other paid employment. This is confirmed at Section 38 of the MTFC Agreement (page 106) where it states that

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“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 placement once approval from the decision maker has been received and agreement from the PS to commence.”

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I entirely accept that in this case the claimants were told that Mrs Johnstone would require to resign from any other employment but that Mr Johnstone would be entitled to continue with his cleaning business two or three days a week. Mr Johnstone's evidence was that if he wished to increase the hours spent on his cleaning business he would require to obtain the respondents' consent. I also accept that at a later stage Mr Johnstone sought and received consent to work as a relief casual carer with a neighbouring Council.

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(2) I agree that in paragraph 31 I have conflated the evidence regarding the claimants with the evidence given by Ms Cronin regarding Mrs Shaw. I appear to have mis-noted Mr Johnstone's evidence during the passage where he confirmed that at present they did not have a placement in that I had understood that like Mr and Mrs Shaw the claimants had also had their payments stopped. I agree that this factual finding requires to be removed from the Judgment and have noted that above.

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(3), (4) & (5) The section refers to the purported consequences of my erroneous factual finding in relation to the claimants having had their payments stopped and will be referred to below.

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Effect of Change of Factual Finding

3. With regard to the first point made by the respondents relating to the suggestion that Mr Johnstone was also required to give up work I confirm that, as noted above, my analysis of the facts proceeded on the basis that Mr Johnstone had been permitted to continue to work in his cleaning business and then to take up part-time employment albeit that he required to obtain the consent of the respondents to this. I can see no reason to revisit my decision on the basis that I was under any misapprehension as to the facts.

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4. With regard to the second point it is clear that so far as my decision was based on the suggestion that the claimants had had their own payments stopped prior to being taken to a panel then my suggestion that the principal of no work no pay was being applied by the respondents to the claimants cannot stand. That having been said the respondents have not sought to challenge my factual finding to the effect that Mr and Mrs Shaw who were also MTFC carers had their payments stopped prior to being taken to a panel. I therefore consider that the respondents' treatment of Mr and Mrs Shaw is still relevant to my overall analysis as to whether or not the claimants were employees. The fact that the respondents ceased payments to Mr and Mrs Shaw shows in my mind that they were applying the principal of no work no pay to MTFC carers. I do not agree that Mr and Mrs Shaw were in a different legal position from Mr and Mrs Johnstone and I endorse fully the claimants' representations regarding this.

5. At the end of the day I considered that this was one of these situations where I was required to respond positively to the respondents' application and reconsider the judgment. I agree with the claimants' representative that the case of ***Outsight VB Limited v Brown [2015] ICR D11*** enjoins me to approach an application for reconsideration under the new rules on a similar basis to the approach which would have been taken under the more prescriptive regime set out in the old rules. In particular I should only be prepared to reconsider a Judgment on the grounds that the interests of justice require it there has been some kind of procedural mishap. I quite accept that my erroneous finding that the claimants' own payments had been stopped in the same way as that of Mr and Mrs Shaw was such a procedural mishap. That having been said and for the reasons given I do not consider that this changes my overall judgment in any way. I was required to adopt a multi-factorial approach. The legal sequelae to the respondents having unilaterally stopped payment of the claimants' allowances was only one of the factors which I took into consideration. If that factor no longer exists, which it does not, then I still consider that I had other grounds for coming to the conclusion which I did, not least the fact that Mr and Mrs Shaw's payments were ceased in the way which I thought the claimants' payments had been. At the end of the day my task was to approach the circumstances of the present case in light of the ***Bullock***

judgment and in particular decide whether the MTFC agreement between the parties was a contract or simply a foster placement agreement. I required to determine whether I could make the same factual finding as in the **Bullock** case to the effect that “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”. For the reasons given in my judgment I considered that the claimants were required by the respondents to play an active part in an extremely prescriptive therapeutic regime being applied to the young persons in their care. I believed there were ample grounds for believing that the facts in this case could clearly be distinguished from those in **Bullock** and having corrected my findings in facts to the extent I have I do not see any reason to change my Judgment.

Employment Judge: I McFatridge
Date of Judgment: 20 October 2017
Entered in register: 26 October 2017
and copied to parties