Cases Number: 3204635/2021

2300852/2022

3302687/2022

EMPLOYMENT TRIBUNALS

In Case No: 3204635/2021

Claimant: **Ms Pauline Oni**

Respondent: **London Borough of Waltham Forest**

In Case No: 2300852/2022

Claimant: **Ms Paulette Dawkins**

Respondent: **London Borough of Bromley**

In Case No: 3302687/2022

Claimant: **Ms Angela Reid**

Respondent: **London Borough of Haringey**

And in all cases

Intervener: **The Secretary of State for Education**

At: East London Employment Tribunal & Taylor House & by CVP

Before: **Employment Judge Crosfill**

On: 20, 21, 22, 23, 27 & 28 June 2023 (Evidence) 6, 7 & 8 February 2024 (Submissions - including deliberations in chambers on 8 February 2024)

Representation

Claimants: Ms Rachel Crasnow KC and Chris Milsom of Counsel instructed by TMP Solicitors LLP

Cases Number: 3204635/2021

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Respondents: Mr Richard Wilson KC (Evidence hearings only) and Mr Tom Wilding instructed by the legal departments of the Respondents

Intervener: Mr Robert Moretto of Counsel instructed by the Government Legal Service.

PRELIMINARY HEARING JUDGMENT

1. The Tribunal remains bound by the decision of the Court of Appeal in ***W v Essex County Council*** **[1999] Fam 90** and must find that the relationship between the Claimants and the local authorities for whom they worked is not pursuant to a contract.

2. The effect of the decision above is that on a domestic construction of:

   2.1. Section 230 of the Employment Rights Act 1996; and

   2.2. Regulation 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994; and

   2.3. Regulation 2 of the Working Time Regulations; and

   2.4. Section 54 of the National Minimum Wage Act 1998: and

   2.5. Section 83 of the Equality Act 2010,

   The Claimants are unable to show that the Employment Tribunal has jurisdiction to hear their substantive complaints.

3. That principles of EU Law do not require the Tribunal to interpret the Equality Act 2010 and the Working Time Regulations 1998 in a way that would permit the Claimants to pursue claims notwithstanding the absence of a contractual relationship because:

   3.1. In respect of claims of race and age discrimination there is no binding decision of the CJEU which requires (or permits) the Tribunal to depart from the binding authority identified above; and

   3.2. In respect of claims deriving from the Working Time Directive 2003, whilst there is binding authority of the CJEU requiring the domestic tribunal to treat the Claimants as workers for the purposes of that directive, the Claimants are precluded from the rights to daily or annual leave by reason of the exception found in Article 2 of Directive 89/391/EEC and domestically in Regulation 18(2)(a) of the Working Time Regulations 1998.

4. That the exclusion of the relevant Claimants from pursing claims under Sections 47B and 48 of the Employment Rights Act 1996 amounts to an unjustified interference of their Convention Rights under Article 10 read with Article 14. That in accordance with Section 3 of the Human Rights Act 1998 sections 230 or Section 43K of the Employment Rights Act 1996 can be interpreted as allowing the relevant Claimants to pursue these claims.

5. That the exclusion of the relevant Claimants from pursing claims under Part 5 of the Equality Act 2010 amounts to an unjustified interference of their Convention Rights under Article 8 read with Article 14. That in accordance with Section 3 of the Human Rights Act 1998 sections 83 of the Equality Act 2010 can be interpreted as allowing the relevant Claimants to pursue these claims.

6. That that Article 1 of Protocol 1 of the Convention is not engaged in respect of the Claimants' claims under the National Minimum Wage Act 1998 or claims for Holiday Pay under the Working Time Regulations 1998.

REASONS

Introduction

1. The Claimants in the three case before me are, or were, foster carers providing care for children on behalf of the local authorities. The Claimants have presented claims before the Employment Tribunal in which they make complaints about their treatment at the hands of the local authorities who had placed children in their care. In each case the local authorities have defended the claims taking a preliminary point that the relationship between a foster carer and local authority is not one which entitles the Claimants to complain of their treatment before an employment tribunal. A foundation of that argument is that they say that there is binding authority from the Court of Appeal in the case of ***W v Essex County Council*** **[1999] Fam 90** that the relationship between local authorities and foster carers is not founded in any contract but is a product of the statutory regime.

2. At various points the Claimants have acquired the assistance of the National Union of Professional Foster Carers ('the NUPFC'). In ***NUPFC v Certification Officer*** **[2021] ICR 1397** the NUPFC obtained a declaration that: 'For the purpose of section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992, as applied in sections 2-4, the definition of 'worker' in section 296 (1) extends to persons who are parties to a foster care agreement with a fostering service provider within the meaning of regulation 27 (5) of the Fostering Service (England) Regulations 2011'. The Court of Appeal's route to that conclusion relied on it finding that the exclusion of foster carers from the right to form a trade union dedicated to

their profession was an unjustified interference with their rights under Article 11 of the European Convention on Human Rights. The Court of Appeal held that it was bound by ***W v Essex County Council***. As such the decision had no direct impact on the question of whether foster carers had the benefit of any employment rights. However, the NUPFC were given some encouragement by comments made by Bean LJ who described the reasoning in ***W v Essex County Council*** as *'puzzling'* and respectfully suggested that the matter should be revisited by the Supreme Court of Parliament.

3. Through a process of case management and transfer between regions the three cases before me are to be heard together for the purposes of resolving a number of preliminary points. The issues I need to determine have been the subject of careful agreement between the parties. I hope I do not do any damage by paraphrasing the main issues before me as follows:

   3.1. Whether in the light of the recent decisions of the Supreme Court, in particular, ***Uber BV v Aslam*** **[2018] IRLR 97,** ***W v Essex County Council***, still prevents the Tribunal from holding that the Claimants are able to access statutory rights because of the statutory language that refers to a contract; and

   3.2. Whether for the purposes of EU derived rights the existence of a contract is a precondition of exercising any such right; and

   3.3. In respect of rights that engage any of the rights and freedoms protected by the European Convention of Human Rights whether excluding the Claimants from these rights on amounts to a breach of Article 14 of the Convention being unjustified discrimination on the grounds of their 'other status'.

The Hearing(s)

4. Ms Oni's case was issued in East London Employment Tribunal. It was the subject of a great deal of case management and was listed for a final hearing in Mid 2023. She had indicated that she wished to take some, or all, of the points that I have determined during this preliminary hearing. On 24 February 2023 I conducted a preliminary hearing. At that hearing I considered applications for the cases of all three Claimants to be heard together for the purposes of determining preliminary issues and an application that the Secretary of State be joined to the proceedings under rule 34 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules'). I acceded to both applications.

5. I had directed that the parties agree a list of the issues to be decided at

the preliminary hearing together with a joint schedule of the findings of fact that the parties invited the tribunal to make. It was agreed that the 6 day hearing listed in Ms Oni's case could be utilised for a determination of the factual disputes with further days in December set aside for the legal arguments.

6. The hearing in June 2023 took place as planned save for the fact that the hearing occurred during a period of very high temperatures and coincided with the failure of the air conditioning in the East London Employment Tribunal. The administration was able to arrange for the matter to be transferred to the Tax Chamber situated at Taylor House where the remainder of the hearing was conducted in comparative comfort.

7. As planned the early stages of the hearing dealt only with evidence. The reason why there was a substantial delay between June and December 2023 when the submissions were due to be heard was the availability of Counsel. The Tribunal was able to accommodate an earlier date. Careful directions had been made for the exchange of written submissions and the preparation of bundle of authorities.

8. Mr Wilson KC had been preparing the written submissions of the Respondents. Prior to the hearing in December he informed the parties that he had not completed his submissions due to issues with his health. He asked that the matter be postponed. I acceded to that request on the basis that Mr Wilson KC was expected to make a full recovery within weeks. At that stage the Respondents were very keen to ensure continuity of Counsel and were not prepared to instruct Mr Wilding on the basis that he was the sole counsel. Ultimately Mr Wilson KC was unable to complete the submissions and Mr Wilding stepped into his shoes. Difficulties with Counsel's diaries for the postponed hearing required a high degree of flexibility from all sides. We were ultimately able to resume in February 2024 but only by conducting a hybrid video hearing as I was unable to be present at East London Employment Tribunal. The legal submissions were timetabled over 2 days.

9. I record that I was provided with an initial bundle 'the main bundle' that had 4257 pages. That was divided conveniently into sections. The evidence filed by the Secretary of State included a number of reports dealing with various aspects of the foster carer system. I was invited to read those reports in full and was able to do so.

10. Various supplementary documents were produced. A formal supplementary bundle added to the main bundle expanding it to 4469 pages. During the fact finding hearing additional documents were produced. In the main they were admitted by consent. Where there was a dispute I admitted the documents giving my reasons at the time. I was able to maintain an electronic file of all the documents produced. There

were a significant number of documents and I shall not list them here.

11. Before the hearing in February I was provided with written submissions. The Claimants' submissions ran to 109 pages and those of the Secretary of State to 64 pages. Mr Wilding provided a skeleton argument which was shorter at just 17 pages but Mr Wilding adopted many if not all the arguments of Mr Moretto. The parties provided a bundle of authorities which ran to 5333 pages. A small number of additional authorities were produced separately mainly to correct errors in the bigger bundle.

12. I have set out the volume of material I was provided with to give a flavour of the width of the dispute. In fairness to the parties many, but not all, the material I was provided with was important. I have referred to the material, submissions and authorities that I have felt necessary to resolve the disputes before me. To do so I have digested about 10,000 pages to just over 100. I have left a lot out. I have done so deliberately but have had regard to all the material that was expressly drawn to my attention.

The Witnesses

13. The parties had agreed that I should hear from the witnesses in each claim in turn with the Secretary of State calling its evidence at the end. I agreed as this allowed me to hear evidence about any local practices in each of the London boroughs. This meant that I heard from:

14. Pauline Dawkins on her own behalf; and then on behalf of the Respondent L.B. Bromley,

15. Wenifred Marshall, who is currently the Head of Service for Permanency within the People Department, Children Education and Families at the London Borough of Bromley; and then

16. Pauline Oni Pauline on her own behalf; and then on behalf of the Respondent L.B. Waltham Forest,

17. Roberta Onyekwelu, the Head of Placement and Resources at the London Borough of Waltham Forest.

18. I was provided with a further witness statement by LB Waltham Forest for George Rampat, a Debt Recovery Officer. His statement dealt with an allegation that there had been an overpayment to Pauline Oni. He did not attend to give oral evidence. His evidence was of little assistance to the issues I needed to decide. I then heard from:

19. Angela Reid who gave evidence on her own behalf and then from,

20. Sandi Basil the Service Manager for Fostering and Permanency at the LB

Haringey.

21. Finally Sophie Langdale was called to give evidence on behalf of the Secretary of State. She is a Portfolio Director: Children's Social Care Reform at the Department for Education. She is responsible for implementing the Government's policy and delivery goals in respect of Children's Social Care including fostering and residential care.

22. I shall say at this stage that I find that all the witnesses were doing their best to assist me. In the evidence of all the witnesses there was an entirely understandable desire to advocate for the position of their party. I was able to disregard that without difficulty and it did not detract from the helpful approach taken by all the witnesses.

23. What was entirely clear from the evidence of the parties is that every witness placed an enormous emphasis on the welfare of children in foster care. There was no disagreement about that. Where the parties differed on the fundamental questions I have to decide, was the question of whether affording the Claimants the rights they seek would have a beneficial or detrimental affect on the interests of the foster children.

The Issues

24. The parties had agreed a list of the factual and legal issues to be determined by the Tribunal. The list of issues that was agreed is set out as an appendix to this judgement.

25. The parties had prepared schedules of the findings of fact that they invited the Tribunal to deal with. I shall not include the composite schedule prepared by the parties as it is a long document. I have made findings of fact below limited to those that I considered necessary to determine the disputed issues.

Employment Status – the statutory provisions

26. The scope of the various employment rights afforded by the Employment Rights Act 1996 ('ERA 1996') is in part[1] delineated by Section 230 of the ERA 1996 the material parts of which say:

[1] Further provisions set out at sections 191 – 195 bring other occupational categories within the scope of the ERA 1996 whereas Sections 197 – 200 exclude or limit the rights of other categories of person

230 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;

and any reference to a worker's contract shall be construed accordingly.

27. The right to bring claims complaining of a failure to provide a statement of particulars of employment under Part I or a complaint of unlawful deductions from wages under Part II of the ERA 1996 is limited to workers who fall with within the definition of worker as defined in Section 230(3) above.

28. The right to complain of unfair dismissal is limited to employees who fall within the definition in Section 230(1) ERA 1996.

29. The right to complain of a breach of contract (including wrongful dismissal) under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is limited to employees by reason of the wording of Article 3 of that Order.

30. The rights afforded under the Working Time Regulations 1998 ('WTR 1998') are limited to workers as defined in Regulation 2 which defines worker in the same language as sub-section 230(2) of the ERA 1996.

31. The right to bring complaints under part 5 of the Equality Act 2010 ('EA 2010') is granted to a wide range of occupational categories and situations set out between sections 39 to 60A of the EA 2010. Section 39 and 40

provide protection to people who are 'in employment' Section 83(2) defines employment as:

> *'(2) "Employment" means—*
>
> *(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;*
>
> *(b) Crown employment;*
>
> *(c) employment as a relevant member of the House of Commons staff;*
>
> *(d) employment as a relevant member of the House of Lords staff.'*

Fostering - The Statutory Regime

32. There was no substantial dispute before me about the statutory regime applicable to foster care. It was the Claimants position that *'the overall framework* applicable *to foster care was set out by the CA in NUPFC v Certification Officer [2021] ICR 1397 at [21]-[64]. This applies to each of the Claimants'*. Their submissions briefly summarise the main features of the scheme. On behalf of the Secretary of State Mr Moretto sets out a more extensive summary of the statutory provisions. I did not understand the Claimants to take issue with that summary although there was one point of controversy in respect of the effect of the legislation.

33. I consider it sufficient for me to extract from the judgment of Underhill LJ in ***NUPFC*** the main features of the statutory scheme. I regret that this involves more extensive quoting than I would have wished but I have no doubt that the summary in ***NUPFC*** is more succinct than if I attempted to reinvent the wheel. I shall supplement those paragraphs only as far as is necessary and, where appropriate quoting from Mr Moretto's submissions only where those were uncontentious.

34. The Children Act 1989 ('CA 1989') is the starting point. Section 1 of that Act says: *'When a court determines any question with respect to…the upbringing of a child…..the child's welfare shall be the court's paramount consideration'*. Whilst the preliminary issues that I have to decide do not impact the upbringing of any particular child the Respondents and Secretary of State have urged me to have regard to this welfare principle.

35. Section 17 of the CA 1989 imposes a duty on any local authority to safeguard and promote the welfare of children within their area who are in need.

36. Underhill LJ's summary starts with the following passage:

22. Section 22C of the Children Act 1989, which applies to England and Wales, specifies the ways in which children who are "looked after" (a term defined in section 22) by local authorities may be accommodated and maintained. Subsections (5) and (6) provide that in circumstances where a child cannot live with a parent or someone in (broadly) an equivalent position, they must be "placed" either in a children's home or with "a local authority foster parent". Section 105 provides for "local authority foster parent" to be defined by regulations.

37. Underhill LJ's reference to somebody in a broadly an equivalent position is a reference to Section 22C(6)(a) which defines a placement *'with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent'*. This is often referred to as a 'family and friends' foster placement. Ms Reid was at least initially an example of such a foster parent. Placement of children in need with a friend or relative who is not already an approved foster parent is commonplace and permitted in the circumstances set out in Regulation 24 of the Care Planning, Placement and Case Review (England) Regulations 2010. That regulation provided for the temporary placement of a child with a connected person for a maximum of 16 weeks (extended to 24 weeks during the Covid Pandemic). There are as to be expected conditions of basic suitability imposed by regulation 24(2). The local authority must take immediate arrangements for the suitability of the temporary carers to be approved as local authority foster carers.

38. Underhill LJ continued with his summary of the legislation:

23. The Care Standards Act 2000 establishes a statutory framework for the regulation of agencies engaged in various kinds of social care, including both local authorities and "fostering agencies", which are defined (so far as relevant) as undertakings which "[discharge] functions of local authorities in connection with the placing of children with foster parents" (see section 4 (4)). Section 23 of the Act empowers Ministers to publish national minimum standards applicable to agencies. By section 49 those standards apply also to local authorities in the exercise of their relevant functions.

24. The primary regulations governing the provision of foster care services in England are the Fostering Service (England) Regulations 2011. These contain provisions as regards two kinds of "fostering service", namely a fostering agency and a local authority fostering service. (There is also reference to a "fostering service provider", who is, in the case of an agency, a responsible "registered person" within the agency and, in the case of a local authority, the authority itself.) The relevant provisions for our purposes are in Parts 4 and 5, which it is

convenient to take in reverse order.

25. Part 5 of the Regulations, which comprises regulations 23-32, is entitled "Approval of Foster Parents". It contains provisions under which a prospective foster parent (referred to as "X") is assessed for suitability by a specialist "fostering panel" on the basis of specified information and in accordance with specified procedures; and for regular reviews following an initial approval, with a power to the fostering panel to terminate an approval where the parent is found no longer suitable (regulation 28). Regulation 27 (5) reads:

"If a fostering service provider decide [sic] to approve X as a foster parent they must –

(a) give X notice in writing specifying any terms on which the approval is given, and

(b) enter into a written agreement with X covering the matters specified in Schedule 5 (the 'foster care agreement')."

Schedule 5 is entitled "Matters and obligations in Foster Care Agreements" and reads:

"1. Matters to be recorded

(a) The terms of the foster parent's approval.

(b) The support and training to be given to the foster parent.

(c) The procedure for the review of approval of a foster parent.

(d) The procedure in connection with the placement of children and the matters to be included in any placement plan.

(e) The arrangements for meeting any legal liabilities of the foster parent arising by reason of a placement.

(f) The procedure available to foster parents from making complaints and representations.

2. Obligations on the foster parent

(a) To care for any child placed with them as if the child was a child of the foster parent's family and to promote that child's welfare having regard to the long and short-term plans for the child.

(b) To give written notice to the fostering service provider without delay, with full particulars, of –

(i) any intended change of the foster parent's address,

(ii) any change in the composition of the household,

(iii) any other change in the foster parent's personal circumstances and any other event affecting either their capacity to care for any child placed or the suitability of the household, and

(iv) any request or application to adopt children, or for registration as an early years provider or a later years provider under Part 3 of the Childcare Act 2006.

(c) Not to administer corporal punishment to any child placed with the foster parent

(d) To ensure that any information relating to a child placed with the foster parent, to the child's family or to any other person, which has been given to them in confidence in connection with a placement is kept confidential and is not disclosed to any person without the consent of the fostering service provider.

(e) To comply with the terms of any placement plan.

(f) To comply with the policies and procedures of the fostering service provider issued under regulations 12 and 13.

(g) To co-operate as reasonably required with the Chief Inspector and in particular to allow a person authorised by the Chief Inspector to interview the foster parent and visit the foster parent's home at any reasonable time.

(h) To keep the fostering service provider informed about the child's progress and to notify it as soon as is reasonably practicable of any significant events affecting the child."

The policies referred to at 2 (f) relate to the prevention of abuse and neglect (regulation 12) and "acceptable measures of control, restraint and discipline of children placed with foster parents" (regulation 13).

26. Part 4 is entitled "Conduct of Fostering Services". I need only refer to regulation 17, which reads:

"(1) The fostering service provider must provide foster parents with such training, advice, information and support, including support outside office hours, as appears necessary in the interests of children placed with them.

(2) The fostering service provider must take all reasonable steps to ensure that foster parents are familiar with, and act in accordance with the policies established in accordance with regulations 12(1) and 13(1) and (3).

(3) The fostering service provider must ensure that, in relation to any child placed or to be placed with a foster parent, the foster parent is given such information, which is kept up to date, as to enable him to provide appropriate care for the child, and in particular that each foster parent is provided with a copy of the most recent version of the child's care plan provided to the fostering service provider under regulation 6(3)(d) of the Care Planning Regulations."

27. The Government has issued guidance to local authorities under section 7 of the Local Authority Social Services Act 1970 under the title The Children Act 1989 Guidance and Regulations Volume 4: Fostering Service ("the Guidance").'

39. I was provided with the following guidance issued under Section 7 of the Local Authority Social Services Act 1970:

    39.1. The Children Act 1989 Guidance and Regulations Volume 4, Fostering Services ("Fostering Services Statutory Guidance"); and

    39.2. Assessment and approval of foster carers: Amendments to the Children Act 1989 Guidance and Regulations Volume 4: Fostering Services, July 2013 ("Statutory Guidance on the Assessment and Approval of Foster Carers")

    39.3. Children Act 1989 Guidance and Regulations, Volume 2: Care Planning, Placement and Case Review ("Care Planning, Placement and Case Review Statutory Guidance")

    39.4. Family and Friends Care, Statutory Guidance for Local Authorities

40. A point of controversy between the parties arose from the submission made by Mr Wilding and Mr Moretto that the effect of the definitions in Regulation 2 of the Fostering Service (England) Regulations 2011 ('the 2011 Regulations'), is that foster carers in England are prevented by statute from being an employee or worker. The material parts of regulation

2(2) are as follows:

> *'In these Regulations, references to employing a person include employing a person whether or not for payment, and whether under a contract of service or a contract for services, and allowing a person to work as a volunteer, but do not include allowing a person to act as a foster parent, and references to an employee or to a person being employed are to be construed accordingly'.*

41. I will decide this disputed point at this juncture. I note that the 2011 regulations impose duties on a fostering service provider who employs staff. These duties are imposed by Part 4. Regulation 20 imposes standards of fitness. Regulation 21 sets out an obligation to impose a probation period, to provide a job description, to have a disciplinary procedure which provides for suspension in the interests of safety and welfare and imposes a positive duty to report wrongdoing. Part 3 of the 2011 regulations imposes standards that are expected by those who manage a fostering service.

42. Part 5 of the 2011 regulations sets out the process by which foster carers are to be approved. Recommendations are made in the first instance by the 'fostering panel' (the composition being regulated by Regulation 23). Regulation 25 provides that the foster panel has primary responsibility for making recommendations about the approval of foster carers and the terms of approval. In addition they may make recommendations about whether a person remains suitable for approval as a foster carer and upon what terms. In making those recommendations the foster panel is required to have regard to the information having obtained information required by Schedule 3. That schedule contains a broad list of personal characteristics, skills and experience. Regulation 27 deals with the circumstances where a foster care is approved by the fostering service. A foster service cannot approve a foster carer who is approved by another fostering service. The fostering service is required to have regard to the recommendation of the fostering panel. Under the same regulation decisions not to approve a foster carer may be challenged by an application to the Independent Review panel (see below).

43. Foster service providers must conduct reviews of any approval no less frequently than annually (Regulation 28(2) and (3)). A decision may be taken to terminate approval by the foster service provider such a determination may be challenged by an application to the Independent Review panel.

44. I would agree with the Respondents and Secretary of State that the regulations provide a difference in the approval processes for employees, managers and foster carers. I find that unsurprising. Each category caries

out a different function and a one size fits all approach to approval is inappropriate. I do not consider that the fact that the regulations exclude foster carers from the definition of employed persons within the regulations can be taken to mean that foster carers cannot ever be employed for other purposes as a matter of statute. In my view the clear purpose of the definition is to exempt foster carers from the approval processes applicable for employees. If they were not excluded from that definition then they would be subjected to both approval regimes. I would accept that this is an instance of there being a bespoke scheme for foster carers but that is a different point.

45. I am not persuaded that the 2011 regulations can be taken as a statutory bar to the employment of persons to act as foster carers. If a foster carer was employed as a foster carer the effect of the definitions in Regulation 2(2) would be that for the process of the approval process the foster panel and foster service providers would be required to follow the approval processes for foster carers as opposed to employees who were not foster carers. The regulations do not say that foster carers could never be employed by a foster service provider and there is no basis to read the regulations as precluding such an arrangement as a matter of law.

46. This decision answers the question posed at paragraph 2 of the list of issues.

Findings of Fact

47. Below I set out the findings of fact that I have thought necessary to determine the issues before me. I am very conscious that in doing so I am in part dealing with the same territory that was considered in ***NUPFC***. I see no benefit in me attempting to repeat an exercise already undertaken particularly where I would have nothing to add to the summary by Underhill LJ. I have therefore set out below the passages of Underhill LJ's judgment where I am satisfied that the evidence before me corresponds with that judgment. Where appropriate I have added to those findings. In particular focusing on aspects of the evidence that shine a light on the issues of employment status. I touch upon matters relied upon by the Respondents and Secretary of State to justify why they say foster carers should not be afforded the employment rights they seek but I return to that and make further findings when I expressly deal with the issue of justification below.

The Claimants

48. Paulette Dawkins had worked in a city office for 12 years before seeking a new path in social care. Encouraged by her own 12 year old daughter she decided to retrain and become a foster carer. Her motivation in doing so was a desire to offer a welcoming, loving and safe environment for children in her care. I find that she regarded this change as a change in

her vocation. It was something that she wished to do professionally. She would not have contemplated this path if she had not anticipated it generating sufficient funds for her to maintain her household. She was first approved as a foster carer for Tower Hamlets LBC in 1994 remaining as a foster carer for 6 years. She then transferred to a foster service provider 'Clarion' attracted in part by a more beneficial financial package. She remained with Clarion for 8 years until they closed. After a short period with another private foster care provider she was approved by Bromley in 2010. An attraction of working for Bromley was an understanding that there was a shortage of black foster carers in the borough. Paulette Dawkins says that she advocated for better treatment of black and ethnic minority children through a forum promoted by Bromley. This led to disagreements with both her and Bromley making allegations and counter allegations of racism. Ultimately she indicated that she had been forced to resign from being an approved foster carer in a letter sent on 23 March 2023. In her time as a foster parent Paulette Dawkins has fostered many children.

49. As a child Pauline Oni was placed by her parents in a private foster care arrangement which she says was commonplace at the time. She recalls that arrangement as having given her an idyllic childhood and adored her foster mother. She studied Film and Television at University and went on to have a career with the BBC and ITV. In 2009 she applied to be approved as a foster parent. Her motivation was informed by her own positive experience of foster care and a desire to 'give back' to other children. She was also motivated by concerns about safeguarding in the wake of well known failings of the care system. During her time as a foster carer Pauline Oni has had 5 children placed with her all of whom were between 16 and 17 years old. The placements lasted from as little as a few days to the longest which was just short of two years. The circumstances that led to Pauline Oni bringing her claim relate to the final child who was placed with her. She says that that child assaulted her. She relies upon her report about that as being a protected disclosure. She says that her relationship with the local authority declined because of her disclosure. She says that she was subsequently falsely accused of racism. She 'resigned' as a foster carer on 24 March 2021.

50. Angela Reid's decision to become a foster carer came about in different circumstances. As I have understood it she is an active member of her church. She had cared for a young mother who had mental health difficulties and maintained her relationship with her. She described how she came to care for the two foster children who were placed with her when she challenged the decision to revoke her approval as a foster carer before the Independent Review Mechanism in the following terms:

Angela shared that she received a telephone call from the Local

Authority as she was listed as an "auntie" to the children on their system. She explained that although she was not a blood relative, she has known the children's mother for over twenty years and has always helped the latter through her previous challenges. On 15th November 2018 there was a crisis and the social worker asked if Angela could have the children who were considered to be at risk from their mother and look after them for the time being. Angela expressed concern as she is retired and did not have the financial means to care for the children but said that she was reassured that support would be provided. She added that she attended the address and told the children's mother not to worry as she was going to care for them until their mother was well again.

51. Angela Reid was 67 years old at the point that the children were placed with her in 2018. She had had a career as an Admin Assessor. She had children, grandchildren and one great grandchild of her own. She was approved as a foster carer as a 'connected person' on 1 April 2019. She says that after a period LB Haringey asked her to consider being appointed as a Special Guardian for the children. She was reluctant to so having taken legal advice. She says that this led to the breakdown in her relationship with the local authority with what she says were unjustified allegations about the standard of care she provided. The children were ultimately removed from her care. Angela Reid believes that the reasons for this included her age which she suggests was discriminatory.

The fostering system in England

52. In ***NUPFC*** Underhill LJ gave the following description about the role of foster carers in England. He said:

> *37. In March 2018 there were about 75,000 looked after children in England. Of those, 73% (about 55,000 placements) were in foster care. We do not have the figures for the number of fostering households at that date, but in March 2016 it was about 44,000. Local authorities engage foster carers either directly or through an agency: the proportion is about 60:40. The great majority of foster carers undertake the role because it is something they want to do generally, and they are in that sense "professional"; but just under a fifth are family members or friends of a particular child who have become foster carers in order to help in their case (sometimes referred to as "kinship carers").*

53. Sophie Langdale was able to provide me with updated statistics for foster care in England. She told me and I accept that as of 31 March 2022 there were 82,170 'looked after children' in England. Of these 63,660 (77%) were looked after under Care Orders made by the Family Courts, 1810 were looked after pursuant to voluntary arrangements (17%) and 4,430

(5%)were looked after under placement orders (by which I understand they are awaiting adoption.

54. Underhill LJ continued:

> *38. Placements vary greatly in character. Children of any age may be fostered, and placements may last from as little as a few days to two or more years. Although it is most common for a single child to be placed with a household, almost half of fostering households have two or more children. The mean duration of a placement is about a year. Most of the children in question are the subject of a care order as a result of abuse, neglect or family dysfunction, but the circumstances can vary enormously. Many children will present with acute problems and will need special care and attention.*

55. The evidence of Sophie Langdale was that the length of stay with any particular foster carers was driven by the needs of the child. Where a child cannot return to their birth parents they would be regarded as being in long term foster care which would persist until their eighteenth birthday or longer if the local authority funded a 'staying put' arrangement as part of its duties to those leaving foster care. As of 31 March 2022 there were 21,710 children in such long term foster care.

56. The fact that a child is regarded as being in long term Forster care does not mean that they will remain with the same foster carers throughout the remainder of their childhood although that is often what is hoped for. Foster care placements will commonly break down sometimes after days or weeks. The experience of Pauline Oni was that three of the 5 children she fostered were removed when the placement broke down. Foster placements can end for any number of reasons such as foster carers deciding to prioritise their own families or career aspirations.

57. I asked Sophie Langdale whether there was a national shortage of foster carers. Her evidence was that in terms of the numbers of carers and children there was no absolute shortage. She explained that there were difficulties in having the right number of foster carers in the right areas and shortages of specialist foster carers. She suggested that the Government is taking measures to address these shortages. Amongst these is the creation of support networks, 'the Mockingbird Project' which I return to below. I was provided with the record of a parliamentary debate on the recruitment and retention of foster carers that took place on 21 April 2022. Within that debate there was reference to there being a crisis in the recruitment and retention of social workers. Statistics were cited that suggested that whilst the number of children in care was increasing the recruitment of foster carers was falling behind. I do not need to make any precise findings but accepting the evidence of Sophie Langdale as I do I

conclude that overall there is a greater need for foster carers than there are foster carers able to meet those needs.

The formal agreements

58. As set out in the summary of the relevant legislation above the 2011 regulations require a foster service provider to '*enter into a written agreement with [the foster carer] covering the matters specified in Schedule 5*. The legislation is silent as to what other maters might be included in addition to the mandatory terms.

59. The process of being approved as a foster carer may vary. That said the experience of Pauline Oni is a good example of a person applying for approval in ordinary circumstances. There was no material dispute between Pauline Oni and Roberta Onyekwelu both of whom gave a full description of the process (in differing boroughs) . In London, local authorities commonly advertise for foster carers. Whether in response to such advertisements or otherwise the first stage is for a general enquiry to be made by a prospective foster carer. If that is progressed they would complete an application form and undergo a screening process. There would generally be a home visit. Thereafter there is some pre-approval training. Pauline Oni described that as taking place over many days in a three month period. The courses included in that training included basic matters such as first aid through to courses aimed at training the prospective foster carer to deal with the sorts of complex issues expected when looking after young people in the care system. Thereafter there is an evaluation by the local authority. Roberta Onyekwelu said that the process would take around 6-8 months.

60. Once the training was complete the prospective foster carer is 'presented to' the Fostering Approval panel and a recommendation made. In the case of all three claimants before me a positive recommendation was made and was accepted by each local authority. Angela Reid's approval took place after the children she cared for were placed in her care. Despite this she underwent a similar assessment process and had to undertake some training before a recommendation was made by the fostering approval panel.

61. The approval process in each case was in each case rigorous. It involved background checks including family members as well as medical information and an assessment of the ability to care for foster children. The terms of approval in any given case might be general or they might be limited for example to the number of children that might be fostered at any one time, the age of children or any other circumstances. In the case of Pauline Oni and Paulette Dawkins the terms of approval were not couched in terms of any particular children. In the case of Angela Reid she was approved as a 'connected person'

the effect of that was that her approval was limited to the two children in her care.

62. I shall set out the essential terms of the Foster Care Agreements between London Borough of Waltham Forest and Pauline Oni as they have many features in common with those issued to the other claimants. The key features are as follows:

62.1. The agreements summarise the terms of approval (section 1); and

62.2. Undertake to provide details of the fostering allowances and fees payable (section 2.2) which will be updated annually and any equipment that will be provided (Section 2.3); and

62.3. Set out a minimum level of contact with a social worker during any placement (section 2,4); and

62.4. Undertake to provide access o an experienced carer for support, a comprehensive training program, facilitating access to the Fostering Network and further support (sections 2.5-2.8)

62.5. Section 3 deals with the process of reviewing the approval. Approval is reviewed annually or whenever there is a significant change of circumstances. There is an obligation placed on the foster carer to co-operate with the process. An outcome of this process might be that approval is no longer appropriate.

62.6. Section 4 deals with the placement of children. It provided that in advance of any placement an assessment will take place in accordance with Schedule 6 of the 2011 regulations. If the assessment is positive a placement agreement would be drawn up. That will: *'include a statement of all relevant information, financial support of the child, arrangements for giving consent, approval for trips/overnight stays, arrangements for statutory visits and reviews, arrangements for contact, signed compliance with Foster Carer Agreement and co-operation with the placing authority'.* Section 4.5 includes an obligation on the local authority to pay the appropriate foster allowances and other agreed expenses payable in connection with the child's care.

62.7. Under Section 5 the local authority agree to insure the foster carer against any 'legal liabilities arising from the placement.

62.8. Section 6 deals with complaints and refers to an internal complaint process.

62.9. Section 7 requires the foster carer to give written notice of any

change of address or in the composition of the household.

62.10. Section 8 prohibits the use of corporal punishment.

62.11. Section 9 imposes a duty of confidentiality on the foster carer

62.12. Section 10 imposes an obligation on the foster carer to comply with the terms of the Foster Placement agreement. Examples are given about whet this agreement may specify and includes matters such as arrangements for contact, approval for overnight stays and the limits of the delegated parental responsibility (consent).

62.13. Section 11 imposes a general obligation to promote the welfare of the child , It also includes specific obligations to keep detailed records of the activity and progress of the child and to ensure that these are kept securely.

62.14. Section 12 imposes a requirement to follow the LB Waltham Forest policies and procedures and makes further provision for meetings between the Foster Carers and the Supervising Social Worker.

62.15. Section 13 imposes an obligation to co-operate with Ofsted.

62.16. Section 14 requires the Foster Carer to report significant events.

62.17. Section 15 requires the foster carer to comply with any decision of the Local Authority to terminate the agreement and to remove the child.

62.18. Section 16 provides that approval will be terminated 28 days after a foster carer gives notice that they no longer wish to act as a foster carer. It further provides that a foster carer cannot change fostering agency whilst there is a placement. Unless arrangements for care are agreed in advance.

62.19. Section 17 provides that any breach of the agreement by the foster carer may result in the removal of approval. A right to change the terms of the agreement on 28 days' notice is reserved to the Local Authority.

63. My summary of the LBWF Foster Care Agreement shows that the agreement contains all matters mandated by Schedule 5 of the 2011 regulations. There are however some matters which are included which are in addition to those mandatory matters. One matter of no small importance is the obligation to notify the foster carers of details of payments that will be made to them and to actually make payment. Some matters, such as the specific obligations imposed by any care plan for a child are not specifically

included but are incorporated by reference to an agreement reached when a placement is made.

64. The LBWF Foster Carers Agreement is silent on the hours that might be expended on carrying out the tasks required. It does not say anything about the ability of the foster carer to take any time off.

65. The agreement between Paulette Dawkins and LB Bromley contains many of the same terms as that entered into by Pauline Oni albeit with different wording as it is written in a very accessible style. There are no material differences between the agreements.

66. The Foster Carers Agreement entered into by Angela Reid and LB Haringey has some features not found in the LBWF agreement. The following obligations are set out:

    66.1. A commitment to learning and professional development is required. Different requirements apply to newly approved foster carers but even an experienced foster carer is expected to undertake 30 hours per year of learning and development and attend foster carers support groups a minimum of 8 times a year.

    66.2. The agreement includes the right to refuse any placement but *'the Service does, however, expect you to be flexible'*

    66.3. The agreement includes an express obligation to care for any child fostered as *'they would care for a members of their own family'*.

67. In addition to the foster care agreements I was provided with Foster Carers Handbooks produced by LBWF and LB Bromley. Those handbooks contain a detailed description both of what foster carers can expect from the local authorities and also how the local authorities expect them to behave. In that latter respect they set out exacting standards. In the LB Bromley handbook there is a suggestion that children should always be asked before being given a kiss or a cuddle. They should be discouraged from referring to the foster carers as 'mummy' or 'daddy' permission should be sought before taking any photographs. The contrast between those expectations and those of a persons own children are stark.

<u>Working Time in practice – hours of work</u>

68. In her ET1 Paulette Dawkins had, for the purposes of her National Minimum Wage claim attempted to quantify how much of her time was taken up caring for the children who they looked after. She had given a figure of 84 hour a week. Angela Reid estimated that she spent 112 hours a week caring for the young children in her care.

69. In ***NUPFC*** Underhill LJ dealt with the issue of hours of work in the following way:

> *39. The essence of the role of a foster carer is to look after the fostered child throughout the placement as a member of their family. The phrase "quasi-parental" is often used and is appropriate, as long as it is understood that the legal responsibility remains with the local authority. That means that, although the actual hours spent directly looking after the child will vary according to the circumstances – most obviously, depending on whether they are attending school – it is an "always on" role.*

70. The evidence from the three Claimants before me demonstrates that the description of the role of a foster parent as an 'always on' role was entirely accurate. I can illustrate that with one example from the evidence. Paulette Dawkins looks after a young person with mental health difficulties. In her witness statement she describes a typical day. That started first thing in the morning with an incident of possible self-harm. When things appeared calm she took the young person to school after checking on her medication. Discovered that the young person was truanting from school and spent the morning tracking her down with the assistance of the young person's mother and the police. On return the young person was very disturbed. Paulette spent all night monitoring her concerned that she would harm herself. This is perhaps an extreme example but one which from the entirety of the evidence I have considered is not that unusual.

71. I accept a point made by the Respondents and Secretary of State that it is an almost impossible task to determine what time is spent carrying out the obligations under the foster care agreement and what time is not. That is not to say that I accept that where a foster parent is not directly caring for a child they are free of any obligations. They are not. They are required to be available to care for the children in their care 24 hours a day.

72. Many foster carers are married or in similar relationships and are approved as foster carers as couples. There is nothing in any of the Foster Carers agreements that I have seen that would prevent one or more of the foster parents from having some other employment as long as that was consistent with the Foster Care Agreement. However, I find that where as in the cases before me, the foster carer is a single parent, the reality is that it would be very difficult to contemplate any other employment. The obligations of the Foster Carer Agreement go beyond those of an ordinary parent in a number of ways. There are training obligations, obligations to keep records, obligations to inform the local authority and obligations such as complying with arrangements for contact. All these obligations limit the free time as is available to the foster carer. Those findings are supported by the conclusions of the Narey report where it is said: "It is often difficult to

combine other paid work with fostering and with some placements and fostering services require one partner in a couple to be a foster carer full time". The report suggests that two thirds of foster carers have no other paid work.

Control and Supervision

73. In ***NUPFC*** Underhill LJ set out his findings in respect of the degree to which the activities of Foster Carers are controlled or supervised by the Local Authority. He said:

> *43. It is in the nature of the role of a foster carer that they have a high degree of day-to-day autonomy as to how they perform their role. The Guidance says:*
>
> *"Foster carers should be given the maximum appropriate flexibility to take decisions relating to children in their care within the framework of the agreed placement plan and the law governing parental responsibility. Except where there are particular identified factors which dictate to the contrary, foster carers should be given delegated authority to make day to day decisions regarding health, education, leisure, etc."*
>
> *44. Having said that, a foster carer does not have the freedom of an ordinary parent. They are obliged to look after the child in accordance with the care plan, which may be detailed and prescriptive. They are issued with a handbook and obliged to keep records about the children in their care. They are subject to oversight and supervision by the fostering service. By way of example, para. 1 (a) of the Haringey FCA (reflecting the requirements of Standard 21) reads:*
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> *"Foster carers approved by Haringey Fostering Service will be supported and supervised by a named supervising social worker, who will visit every six weeks as a minimum. They will also visit on request and as required to support carers. The supervising social worker will write formal reports of their visits every six weeks. In some cases the level of visiting and support will be agreed with your supervising social worker and authorised by senior managers. At least one visit each year will be unannounced."*
>
> *There is a formal complaints system for dealing with complaints against foster carers, with the possibility of referral to an Independent Review Mechanism.*
>
> *45. Foster carers are subject to an annual review of their approval (over and above the supervision associated with a particular placement): in*

the first year this must be by the Fostering Panel. The Haringey FCA also requires a medical report every other year. The fostering service has the power to terminate a placement at any time.

46. Foster carers are required to maintain their skills and training. Paras. (f) and (g) in section 1 of the Haringey FCA deal with the obligation of foster carers to attend training, which differs between carers who have been approved for less than eighteen months and those who have been approved for longer; but both are required to undertake training or other learning and development, and to attend at least eight meetings of a foster carers support group.

74. Again I find myself in complete agreement with the assessment of Underhill LJ. I would only seek to illustrate that with some examples from the evidence. Where there is a care order the Local Authority will step into the shoes of the parents. They are responsible for the exercise of parental responsibility. The extent to which that is delegated is a matter for the Local Authority subject of course to the statutory guidance which they are obliged to take into account. The guidance suggests that as much autonomy as possible is delegated to the foster parent. In practice however what is 'appropriate' will depend on the judgment of the local authority and, in particular, the professional judgment of the Supervising Social Worker. Disagreement with the Supervising Social Worker is not necessarily without consequences for the foster carer.

75. Paulette Dawkins told me of a disagreement she had with the social workers supervising her when a young black child was placed in her care. The child had matted, and Paulette Dawkins says dirty, hair. She says that she immediately identified that the state of the child's hair was due to neglect and that she needed it washed and combed. She says that she was told that this should not be done because or respect for the child's cultural traditions (perhaps a reference to Rastafarianism). The power to veto lay in the hands of the local authority and not in the hands of Paulette Dawkins who says that only after protesting and she says being criticised was she found to be correct. This lack of autonomy for foster carers is reflected in the report of Sir Martin Narey and Mark Owens of 2018 in a section dealing with delegated authority. They cite the experiences of a 13 year old girl who said: *'I am of a place in life where things like getting your hair cut or ears pierced are things that people around me can go and do whenever they feel like it. [But] I have to ask the local authority before I get this done and sometimes this can be denied, or my social worker won't answer to this because they have too many cases'*. The suggestion is that failures to delegate of this kind remain despite guidance to the contrary now found in The Children Act 1989 guidance and regulations and in particular paragraphs 3.206 onwards. Each local authority is required to publish a policy setting out their approach to delegated authority – see paragraph

3.222.

76. In addition to the involvement of the Supervising Social Worker a looked after child in foster care has what is in effect an independent advocate in the person of the Independent Review Officer ('IRO') appointed under Section 25A(1) of the Children Act 1989. The role of the IRO is to ensure that the Care Plan fully reflects the needs of the child. As beneficial as this clearly is for the child it does represent a further voice in the decisions that are made about the day to day parenting of a child in foster care.

77. The evidence of the Claimants, and particularly that of Paulette Dawkins and Pauline Oni was that the expectations of the local authority placed considerable restrictions on their family life. The evidence included the care that needed to be taken in having guests including family members in their house. The need to place sharp objects and medication under lock and key. Pauline Oni and Paulette Dawkins told me, and I accept, that they were required to keep a room in their property available even when there were no children placed in their care. This restricted the use of part of their homes as they were expected to have space available if it was called upon. In addition, Pauline Oni describes changes that she was required to make to her home such as fitting locks to the bathroom that could be opened from outside and using window restrictors.

78. Each of the Claimants described the training and courses that they were expected to attend. In each case the training was extensive and continued beyond the initial stage of approval. In addition to the training where there was a child in their care they were expected to attend meetings with other professionals on a regular basis.

79. Whilst not specifically raised in the evidence, my own experience tells me that foster carers re expected to comply with directions in respect of the contact that children may have with their parents and wider family. They may be expected to facilitate this directly with video calls and the like. They would be expected to follow the care plan in this respect despite any concerns that they might have about the effect on the children. They could raise those concerns but ultimately they would need to follow the instructions they were given. In reaching this conclusion I am alive to the point made by the Respondents and Secretary of State that foster carers are expected and encouraged to advocate fiercely on behalf of the children. I accept that. Being able to advocate is not the same as being able to decide.

80. Standing back from the evidence my overall impression was that being a foster parent has marked differences to parenting ones own children. Ordinary parenting can be a haphazard process where provided that the standard of care is 'good enough' there can be no interference. Fostering is a different animal. The standards required are significantly higher.

Foster carers are expected to display a degree of professionalism. They are expected to implement decisions whether or not they agree with them. They are expected and required to adapt their own circumstances to the needs of the foster child. I find that there is a considerable degree of control by the local authority over what foster carers do and how they do it.

Payments to foster carers

81. In NUPFC Underhill LJ said of the evidence before the Court of Appeal:

> *47. It is in this area that the evidence before the EAT was particularly unsatisfactory. Some basic information is simply lacking. Such information as there is in the published reports is partial and illustrative and not always to the same effect. This may reflect what was described in the Narey report (p. 12) as "wide inconsistencies and a general lack of clarity about the compensation and reward given to carers".*

82. The position regarding payments to foster carers was explained in the witness statement of Sophie Langdale. She explains that Section 22C(10)(b) of the CA 1989 provides that a local authority may determine the terms on which they place a child with a foster parent including terms as to payment. That right is subject to the overriding right of the Secretary of State found in Section 49 CA 1989 to make by order provision for the payments to foster carers. No order has yet been made. However, the National Minimum Standards for foster carers provide for a minimum foster allowance. That varies only depending on age and geographical location. Underhill LJ explains the full scope of the range of payments available and their apparent purpose as follows:

> *48. Types of payment. Payments made to foster carers during a placement are of essentially three kinds – an "allowance"; "fees"; and reimbursement of expenses. (In addition, a minority of fostering services pay a "retaining fee" to foster carers between placements, but these are not relevant for our purposes.)*
>
> *49. The "allowance". Standard 28, published by the Government under section 23 of the 2000 Act, requires fostering services to pay to foster carers, during the time that a child is placed with them, a "National Minimum Fostering Allowance", which is described as being intended (when taken with the reimbursement of expenses – see below) to "cover the full cost of caring for each child". The amount of the allowance is set annually by the Government and varies by reference to geographical area and the age of the child: in 2017 the range was between £125 and £219 per week. The prescribed amount is a minimum: some fostering services pay more. Of its*

nature, being a standard amount, the extent to which the allowance paid in a particular case corresponds to the actual cost of caring for the child (to the extent that that is calculable) can only be approximate, and there is evidence that many foster parents believe that it does not fully do so.

50. Fees: general. These are amounts paid in addition to the allowance. The Narey report refers to them (p. 24) as being paid "to remunerate the foster carers for their experience, skills and time". The HoC report (para. 52) says the same except that it uses the language of "recognise and reward" rather than "remunerate". Although there is no obligation to pay such fees, they are in fact paid in the majority of cases. The evidence is unclear about the exact proportion. According to the Narey report (p.44), "nearly all" local authorities and agencies pay fees.

83. I shall adopt the same distinction between an 'allowance', 'fees' and 'expenses in discussing the evidence before me. Other than the cases before me I am in no better position that the Court of Appeal to make any wider findings about the remuneration of foster carers. The reasons for this is that whilst there is a minimum allowance that must be paid the decision about how much might be paid by way of fees and allowances is left to foster service providers. I shall set out my findings in respect of the remuneration of each Claimant. The best I can do, were anybody to wish to treat my findings as being of any wider application, is to identify my understanding of the general position.

84. I shall deal with each of the Claimants in turn starting with Pauline Oni and the scheme for payment used at the time by the LBWF. The most up to date information I was provided with about the fees and allowances paid to Pauline Oni were dated 2014/2015 (about the middle of the period when she had children in her care).

85. The scheme for payments by LBWF is set out in a published document. The document covers most if not all aspects of payments to the foster carers. It is said that the document is produced in accordance with the 2011 regulations and the National Minimum Standards. An allowance is paid to every foster carer approved by LBWF. The rate is per child and is said to exceed the National Minimum Allowance in force at the time. The allowances vary over 5 different age groups and range from £146.81 for a child under 4 to £289.00 for a person in supported lodgings (a former looked after child now over 18). The document explains that the allowance is expected to cover all food, clothing pocket money, personal and household expenditure together with a number of other common recurring costs.

86. The policy in respect of fees is more complex. They are paid under a 'Carers Progression Scheme'. They are said to be *'to recognise carers' skills, experience, professional learning and development'*. The fees do not

vary dependant on the age of any child but vary by 'tier'. There are three tiers and a further category for specialist foster carers. Broadly the tiers reflect the time that a foster carer has been approved coupled with proof that they have met all the requirements of the scheme to progress. There is no difference in payment between tier 1 and tier 2 foster carers. Tier 1 foster carers are 'mainstream' foster carers in their first year. Tier 2 are those approved for between 1 and 3 years they are said to be paid £150 per week . Tier 3 is for mainstream foster carer with 3 years or more of approval who have met the other requirements of the scheme. Those fees are £191.00 per week. A specialist foster carer is caring for a child who would otherwise be placed in residential care or high cost IFA placement. Specialist foster carers are paid £500 per week.

87. The standards of the scheme that have to be met to progress between tiers (other than time) include completion of training, attending support groups and having a child placed with them 75% of the time. In addition positive feedback is required. It is possible to move down a tier if these requirements are not met.

88. Pauline Oni says, and I accept, that as a matter of course she was paid some additional allowances. These were £500 a year allocated to cover the cost of a holiday taken with the child in foster care and £300 if the child had a birthday whilst in a placement. She says in her witness statement that she was paid fees of £197 per child and an allowance of £261. If that was the case then she was being paid at the tier 2 rates. Remittance slips would suggest that, for some time at least, she was paid at the specialist rate.

89. Angela Reid received £377 per week per child. Haringey have not provided any published rates of payment but it was common ground that the payment was calculated as an allowance of £192 per week per child and a fee of £185 per week per child. It follows that the rates paid by Haringey were broadly in line with those paid by LBWF to Pauline Oni for children not requiring specialist care.

90. Paulette Dawkins was able to tell me what she received from the L.B. Bromley as well as give me evidence about her experience with non-local authority fostering services. Paulette Dawkins worked as a foster carer for 6 years for Tower Hamlets before transferring to work for an independent Foster Service, Clarion. She did so because she was attracted by what she describes as better support and a better financial package. After 8 years Clarion closed down and Paulette Dawkins transferred to another independent agency. She was pleased at the level of support and additional training (a Children's Workforce Development Council qualification 'CWDC') she received. She found being paid in arrears a financial burden. After three years she transferred to L.B. Bromley.

91. Paulette Dawkins says that in 2017 LB Bromley made unilateral changes to the payments it made to foster carers. She says that her monthly income reduced by £200 and that she no longer received an annual payment of £300 that had been made to foster carers with the CWDC qualification.

92. I was provided with the policy produced by LB Bromley that set out the rates of payment of allowances and fees for the year 2022/2023. The allowances follow a similar structure to those paid by Haringey in that there are 5 age bands and the allowances ranged from £163.10 of a child between 0 and 4 to £240.10 for a child over 16. In each case the allowance was said to include £2.50 per week as 'savings' for the child. L.B. Bromley pay fees that vary depending on the age of the child. If the child is under 13 years old ordinarily a standard fee of £206.66 is paid. If there is agreement that the child has additional needs an enhanced fee of an additional £50 is made. An enhanced fee of £258.27 is paid in respect of all children over 13. Additional allowances are paid of one week for any birthday or Christmas when the child is cared for and 2 weeks during the summer said to be a contribution to the cost of any holiday or summer activities.

93. In some instances Paulette Dawkins continued to offer accommodation to young people who had reached the age of 18. This is referred to as a 'staying put' arrangement. In those circumstances the rate of payment is reduced. It appears that the assumption is that the need for care is reduced. Paulette Dawkins disputed that in her witness statement. I would accept that for a vulnerable young person reaching the age of 18 will not 'magic away' any issues they might have.

94. In the cases of all three claimants and local authorities there was limited or no opportunity for individual negotiation of the rates of allowances and fees that were paid.

Taxation and the treatment of benefits

95. The tax and benefits regime applicable to foster carers was explained in the witness statement of Sophie Langdale. It was not a matter of dispute. The Claimants were paid the fees and allowances set out above without any deductions of tax and national insurance. The scheme described by Sophie Langdale is summarised by Underhill LJ in ***NUPFC*** as follows:

> *53. Tax and benefits. Ms Willison summarises the position about tax and benefits as follows:*
>
> *"41. The majority of foster parents are registered as self-employed for tax purposes. As foster parents, they receive Qualifying Care Relief that is made up of two parts:*

i. Tax exemption on the first £10,000 shared equally among any foster carers in the same household. No tax paid on the first £10,000 income from fostering.

ii. Tax relief for every week a child is in their care. The amount depends on age (£200 a week for each child under 11 and £250 a week for each child aged 11 or over).

42. Foster parents are entitled to claim means tested welfare benefits if they meet the general eligibility criteria. Income from fostering and foster children are not taken into account for the purposes of assessing benefits. Foster parents can claim child tax credit and child benefit for their own children but not for any foster children. Under Universal Credit, foster parents will have a reduced level of conditionality, designed to recognise their caring responsibilities and the valuable role they play in society."

It follows that, depending on their circumstances, some foster carers will pay tax on part of their "income from fostering", which in principle includes the allowance as well as fees.

Time off, holidays and respite

96. I have referred above to the fact that in each of the local authorities an additional allowance was paid each year that was aimed at assisting with the costs of holidays or summer activities. I find that this additional allowance was paid with the expectation that any holidays would be taken with the foster child accompanying the foster parents and any other family members. Paulette Dawkins intended to take two children in her care on a holiday to Jamaica. The additional allowance was insufficient to meet the extra costs and Paulette Dawkins had to meet the costs out of the 'all year round' payments made to her. She told me and I accept that she had intended to take two children on holiday but because the local authority was unable to obtain a passport in time she could only take one.

97. All the local authorities witnesses accepted that some form of respite care might be necessary in order to preserve the placement(s). There was no uniform approach to how this was dealt with. Sandy Bansil, for Haringey, said that Haringey had no formal written policy about how respite care would be dealt with. She said that the need for respite care would be considered on a case by case basis and included in any care plan. My understanding is that respite care is more likely to be offered when the child in foster care has some particularly challenging physical, mental or emotional difficulties. Paulette Dawkins told me that she understood that Bromley has a policy of giving foster carers a day a month of respite care

but that permission to take advantage of that was rarely given When Wenifred Marshall gave evidence she accepted that there was a practice of offering respite care on occasions but that this would not exceed 4 days a month. LBWF included provision for respite within their foster carers agreement. The relevant parts of the agreement start with a general statements of the benefits of respite care including the maintenance of the placement. The policy goes on to say: *'the value base of the fostering service is that children should feel as if they are a full part of the family. Therefore respite arrangements will only be agreed if they are a necessary part of the child's care plan and that arrangements for respite are sensitive to the child's need to have a sense of belonging'*. The agreement goes on to explain that if a respite break is granted then the foster carer will continue to get the fee for looking after the child but will not get the allowance (which is paid to the respite carers). A maximum of two weeks respite care is contemplated by the agreement.

98. The general picture that emerged from the evidence was that each local authority recognised that there may be occasions where the need of the foster carers for respite care might outweigh the wish to include the child in all family activities. Each local authority dealt with respite care on a case by case basis. In most circumstances (other then for example short term medical emergencies) the use of respite care meant that the foster carer would not have the benefit of the allowance but would retain the fee element of their remuneration. The general rule was that respite of any description needed to be justified by reference to the needs of the child. There was a presumption that wherever possible a child should be included in any family holiday.

99. The Claimants point towards the policy adopted by Essex Council. That document says that foster carers are entitled to up to 28 days break entitlement per year'. The policy says that the foster carers will receive 'foster care payments' during any period of respite care. It is not entirely clear whether that would include just fees or fees and allowances. The policy suggests that the ability to take 28 days break without a foster child is an 'entitlement'. Despite this the policy states that the arrangements for taking a break will need to be agreed with the supervising social worker. The policy suggests that despite this the ability to take the 28 days leave is a 'right'. The policy acknowledges the same concerns as articulated by the local authorities before me that the risk that a child will feel excluded from the family activities should be mitigated as far as possible.

100. I heard evidence about a scheme promoted by the Secretary of State and adopted in Haringey which is called the Mockingbird Project. This scheme is designed to encourage peer to peer support between foster carers and to expose less experienced carers to learn from those with more experience. A 'hub carer' offers support to 10 satellite carers. Mrs

Reid was one such satellite carer. The support that could be offered would include a foster carer looking after another foster carers children on a short term basis, say a social event, without having to seek any more formal approval. The take up of the mockingbird project in Haringey is low with just 5 out of 70 households joining the scheme. The scheme may provide support but it does not provide paid time off away from the responsibilities of caring for a foster child. I have no doubt that the scheme provides other important benefits.

Schemes for complaints and redress

Direct complaints

101. In common with many other fields there is nothing preventing a foster carer dissatisfied with their treatment at the hands of a local authority or other fostering service attempting to reach a resolution internally. The foster care agreements give information about internal complaints.

Ofsted

102. It is possible to make a complaint to Ofsted about a fostering service. Ms Oni did just that. She was informed that whilst the matters she raised would be looked into Ofsted did not deal with complaints made by individuals. As such I do not think it arguable that the existence of such a route of complaint is one that can be used for personal redress.

The Independent Complaints Procedure – Children Act 1989

103. The Children Act 1989 includes a statutory complaints procedure under Section 26 for complaints made by children, parents, people with parental responsibility or foster parents. The Children Act 1989 Representations Procedure (England) Regulations 2006 set out the scheme. The scope of the complaints considered are limited to specified 'functions' under the Children Act 1989 and Adoption and Children Act 2002. Representations will not be considered where a person has stated in writing that they are taking or intend to take proceedings in a court or tribunal (see regulation 8) A complaint must be independently investigated (Regulation 17) and then may, at the request of the complainant reviewed by a panel of three independent persons (See regulations 18 and 19). The powers of the panel are limited to making recommendations (see Regulation 20). The panel are required to draw attention to the right to complain further to the Local Government and Social Care Ombudsman.

The Local Government and Social Care Ombudsman

104. The statutory underpinnings and scheme relating to the Local Government and Social Care Ombudsman ('the Ombudsman') is, as Mr

Moretto pointed out, summarised in ***R (Piff Elms Ltd) v Commission for Local Administration*** **[2023] EWCA Civ 486** between paragraphs 78 and 85. There is a wide ranging power to investigate maladministration and other wrongdoings within local government. The powers of the Ombudsman are restricted to complaints by 'members of the public – See Section 26A of the Local Government Act 1974 ('LGA 1974'). The Ombudsman has treated foster carers as members of the public.

105. Mr Moretto says that if foster carers were workers or employees they would not be able to complain to the Ombudsman. He refers to a decision of the Ombudsman to that effect. I think that is correct. Employees and workers are not expressly excluded from the scheme by any provision of the LGA 1974 but the effect of Section 26(6) of the LGA 1974 is that the Ombudsman may not investigate a matter where a complaint could be made to a court or tribunal unless it was not reasonable to expect the person to resort to such litigation. I bear in mind that Mr Moretto and Mr Wilding took the stance that foster carers could bring discrimination complaints through part 3 of the Equality Act 2020. If that is right then it would be open to the Ombudsman to decline to hear any complaint. As Mr Moretto points out that may not be the case where discrimination or a failure to make reasonable adjustments is just a strand in an argument that there has been mal administration or a service failure. He relies on ***R (Mencap) v Parliamentary & Health Service Ombudsman*** **[2011] EWHC 3351 (Admin)** for that proposition. I find he is correct. The Ombudsman is not asking whether there is a breach of the EA 2010 but whether there is maladministration or a service failure. At paragraph 34 of ***Mencap*** Mr Justice Mitting refers to ***Maxwell v the Office for the Independent Adjudicator for Higher Education*** **[2011] EWCA Civ 1236** where Mummery LJ stated in paragraphs 33 and 34 of his judgment (my emphasis added):

> *"The courts are not entitled to impose on the informal complaints review procedure of the OIA a requirement that it should have to adjudicate on issues such as whether or not there has been disability discrimination. Adjudication of that issue usually involves making decisions on contested questions of fact and law which require the more stringent and structured procedures of civil litigation for their proper determination...*

106. At paragraph 35 of ***Mencap*** Mr Justice Mitting continues and says: *'Determination of questions under the equality legislation both old and new is not a straightforward task. Expert evidence and expert legal advice is required. As the Ombudsman in her witness statement made clear, she and her office lack internally the necessary expertise and funds to conduct such an exercise'*.

107. The power of the Ombudsman is initially to make a report which may include recommendations – see Section 30. It is the duty of the local authority to consider those recommendations. It is common ground that those recommendations can and frequently will include a recommendation that the local authority pay compensation. The Ombudsman can then issue a further report – see Section 31. If the recommendations are not followed then the Ombudsman may require the local authority to publish the report. Furthermore the aggrieved person could instigate proceedings by way of judicial review to challenge the failure to comply.

108. The procedure that the Ombudsman will follow is prescribed in Sections 28 and 29 of the LGA 1974. The process with ordinarily be conducted in private see Section 28(2). There is a power to call for documents and witnesses.

109. A significant issue of dispute between the parties concerned the approach taken by the Ombudsman in relation to compensation. Mr Moretto in his submissions pointed out that the powers of the Ombudsman were in some aspects much wider than a court or tribunal – see paragraph 100 of his submissions. He suggested that the compensation that the Ombudsman might award could be substantial and referred to ***R (Nestwood Homes Developments Limited) v South Holland District Council*** **[2014] EWHC 863 (Admin)** where the Ombudsman had recommended a payment of £250,000 to remedy the injustice. The sums recommended in that case related to financial loss but also £25,000 for *'the extreme stress and severe and prolonged strain on family and business relationships'*. The local authority declined to follow the recommendation and instead paid just 20% of the sum recommended. Its reasons for doing so included its budgetary constraints. Its refusal to follow the recommendation was held to be lawful. If it needs pointing out that is a very different scheme to that in the courts where the means of the wrongdoer must play no part in the assessment of the compensation.

110. The Claimants pointed to what they said was a distinct difference in approach between awards made by the Ombudsman and those made by tribunals in respect of 'injury to feelings' by which I mean non pathologized injuries. The parties had included an Ombudsman's decision in my bundle where a payment of £2,000 was made for distress that was described as 'severe and prolonged'. I have had regard to the entirety of the decision and conclude that sum is significantly lower than might be awarded by a tribunal. The decision refers in turn to the 'Guidance on Remedies' used by the Ombudsman. That refers to 'symbolic payments'. The suggestion is made within that guidance that any pathologized injury would be 'a matter for the courts'. I find that the approach taken by the Ombudsman in respect of awards of a type commonly made in discrimination and

whistleblowing cases is very different than the approach taken by the tribunal.

111. Looking at the scheme as a whole it is clearly a valuable source of address for many complaints. I accept Mr Moretto's point that the proceedings are speedy in comparison with claims before the tribunal. However, in my daily experience the process followed by an employment tribunal in a complex discrimination or whistle-blowing case cannot be compared with the Ombudsman scheme. In the tribunals the upper courts have reminded us time and again of the fact sensitive nature of such claims. As a consequence even apparently weak claims are carefully scrutinised in public and with an adversarial process that allows both parties to challenge the evidence. They are commonly listed over several days. The Tribunal awards compensation in the same way as the county court including injury to feelings awards which are in no sense regarded as 'symbolic'. A Tribunal will deliver a fully reasoned judgment in public. It is a very far cry from the privacy afforded by the process under the LGA 1978. It would be an error of law for a tribunal to take into account the question of whether a respondent could afford to compensate a claimant. Whilst ***Maxwell*** concerned a different complaints scheme I regard the passage I have quoted above as instructive in respect of the differences between the informal and fast Ombudsman scheme and the more rigorous approach taken to matters of discrimination (and by analogy whistleblowing) in the employment tribunal.

The Independent Review Mechanism

112. Sophie Langdale gave a description of the Independent Review Mechanism ('IRM') in her witness statement which I accept is accurate. The scheme is statutory and derives from powers conferred the Children Act 1989 and the Adoption and Children Act 2002. The scheme is set out in the Independent Review of Determinations (Adoption and Fostering) Regulations 2009. The scheme permits a foster carer or proposed foster carer to ask for an independent review where a fostering service provider either proposes not to approve a person as a foster carer or proposes to terminate or revise the terms of approval of a foster carer (See regulation 4 of the 2009 Regulations)[2]. The members of independent review panels are drawn from the ranks of experienced social workers, medical practitioners and those with personal experience of adoption and fostering (See regulation 6). Pannels concerned with decisions about foster carers consist of no less than 6 people and where reasonably practical two of whom will have been local authority foster parents within the previous 2 years (see regulation 8). In respect of decisions about fostering the panel is required to make a recommendation as to whether a person is suitable

[2] The scheme also applies to prospective adopters

to be a foster parent or as to the terms of any approval (see regulation 13). The costs of any determination must be paid by the fostering service that made the qualifying determination.

113. The evidence of Sophie Langdale was that in 2020-2021 there were 94 referrals concerning qualifying determinations in relation to foster carers. In 23 cases the Independent Review Panel ('IRP') determined that a foster carer was suitable. In 9 instances the Local Authority accepted that determination; 1 case where a further assessment was carried out and 13 cases where the Fostering Service disagreed with the IRP. It was common ground before me that a prospective foster carer could challenge the decision not to follow the recommendation of the IRP by means of seeking judicial review.

114. I consider it quite striking that, given the specialist and independent nature of the panel over half of the recommendations made were not accepted by the fostering service concerned.

115. The jurisdiction of the IRM is limited to 'qualifying determinations'. This would not include for example a complaint about whether a foster carer had been subjected to a racist remark.

116. Angela Reid received a 'qualifying determination' on 28 June 2022. A decision was made to remove the two children in her care. She says that that decision was unlawful direct discrimination because of age. She made an application to the IRM on 24 July 2022. A hearing took place on 18 October 2022 where the Claimant attended in person before a panel assisted by Robin Findlay from the NUPFC. A recommendation was made that Angela Reid was suitable to continue to be a foster carer. However, a consequence of the original decision made by Haringey was that the Children who she had cared for had already been removed and had settled with alternative carers. Angela Reid pragmatically did not suggest that they should be returned to her. As such there does not appear to have been any consideration of whether the recommendation should have been accepted by Haringey. The evidence of Sandy Bansil was that Angela Reid had been informed that she could make contact with the Assessment team who would then consider any further placement.

117. Paulette Dawkins received a qualifying determination letter on 30 September 2021. The events leading to that determination form part of the complaints that Paulette Dawkins has made to the Tribunal and so I shall deal with them as neutrally and briefly as I can. Bromley took the decision to terminate Paulette Dawkins' approval as a foster carer suggesting that she had consistently failed to meet aspects of the National Minimum Standards of Care and in particular *'promoting a positive identity potential and valuing diversity through individualised care'*. Paulette Dawkins sets out the background to this decision in her witness statement. Her case is

that she was treated in this way because she had consistently championed the rights of non-white children who she considered did not receive the same degree of care from Bromley. She says that she was wrongly cast as being angry and raising her concerns improperly. She made an application to the Independent Review Mechanism and a hearing took place on 17 March 2022. The minutes of that meeting show that Ms Dawkins did refer to her concerns about a lack of understanding about what she called BAME care. Pending the hearing Paulette Dawkins had continued to act as a foster carer for one individual MO. The IRP recommended that she continued to be approved for that individual. The initial response of Bromley was to accept that recommendation a decision communicated by Richard Baldwin the Director Children, Education and Families on 26 May 2022.

118. On 17 April 2023 Mr Baldwin wrote again to Paulette Dawkins. His letter refers to correspondence from her that had used the phrase *'extreme bullying, racism, discrimination'* and *'coercive gang like behaviour'* . Noting that MO had turned 18 years of old he said that 'he did not find it credible that you and the Council could continue to work successfully together. He took a further decision to terminate Paulette Dawkin's approval. Putting the matter as neutrally as possible the terms of Mr Baldwin's letter could possibly suggest that his response to an allegation of racism was to terminate the relationship. This is a matter that could possibly fall into the type of conduct proscribed by Section 27. There was no further referral by Paulette Dawkins to the IRM as I understand it (she describes herself as having resigned).

Do Foster Carers work under a contract?

119. Whilst reserving their right to argue that ***W v Essex*** was wrongly decided the Claimants' primary argument before me was that the reasoning of the Supreme Court in ***Uber v Aslam*** means that ***W v Essex*** has been implicitly overruled, that it is open to me to find that they worked under a contract which means that they should be found to be employees and/or workers.

120. The Claimants' submissions included this summary of their position:

'(261) The doctrine of precedent requires the ET to follow a decision of the SC where its ratio conflicts with that of a CA decision. Following Uber, W has been superseded in two critical respects:

a. The focus is upon statutory rather than contractual interpretation and is to be approached purposively having regard to the statutory objective of conferring workplace rights; and

b. The regulatory source of certain terms of agreement do not preclude

them from being contractual in nature (or part of a worker relationship)'.

121. I consider the first sentence of the passage above to be uncontroversial. In order to address these issues I start below by summarising the decision in ***W v Essex***. I then set out a summary of cases where that decision has been followed. I then review the line of authority that deals with the proposition that an arrangement formed against the background of a statutory scheme might preclude a contract. I then look at ***Uber v Aslam*** for the purposes of examining what was actually decided in that case. Finally I turn to the question of whether the ratio of ***Uber v Aslam*** is inconsistent with the reasoning in ***W v Essex***. I apologise for taking the long way around. I have done so because the issue was argued at some length before me.

W v Essex and the cases that have followed it.

122. The foster parent Claimants and their natural children in ***W v Essex County Council*** **[1999] Fam 90, CA** brought various tortious claims and a claim for breach of contract claiming damages for personal injury in circumstances where they said that they had[3] suffered psychological injury when they discovered that a foster child placed with them had abused their own children. The children sued for their own injuries. The claims had been struck out by the High Court Judge and the appeal to the Court of Appeal concerned those decisions. The Court of Appeal dismissed the appeal. There was a subsequent successful appeal to the House of Lords, but that appeal was brought only in respect of any duties owed in tort. The Court of Appeal regarded the claim that there was a breach of contract as unarguable. The legislative background is set out in the judgment of Stuart-Smith LJ at paragraphs 8 – 15. The breach of contract claim that was brought is described at paragraphs 47 – 49. The parents relied upon a provision in a Code of Practice produced by the Council which provided that the foster carers would be fully informed about a child's background by a social worker as an express contractual term. In the alternative they suggested that there was an implied term to the same effect. It was admitted that the foster child's propensity to abuse was known to the Council. Stuart-Smith LJ's reasons for dismissing the appeal in respect of the breach of contract claim were as follows:

'50. 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

[3] W v Essex [2001] 2 AC 592

receiving a legacy or engaging in other gainful employment and other matters to which the judge referred [1997] 2 F.L.R. 535, 565E-F, 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 Pic. v. Dixon [1995]1 W.L.R. 636, 643F.

51. In S. v. Walsall Metropolitan Borough Council [1985] 1 W.L.R. 1150 the question was whether foster parents were the agents of the defendant council who had placed the child in care. Oliver L.J., with whose judgment Balcombe L.J. agreed, reviewed the statutory provisions which are similar to those relevant in this case. He said, at p. 1154F, 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." And later he said, at p. 1155e, 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." It is true that he does not include the relationship between the foster parents and the council as being so regulated; but it must, in my judgment, follow. 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.

52. Furthermore, I am very doubtful whether the judge was right to consider the Specialist Foster Carer Agreement separate from the Code of Practice, which specifically stated that it is not to be legally binding. The plaintiffs had pleaded that this document formed part of the agreement, and if that is correct it shows that the agreement, whatever it was, was not to be regarded as a legally binding contract. Even if I am wrong in the conclusion I have reached in paragraph 50, I would agree with the judge that paragraph 6.4 of the Code cannot be relied upon as an express term of the contract in view of the express disclaimer to which I have referred.

53. Furthermore, even if the Specialist Foster Carer Agreement was a contract I agree with the judge that it is not necessary to imply the pleaded term. It is not necessary to do so in order to give business efficacy to the contract, nor does it represent the obvious and unexpressed intention of both parties. Indeed, as I have already pointed out, it seems to me to be in conflict with the provision in the Guidance that the information to be given was that which the council considered necessary. Furthermore, the same public policy reasons for granting immunity in tort apply equally in contract: see Rondel v. Worsley [1969]

1 A.C. 191 and Saif AH v. Sydney Mitchell & Co. [1980] A.C. 198, where it was held that a solicitor acting as an advocate under contract enjoys the same immunity as a barrister, who is not in a contractual relationship.

54. Finally, even if there was such an implied term it would not in my judgment avail the parties. So far as the parents are concerned I do not consider that the psychiatric shock which they suffered on learning that the children had been abused would have been within the reasonable contemplation of the parties. So far as the children are concerned there should be no privity of contract to enable them to sue. The judge expressed the view obiter that this would not have presented a problem because the strike-out procedure is not appropriate in a developing state of the law. But there is nothing novel or developing about the law relating to privity of contract.

123. Of these reasons only paragraphs 50 and 51 are germane to the present case. Paragraph 52 rejects the Claimants case that they could rely as an express term of any contract on the terms of a code of practice said on its face not to be legally binding. Paragraph 53 deals with the implication of a term and proceeds on the basis that there is a contract[4]. Paragraph 54 deals with remoteness of damage and privity of contract. Again this paragraph proceeds on the assumption that the finding that there is no contract was wrong.

124. The parents' claim breach of contract claim was primarily rejected because the Court of Appeal held that there was no contract between them and the Council. The reasons for that may overlap but are that:

124.1. A contract is an agreement that is freely entered and freely negotiated; and

124.2. Where the requirement to enter into a form of agreement and the important terms of that agreement are mandated by statute then there is no contract; and

124.3. That given that the whole arena of foster care is '*covered by a complicated and detailed statutory scheme'* there is no room for any contract.

125. ***W v Essex*** has been applied and followed in a number of cases. I shall not deal with all of them as I do not consider it necessary to do so[5]. In

[4] It seems unlikely that the public policy reasons for rejecting an implied term set out in the closing parts of that paragraph remain good law in the light of the outcome of the appeal to the House of Lords but that has no bearing on my decision.

[5] Lambert v Cardiff County Council [2007] 3 FCR 148 and others

Rowlands v City of Bradford Metropolitan District Council **[1999] EWCA Civ 1116,** in a case where a foster carer sought to bring a claim under the Race Relations Act 1976, Stuart-Smith LJ giving the lead judgment reversed the decision of the Employment Tribunal who had held that the Claimant did work under a contract to provide services personally. His reasons in short were that the decision of the Employment Tribunal and the Employment Appeal Tribunal which had upheld the decision had been overtaken by the decision in ***W v Essex*** which was sufficient to dispose of the matter.

126. In ***Bullock v Norfolk County Council*** **[2011] UKEAT 230/10** the foster carer Claimant sought to bring a claim under Section 10 of the Employment Relations Act 1999 complaining that her right to be accompanied at a meeting held to consider the withdrawal of her approval as a foster carer. She needed to establish that she was an employee or worker to bring her claim. The Employment Tribunal had decided that the Claimant could not establish that she had any form of contract with the council and dismissed her claim. In the Employment Appeal Tribunal Counsel on behalf of the Claimant sought to persuade the EAT that the Tribunal had erred in following ***W v Essex*** and ***Rowlands.*** An argument raised by the Claimant that her claim arose in a different context to the claims decided by the Court of appeal was rejected. Slade J said at paragraph 39 (emphasis added):

39. The fact that the Court of Appeal reached their decisions in W and in Rowlands that the relationship between foster carers and local authorities was not contractual in different contexts does not affect their relevance and binding effect on the issue in the appeal before us. 'Contract' is not given a different meaning in the ERA 1996 or 1999 from that which it ordinarily bears. There is no basis for making a different categorisation of the relationship between foster carer and local authority in the factual context of W and Rowlands on the one hand and in the appeal before us on the other. The relationship is not governed by contract.

127. In ***NUPFC v Certification Officer*** it was conceded before the Court of Appeal that the Court was bound by its own decisions in ***W v Essex*** and ***Rowlands*** (see para 7) although the Union reserved the right to challenge the reasoning in those cases if the matter proceeded to the Supreme Court. In dealing with the issue of the justification for excluding foster carers from the right to be listed under section 2 of the 1992 Act Underhill LJ said:

'In my view it is fairly clear that the Secretary of State is concerned not so much about the actual issue raised by the NUPFC's claim as by the risk of it representing the thin end of the wedge in forcing open the door

to full worker (or indeed employee) status. I do not believe that it does so. That door is still barred by the decisions in W v Essex County Council and Rowlands (unless and until reconsidered by the Supreme Court, in which case the Secretary of State will have a much bigger problem), and the wedge opens a crack no bigger than the effect of Convention rights requires.

128. My purpose in looking at the cases that have followed ***W v Essex*** was to examine whether it has been suggested that the ambit of the decision is limited to a particular context. The answer to that question is that it has not. I have looked at whether the reasons in the subsequent authorities further explain the reasoning of the Court of Appeal in ***W v Essex***. I do not believe they do. Only in ***Bullock*** was there any consideration of the reasoning in ***W v Essex***. Slade J gives no further explanation of the essential reasoning of Stuart-Smith LJ. She relied upon ***Lambert and another v Cardiff County Council*** **[2007] EWHC 869** and ***North Essex Health Authority v David-John*** **[2004] ICR 112** in support of her conclusion that *'There is no reason why all workers should be treated as if they work pursuant to a contract. Nor is there anything new about this distinction'*.

Other cases dealing with the question of no contract in a statutory context.

129. Slade J's remark that there is 'nothing new' about the suggestion an arrangement between parties may not be capable of being contractual where the arrangement arises in the context of a statutory scheme is supported by authority. The proposition has a long pedigree. In ***Pfizer Corporation v. Ministry of Health*** **[1965] A.C. 512** an issue arose as to whether the supply of an antibiotic to a patient pursuant to a prescription amounted to a sale. Lord Reid said, at pages 535-536 (with emphasis added):

"I shall consider the case on the footing that a patient is not entitled to demand the drug unless he tenders 2s. The appellants' argument is C that when the patient pays 2s. and gets the drug there is a sale of the drug to him by the hospital or the chemist and that 2s. is the price. If that were right, the appellants say that section 46 does not authorise the department or its servants or agents to sell or vend, it only authorises them to make, use or exercise the invention. But in my opinion there is no sale in this case. Sale is a consensual contract requiring agreement, express or implied. In the present case there appears to me to be no need for any agreement. The patient has a statutory right to demand the drug on payment of 2s. The hospital has a statutory obligation to supply it on such payment. And if the prescription is presented to a chemist he

appears to be bound by his contract with the appropriate authority to supply the drug on receipt of such payment. There is no need for any agreement between the patient and either the hospital or the chemist, and there is certainly no room for bargaining. Moreover the 2s. is not in any true sense the price: the drug may cost much more and the chemist has a right under his contract with the authority to receive the balance from them. It appears to me that any resemblance between this transaction and a true sale is only superficial. I would therefore decide against the appellants on this point."

130. In ***Wadi -v Cornwall and Isles of Scilly Family Practitioner Committee*** **[1985] ICR 492**[6] Dr Wadi had been turned down by the Respondent for a general practice vacancy. He claimed that the refusal was an act of race discrimination. The Employment Tribunal dismissed his claim. An issue on appeal to the Employment Appeal Tribunal was whether a GP would provide services under a contract. Peter Gibson J (as he was) and members were persuaded by Mr Underhill (as he was) that the relationship between a GP and the body that engages them was not contractual. Having analysed the statutory scheme the EAT said at page 498 and emphasis added:

'There is in our view little to support Mr. Susman's suggestion that the family practitioner committee, still less the medical committee, enters into a contract with the doctor who successfully applies for a vacancy. The family practitioner committee is obliged to cause payments to be made to doctors, but it is a mere conduit pipe for such moneys which the Secretary of State must pay to it and which it must pass on to the doctors. It has no discretion in the amounts or the circumstances of the payments. Nor does the "light supervision" (to use the industrial tribunal's words) which it exercises over the doctors signify a contract. Still less is there anything to indicate that the medical committee has a contract with the doctor, there being no continuing relationship between them. In summary, our view is that under the statutory arrangements the doctor on the one side and each of the family practitioner committee and the medical committee on the other have rights and obligations conferred by statute rather than by contract. It is not necessary and we think it wrong to seek to import a contract into a scheme of things which is governed by the very detailed statutory arrangements made by neither the family practitioner committee nor the medical committee.

131. The position of GPs was revisited in ***Roy -v- Kensington, Chelsea and***

[6] Not included in the bundle of authorities but referenced in North Essex Health Authority v. David-John [2004] ICR 112 which is in turn referenced in Bullock v Norfolk County Council.

Westminster Family Practitioner Committee. Dr Roy had brought a private law claim complaining about the reduction in an allowance paid to him. In the High Court the judge held that: *'The rights and duties of those within the scheme stem from and are entirely dependent on statute and regulation. They are not dependent on a contractual relationship'.* the relationship between the parties was not contractual. On appeal that conclusion was held to be incorrect. All three members of the Court of Appeal[7] accepted that the relationship between the parties was contractual relying on ***Reg. v. East Berkshire Health Authority, Ex parte Walsh*** **[1985] Q.B. 152**. On further appeal to the House of Lords[8] ***Wadi*** was relied upon by the family practitioner committee. The House of Lords concluded that the outcome of the appeal did not turn on whether there was a contract. It was sufficient that he had a private law right to payment under the statutory scheme. Lord Lowery deals with the question of the existence of a contract at page 649 where he says:

> *'I cannot altogether accept the reasoning which led the members of the Court of Appeal to conclude that there was a contract, because, although there may well have been a contract for services, I am not satisfied that there was. Reg. v. East Berkshire Health Authority, Ex parte Walsh [1985] Q.B. 152 does not in my view provide a reliable argument in favour of saying that there was a contract in the present case and Wadi v. Cornwall and Isles of Scilly Family Practitioner Committee [1985] I.C.R. 492 indicates the contrary. At the same time, I would be foolish to disregard the fact that all the members of a distinguished Court of Appeal held that a contract for services existed between Dr. Roy and the committee. It shows, to say the least, that there are "contractual echoes in the relationship," as Judge White [1989] 1 Med.L.R. 10, 12, put it and makes it almost inevitable that the relationship, as was said of that which arose in Wadi's case, gave rise to "rights and obligations" and that Dr. Roy's rights were private law rights. I would here observe that the mere fact that the Act and the Regulations constitute a statutory scheme which lays down the doctor's "terms of service" (an expression which has contractual overtones) and creates the relationship between him and the committee, is not fatal to the idea of a contract, but that relationship did not need to be contractual. Moreover, the discretion which the scheme confers on the committee is not typically characteristic of a contractual relationship, and the same can be said of the appellate and supervisory role given to*

[7] [1990] 1 Med LR 328

[8] [1992] 1 A.C. 624

the Secretary of State.'

132. The judgment of Lord Lowry clearly recognises the possibility of a working relationship arising from a statutory background not being contractual. The effect of the decision in ***Roy*** was considered by the Employment Appeal Tribunal in ***Ealing Hammersmith and Hounslow FHSA -v-Shukla*** **[1993] ICR 710.** The EAT held that the House of Lords had overruled the Court of Appeal on whether the relationship was contractual. They went on to add the following reasons at page 718 (emphasis added):

> *'We ourselves would respectfully add some comments. First, since the relationship of general practitioners with the family health services authority is based on statutory provisions, there is no need to seek to explain it in contractual terms. The sources of the obligations are statutory. Secondly, the relationship does not sound in the contractual concepts of offer and acceptance; we doubt whether consideration can be spelt out. Thirdly, the appointing body was the medical practices committee not the family health services authority. Fourthly, the obligations arising do not arise out of a bargaining process between the parties. Fifthly, such discretion as is available to the family health services authority is subject to appeal to the Secretary of State, who is in fact the arbiter. Sixthly, the situation is distinguishable from those instances where a contract exists and statutory terms are to be implied into it. Hospital doctors, nurses and ancillary staff are employees under contracts of service.*

133. ***Norweb*** is chronologically the next case I need to consider. It did not concern a working relationship but the supply of electricity. It arose in the context of a private prosecution for unlawful harassment of a debtor. An essential element to that offence was that there was a contractual debt. The Divisional Court held that there was not and directed an acquittal. Dyson J (as he was) sets out his reasons on pages 642G – 645D. What is instructive is that Lord Dyson recognised that *'There are many examples of cases where the law to some extent restricts the freedom of parties to enter into a relationship, but where the relationship that results is a contract'.* He then refers to other situations which give rise to obligations arising from statute, but which do not give rise to a contract – 643A-F. He then asks himself *'which side of the line does the relationship between a tariff customer and a public electricity supplier fall?'* The conclusion reached *'In my judgment, 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'*.

134. In ***North Essex Health Authority v. David-John*** an employment judge

had incorrectly stated that the issue of whether a GP worked under a contract had never been the subject of any decided case. In the Employment Appeal Tribunal the health authority (represented by Mr Underhill QC) presented the authorities I have summarised above (having drawn heavily from the judgment in the EAT. The EAT concluded that they were bound by ***Shukla*** and allowed the appeal.

135. The impact of a statutory scheme on the existence of a contract was considered in the Supreme Court in ***Gilham v Ministry of Justice*** **[2019] UKSC 44**. At paragraph 16 Lady Hale, giving the judgment of the court identifies the question as being one of intention: *'did the parties intend to enter into a contractual relationship, defined at least in part by their agreement, or some other legal relationship, defined by the terms of the statutory office of district judge?'*. At paragraphs 17 and 18 she sets out statutory regime which regulated the appointment of a judge. The terms of the arrangement were not exclusively derived from statute. Her conclusion, having looked at all of the surrounding circumstances was that neither party intended to enter into a contractual relationship.

136. What I draw from ***Norweb*** but also from the other authorities I have referred to above is that the question of whether a transaction arising in the context of a statutory scheme leaves any room for a private law contractual relationship is a matter of judgment and will depend on the scope of the statutory intervention into the terms of the arrangements. That is supported by the statement of Lord Lowry in ***Roy*** where he said '*the mere fact that the Act and the Regulations constitute a statutory scheme……. is not fatal to the idea of a contract, but that relationship did not need to be contractual*. The existence of statutory implied terms would not (necessarily) take an arrangement outside the law of contract – see ***Shukla*** above. However, in the field of electricity supply the level of statutory compulsion was sufficient to exclude the existence of a contract – ***Norweb***. I consider that the most compelling explanation of why there may not be a contract if many terms are dictated by a statutory scheme is that explained by Lady Hale in ***Gilham*** and reflects the presumed the intention of the parties.

137. Each statutory scheme will require individual consideration as to the scope and extent of the obligations that are imposed. I am driven to the conclusion that it was this exercise of judgment that was undertaken by the Court of Appeal in ***W v Essex***. That is the conclusion reached by the EAT in the ***NUPFC*** case where at paragraph 39 it was said:

> *'We also do not accept Ms Crasnow's submission that the W line of authority is to the effect that where there is statutory underpinning of a relationship there is no contract. There are, of course, many situations where a relationship may be contractual notwithstanding the fact that*

some or even many aspects of the relationship are dictated by statute; a normal relationship of employment in which there are statutorily imposed terms as to equality of treatment is an example. However, the question of which side of the Norweb line the particular relationship falls will depend on the circumstances of that relationship. W was not decided simply on the basis that there was statutory underpinning; Stuart-Smith LJ in that case carefully considered the terms of the agreement and noted, amongst other things that the foster carer had, for example, a right to decline any placement of a child provided such objection was not made unreasonably: see W at 112F. However, the conclusion was that there was, nevertheless, a statutory obligation on the parties to enter into a form of agreement "the terms of which are laid down, at any rate in their most important respect".

138. The statutory scheme has been revised since ***W v Essex***[9]. The Claimants did not place any great emphasis on the revisions to the statutory scheme in their arguments before me. I consider they were right not to do so. When the ***NUPFC*** case was before the EAT the issue of whether ***W v Essex*** remained binding in the light of changes to the statutory regime was raised as an issue. The Employment Appeal Tribunal held at paragraph 28:

'the fact that different regulations were in force at the time of the earlier decisions makes no substantive difference. That is for the simple reason that the effect of the legal provisions, which is to dictate, to a very large extent, the terms of the relationship between the foster carer and the local authority, is the same now as it was then'.

139. As I have indicated above the challenge to the binding nature of ***W v Essex*** was not pursued before the Court of Appeal in the NUPFC case. I am bound by the conclusions of the EAT in that case that the revision to the statutory scheme does not provide any basis for departing from ***W v Essex***.

140. This is an appropriate point for me to deal with the case of ***Glasgow City Council v Johnstone*** **[2019] UKEATS 0011_18_2310**. I note that Lord Summers analysis of the arrangements between the foster carers and the local authority dealt with the issue of whether the totality of those arrangements flowed from the Scottish statutory scheme, and he decided that they were not. He particularly relied on a bespoke arrangement in respect of remuneration. He also noted that other arrangements were to a degree bespoke, and he declined to deal with the case on any wider basis.

[9] A point thought to be of importance by Bogg, A. L., & Ford, M. D. (2022). Employment Status and Trade Union Rights: Applying Occam's Razor. Industrial Law Journal, Article dwac022.

He was not bound by ***W v Essex*** although he noted that in Scotland the existence of a statutory scheme might in some circumstances suggest that a contract did not come into being. This authority was cited in the ***NUPFC*** case and Underhill LJ's judgment, read as a whole, makes it clear that whilst noting the very thin distinctions between the position north and south of the border the decision in ***Johnstone*** did not impact on the binding nature of ***W v Essex***.

Uber v Aslam

141. I now turn to ***Uber v Aslam***. The Claimants rely upon the statement of Lord Leggatt at paragraph 69 of ***Uber v Aslam*** that: *'the primary question was one of statutory interpretation, not* contractual *interpretation'*. I consider that that passage is best understood in the context of the arguments made by Uber that Lord Leggatt was addressing. It is therefore necessary for me to look at exactly what was decided in ***Uber v Aslam***.

142. At paragraphs 41 and 42 Lord Leggatt sets out the main issue that the Court was invited to decide. He says: *'The critical issue is whether, for the purposes of the statutory definition, the Claimants are to be regarded as working under contracts with Uber London whereby they undertook to perform services for Uber London; or whether, as Uber contends, they are to be regarded as performing services solely for and under contracts made with passengers through the agency of Uber London'.*

143. It was Uber's case that the contract to provide transport services to passengers was a contract made between the driver and the passenger. It said that insofar as Uber London had any role in the formation of that contract it was as an agent on behalf of the driver -see paragraph 43. Lord Leggatt held that the written terms between Uber BV and the passenger were not capable of conferring on any Uber company the status of an agent of the driver – paragraph 51. The terms agreed between the drivers and Uber BV did not confer agency status on an Uber affiliate (the relevant one being Uber London). There was no finding by the Employment Tribunal that the drivers had ever conferred authority to act as agent on Under London – paragraph 54. In those circumstances Lord Leggatt rejected Uber's arguments holding that there was no factual basis for a conclusion that any Uber company was an agent of the driver – see paragraph 49. That conclusion was supported a finding that the position suggested by Uber would have resulted in the drivers acting unlawfully – see paragraph 46.

144. The effect of rejecting Uber's agency arguments is summed up by Lord Leggatt at paragraph 56 where he says (with my emphasis):

> *'Once the assertion that Uber London contracts as a booking agent for drivers is rejected, the inevitable conclusion is that, by accepting a*

booking, Uber London contracts as principal with the passenger to carry out the booking. In these circumstances Uber London would have no means of performing its contractual obligations to passengers, nor of securing compliance with its regulatory obligations as a licensed operator, without either employees or subcontractors to perform driving services for it. Considered against that background, it is difficult to see how Uber's business could operate without Uber London entering into contracts with drivers (even if only on a per trip basis) under which drivers undertake to provide services to carry out the private hire bookings accepted by Uber London.'

145. The point that was made by Uber and rejected by the Supreme Court was that there was no contract to provide services as a driver between any Uber entity and the drivers. There is nothing in those passages that suggest that the Supreme Court are indifferent to whether there was a contract. On the contrary. The Court identified the contracting parties under which the driver provided their services.

146. The passages relied upon by the Claimants arise when Lord Leggatt deals with an additional argument by *'Uber's argument that the question whether an individual is a worker for the purpose of the relevant legislation ought in principle to be approached, as the starting point, by interpreting the terms of any applicable written agreements'*. At paragraph 58 Lord Leggatt identifies that that argument needed to address the reasoning of the Supreme Court in ***Autoclenz Ltd v Belcher*** **[2011] ICR 1157**. Uber's arguments are summarised at paragraphs 65-67. It was said that the written terms accepted by the passenger described Uber or its local partner as the agent of the driver. The manner in which Uber and the drivers conducted themselves was consistent with that position and, in the circumstances, there was no basis for departing from the written terms. That was essentially the reasoning given by Underhill LJ in his dissenting judgment in the Court of Appeal.

147. Lord Leggatt held that Uber's arguments were inconsistent in ***Autoclenz*** where it had been held that whether a contract is a worker's contract within the meaning of the legislation designed to protect employees and other workers *'is not to be determined by applying ordinary principles of contract law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake'* – see Lord Leggatt paragraph 68.

148. It is in that context that Lord Leggatt goes on to explain that the reason why ordinary contractual principles could be disregarded was that the exercise was not one of contractual interpretation but one of statutory interpretation. Statutory interpretation requires a purposive approach (see paragraph 70). The purpose of employment legislation is to *'[prevent]*

vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing)' – paragraph 71. Between paragraphs 72 and 75 Lord Leggatt sets out the reasons why the existence of an employment relationship can lead to vulnerability before concluding that: *'It is these features of work relations which give rise to a situation in which such relations cannot safely be left to contractual regulation and are considered to require statutory regulation'*.

149. At paragraph 76 Lord Leggatt rejects Uber's argument for the reasons he has set out saying:

> *'Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a worker . To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker'*.

150. Between paragraphs 79 and 82 Lord Leggatt gives a further reason why the written agreements relied upon by Uber should not be the starting point for any consideration of employment status. He holds that provisions in the Services Agreement between the drivers and Uber BV had the effect and were intended to prevent the driver claiming to have the status of a worker. Given that was the case the relevant clauses fall foul of the statutory prohibitions on contracting out included in section 203(1) of the ERA 1996, Section 49(1) of the National Minimum Wage Act 1998 and regulation 35(1) of the Working Time Regulations 1998.

151. In paragraph 83 Lord Leggatt asks a rhetorical question which is that if a written agreement is not the starting point in determining whether the statutory definition is met then what is the proper approach. The answer is given in paragraphs 84 to 88:

151.1. From ***Autoclenz:*** *'the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.*

151.2. From ***Carmichael v National Power plc*** **[1999] ICR 1226** per Lord Irvine of Lairg LC said at pp 1230—1231 that:

' it would only be appropriate to determine the issue in these cases solely by reference to the documents in March 1989, if it appeared from their own terms and/or from what the parties said or did then, or subsequently, that they intended them to constitute an exclusive memorial of their relationship. The industrial tribunal must be taken to have decided that they were not so intended but constituted one, albeit important, relevant source of material from which they were entitled to infer the parties true intention . . . '

151.3. From Lord Leggatt at paragraph 85: *'The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties agreement and no absolute rule that terms set out in a contractual document represent the parties true agreement just because an individual has signed it'*.

151.4. From ***Bates van Winkelhof v Clyde & Co LLP (Public Concern at Work intervening)*** **[2014] ICR 730** *'[there can] be no substitute for applying the words of the statute to the facts of the individual case*'.

151.5. From Lord Leggatt at paragraph 87 (emphasis added): *'As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a worker who is employed under a worker's contract'* .

152. Lord Leggatt does not spell out in terms the basis upon which he found a contract between the drivers and Uber London. However, in my view the thrust of the passage above is quite clear. The existence of a contract was an *'inevitable conclusion'* the business *'could [not] operate without'* a contractual arrangement. The language used is consistent with the test for implying a contract explained by the Court of Appeal in ***James v Greenwich LBC*** **[2008] ICR 545** being a test of necessity[10] or ***Cable and***

[10] At ET level the Tribunal identified the contracting party in similar language saying: *'Mr Reade submitted that if the drivers had any limb (b) relationship with the organisation, it must be with UBV. There was no agreement of any sort with ULL, which only exists to satisfy a regulatory requirement. We reject that submission. UBV is a Dutch company the central functions of which are to exercise and protect legal rights associated with the App and process passengers' payments. It does not have day-to-day or week-to-week contact with the drivers. There is simply no reason to characterise it as their employer. We accept its first case, that it does not*

Wireless plc v Muscat **2006 ICR 975, CA** where the Court inferred the existence of a contract to reflect business reality.

153. In his written submissions Mr Moretto says: *'Autoclenz v Belcher [2011] ICR 1157, Pimlico Plumbers Ltd v Smith [2018] ICR 1511 and Uber BV v Aslam [2021] ICR 657 do not deal with whether there was a contract and do not assist the Claimants'*. I cannot agree with the suggestion that ***Uber v Aslam*** does not deal with the question of '*whether there was a contract*'. That question was in fact central to the case. Lord Leggatt found that there was a contract between the drivers and Uber London. He then agreed that the Tribunal were entitled to find that under that contract the drivers were workers.

154. The Claimants referred to ***Sejpal v Rodericks Dental UK Ltd*** **[2022] IRLR 752** relying on the statement of HHJ Tayler that ***Uber v Aslam*** had *"substantially shifted the focus of analysis away from contractual construction alone"*. I accept that proposition. However, in ***Sejpal*** HHJ Tayler said at paragraph 17 (with emphasis added):

> *'Focus on the statutory language tells us that there must be a contract (or, for reasons we will briefly consider below, in limited circumstances, a similar agreement)[11] between the worker and the putative employer. But how do we analyse the nature of the agreement? Is it by applying undiluted common law contractual principles? No, it is not; as the Supreme Court authorities now make clear. While there must generally be a contract, the true nature of the agreement must be ascertained and contractual wording, that may have been designed to make things look other than they are, must not be allowed to detract from the statutory test and purpose.'*

155. In my view ***Sejpal*** does not assist the Claimants. It makes it clear that the change in approach wrought by ***Uber v Aslam*** did not sweep away the requirement for there to be a contract between the putative worker and their employer. I would accept that the approach in ***Uber v Aslam*** would permit a tribunal to depart from written agreements that purport to exclude the existence of a contract or to place contractual liability on a party that was not a true party to the contractual arrangement.

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employ drivers. ULL is the obvious candidate. It is a UK company. Despite protestations to the contrary in the Partner Terms and New Terms, it self-evidently exists to run, and does run, a PHV operation in London. It is the point of contact between Uber and the drivers. It recruits, instructs, controls, disciplines and, where it sees fit, dismisses drivers. It determines disputes affecting their interests.'

[11] Those limited purposes referred to an EU/Human Rights Act point raised on behalf of the Claimant by Mr Milsom.

The Claimants' second argument – terms derived from a statutory scheme

156. The Claimants' say in their submissions an essential step in the reasons in ***Uber v Aslam*** was that '*The regulatory source of certain terms of agreement do not preclude them from being contractual in nature'.* Lord Leggatt says this at paragraph 102:

> *'I would add that the fact that some aspects of the way in which Uber operates its business are required in order to comply with the regulatory regime although many features are not cannot logically be, as Uber has sought to argue, any reason to disregard or attach less weight to those matters in determining whether drivers are workers. To the extent that forms of control exercised by Uber London are necessary in order to comply with the law, that merely tends to show that an arrangement whereby drivers contract directly with passengers and Uber London acts solely as an agent is not one that is legally available.'*

157. Lord Leggatt in this passage holds that the fact that some aspects of the arrangements are necessary to conform with statutory obligations does not mean that they fall to be disregarded in an assessment of whether any statutory definition in respect of employment status is met. I accept the Claimants' argument up to this stage.

158. What Lord Leggatt does not deal with is the circumstances where *'the essential components of the relationship are derived from statute'*[12]. I consider this to be an entirely separate point. The point simply did not arise on the facts of the case. The statutory regime that impacted on the arrangement was the PHV regulatory regime. That required Uber London to accept bookings, ensure all driver standards were met and other like matters. It therefore had some impact on the arrangements with the drivers. However, it was not, and could not sensibly have been argued, that any contract between Uber London and the drivers was precluded by the terms of a statutory scheme in the sense used in the authorities I have reviewed above.

159. The question of whether an arrangement is so closely defined by a statutory scheme as to preclude a contract is, as I have said above, a matter of assessment of the scheme. For Foster Carers that exercise has taken place in ***W v Essex***. I am not at this stage concerned with whether that assessment was correct. I am bound by that decision unless it has

[12] The phrase used in Gilham but consistent with W v Essex where the phrase 'in their most important respects' is used.

been implicitly overturned.

160. From my review of the authorities I have come to the conclusion that there is nothing in ***Uber v Aslam*** which dilutes the requirement in Section 230 of the ERA 1996 (or any domestic provisions with the same wording) for a contract as a pre-requisite for employment or worker status. A significant part of the judgment of Lord Leggatt is concerned with identifying the existence of a contract.

161. What ***Uber v Aslam*** did decide was that in looking at the question of whether a contract exists, as well as what the terms are, a tribunal is applying a statutory test and not a contractual one. Written agreements that point against the existence of worker or employment status do not fall to be disregarded but they are not the starting point in any statutory analysis. Nor does the fact that some terms of an agreement were necessary to comply with a regulatory regime.

162. If the Claimants' arguments relying on ***Uber v Aslam*** were correct it is not just ***W v Essex*** that would be wrongly decided. The same would apply in respect of the status of General Practitioners and of judges (see ***Gilham*** above). Had the Supreme Court intended to say that the statutory test for employment status and/or the fact that terms should not preclude employment status because they derive from statute, meant that any case decided on the basis that an arrangement wholly explicable wholly by a statutory scheme was no contractual was wrong then I consider that the court would have understood the need to say so in terms. It would amount to sweeping away a line of authority that has stood for years and was recognised and applied recently by the Supreme Court in ***Gilham***[13].

163. ***Uber v Aslam*** undoubtably makes it easier for a putative worker to push aside artificial arrangements which appear to exclude the existence of a contract[14]. It does not dispense with the requirement all together. The point being that, even if applying a statutory test, the words of the relevant statutes all require there to be a contract.

164. It follows that on a purely domestic construction of the legislative provisions dealing with employment status (all of which require a contract) the Claimants cannot succeed. ***W v Essex*** remains binding authority for the proposition that the Claimants do not work under a contract with the

[13] In my view it would also significantly erode cases where no contract has been found to exist for other reasons such as ***James v Greenwich*** and cases concerning Ministers of Religion.

[14] A well-known case where arrangements which on their face would have precluded a contract between the employer and employee is Catamaran Cruisers Ltd v Williams & Ors [1994] UKEAT 786/93/1301 where the EAT upheld a finding that the formation of a limited company by the employee that received payment for his services did not preclude a finding that there was still a contract between the employer and employee.

Respondents. That conclusion is sufficient to dispose of the claims of unfair dismissal.

Domestic status if I am wrong about W v Essex

165. The Claimants urged me to make findings in respect of whether the Claimants were employees or workers on the assumption that, at some stage, they will persuade the upper courts that ***W v Essex*** does not preclude those relationships to avoid the need for any remittal. Given the extensive factual evidence and arguments that I heard I consider it sensible to do so. However, given the length of this judgment, I shall set out a truncated self-direction on the law and state my conclusions as briefly as I can.

Are the Claimants employees?

166. In ***Market Investigations Ltd v Minister of Social Security*** **1969 2 QB 173, QBD,** Mr Justice Cooke said:

> 'the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task'

167. The approach of Cooke J was considered 'useful' but not 'fundamental' in ***Nethermere (St Neots) Ltd v Gardiner and anor*** **1984 ICR 612**, CA. The privy Council in ***Lee Ting Sang v Chung Chi-Keung and anor*** **1990 ICR 409, PC** accepted that there was no single test for the existence of a contract of employment but said that the matter had never been put better than by Cooke J.

168. In ***Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** **[1968] 2 QB 497** it was said by Mckenna J that

'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

169. The approach of McKenna J has most recently been endorsed in the Supreme Court by Lord Clarke in ***Autoclenz Ltd v Belcher and ors*** **2011 ICR 1157, SC** where at paragraph 18 he described the passage above as the classic test for a contract of employment.

170. In ***Carmichael v National Power plc*** **2000 IRLR 43** the House of Lords confirmed that there is an "irreducible minimum" of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

171. The requirement that the work be performed personally by the putative employee is also a necessary precondition in the statutory definition of worker. It is not necessary that the work is done exclusively by the putative employee/worker a limited power to delegate will not necessarily defeat employee or worker status. The circumstances where a power to delegate might be fatal to employment or worker status were fully explored in ***Pimlico Plumbers Ltd v Smith*** both in the Court of Appeal **[2017] ICR 657** and in the Supreme Court **[2018] ICR 1511**. In both courts it was held that a limited right to delegate would not necessarily be inconsistent with the dominant purpose of the contract being the provision of services personally.

172. The requirement for control suggests it is necessary to demonstrate that the employer can, under the contract of employment, direct the employee in what she did see ***Wright v Aegis Defence Services (BVI) Ltd and ors*** **EAT 0173/17**. That is distinct from showing that the employer controls the way that the employee does the work. Even a complete absence of day to day control is irrelevant if ultimately the employer retains the contractual power to direct what work should be done see ***White and anor v Troutbeck*** **SA 2013 IRLR 949, CA**.

173. A checklist approach is not appropriate. In ***Hall (Inspector of Taxes) v Lorimer*** **1994 ICR 218, CA**, the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:

'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the

accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation.'

Employee status discussion and conclusions

174. I am proceeding on the basis that the arrangements between the claimants and their respective local authorities is contractual. For that contract to be a contract of service it would be necessary to show that the services are to be provided personally. The Respondents and Secretary of state point to many foster carers who foster as couples. They say such an arrangement cannot amount to personal service. Ms Crasnow KC does not accept that such an arrangement is incapable of being one of personal service. I am inclined to agree. It would be a very rare situation where a foster care agreement with a couple did not impose at least some requirement on each partner to provide at least some personal service. However, I prefer to deal with Ms Crasnow's alternative position which she put in pithy terms. None of the Claimant's before me fall into that category so the issue does not arise. I agree. In the case of each claimant the services that they had agreed to provide were not services that could be undertaken by unfettered delegation.

175. The next issue that I need to consider is whether there is 'sufficient control'. I have set out my findings about control above. The conclusion I reach is that having regard to the reasoning in ***White and anor v Troutbeck*** there is sufficient control during any placement that the relationship is capable of being employment.

176. I find that it is at the final stage that the Claimants have failed to satisfy me that the relationship is one of employee/employer. The authorities I have set out above require me to stand back and look at the whole picture. To see the entire arrangement as a whole. As Underhill LJ said in ***NUPFC*** the foster care agreement is best regarded as an umbrella agreement. It does not guarantee any level of work as no placements are promised. It does not oblige the foster carer to accept any placement. Between placements the position is the same neither party is obliged to offer or accept a placement. There may be an expectation and there may be obligations to undertake training but that is not the same as providing fostering services. Such a relationship is in my view inconsistent with an employment relationship.

177. Further features of the relationship that are in my view inconsistent with the existence of an employment relationship is the fact that any placement can come to an end through the ending of a care order at any time. This is commonplace whilst public law proceedings are on foot. It is not unusual once they have concluded. Care orders can end with adoption and special guardianship orders in

favour of foster carers or third parties. That sort of dependence on third parties is typical of agency work but less so in an employment relationship.

178. A feature of an employment relationship is often the extent of the integration of the employee within the business of the employer. In the case of foster carers, standing back from the evidence, I am not persuaded that the role of foster carers is integrated into the business of a local authority. Foster carers provide services to that 'business'. They are not an integral part of it.

179. I have dealt with this as succinctly as I can. I conclude that the relationship between the claimants, assuming it to be contractual, is not performed under a contract of service but is a contract to provide services.

Worker status

180. The position of workers in the hierarchy of employment status was described by Lady Hale in ***Bates von Winkelhof v Clyde & Co LLP*** **[2014] ICR 730 as follows:**

> *'…the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act'*

181. In common with employment status, worker status will not be defeated by some limited right to delegate see ***Pimlico Plumbers Ltd v Smith***.

182. In ***Pimlico Plumbers Ltd v Smith*** **[2018] UKSC 29**, the Supreme Court considered, among other issues, whether Pimlico should be regarded as a client or customer of Mr Smith. The Court referred to two authorities which may be of some assistance in the conduct of the inquiry: ***Cotswold Development Construction Ltd v Williams*** **[2006**] IRLR 181 where it was said by Langstaff P:

> *"… a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he*

is recruited by the principal to work for that principal an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls"

and ***Hashwani v Jivraj*** **[2011] UKSC 40** where Lord Clarke stated, at paragraph 34:

"… whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services"

183. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker; see paragraph 30 of ***Bates von Winkelhof v Clyde & Co LLP*****.**

Worker status – discussion and conclusions

184. Again proceeding on the basis that the arrangements between the Claimants and the local authorities is contractual it is necessary for me to apply the words of the statutory provisions. The first question is whether there is a contract under which the Claimants provide services personally. I repeat the point about personal service that I have set out above. The answer is plainly that the Claimants do provide services to their respective local authorities.

185. The only remaining question is whether the status of the local authority is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the claimant. I find the answer to that question straightforward. Foster carers can only provide their services to one fostering service at a time. They are unable to market their services. They are unable, in reality, to negotiate their rates of remuneration to any significant degree. I have found that they work under the control of the fostering service. They are entirely dependant on the fostering service to provide them with any work. I find that they are not operating a professional or business undertaking. They are providing a service for reward. The local authorities are neither their clients nor their customers. But for the absence of a contract, I would have concluded that the Claimants were workers under the domestic legislation.

186. For completeness I would have reached exactly the same conclusion for the same reasons using the statutory definition in Section 83 EA 2010.

EU Law arguments

187. The Claimants argument that the tribunal is required to read the Working

Time Regulations 1998 and the EA 2010 to permit foster carers to assert a right to paid holiday and to complain under part 5 of the EA 2010 about any unlawful discrimination, harassment or victimisation breaks down into the following steps:

187.1. they say that there has been a finding both domestically in the ***NUPFC*** case and in the CJEU in ***Sindicatul Familia Constanţa v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa*** **C-147/17 [2019] ICR 211** that foster carers are in an 'employment relationship' with those who engage them; then

187.2. it is said that whether or not the foster carers work under a contract, being in an 'employment relationship' is sufficient to satisfy the EU definition of worker for the purposes of the Working Time Directive and the Framework Directive and Race Equality Directive; and

187.3. that the UK had (at least at the time) an obligation to provide a remedy for any breach of the two directives that was both effective and equivalent to any similar domestic claim; and

187.4. That the Tribunal could and should read the Working Time Regulations 1998 and EA 2010 in a manner that provides such a remedy.

188. If EU law does not require there to be a contract between the employer and worker in order for the worker to be able to point to an EU right then, absent any changes caused by the withdrawal from the EU, the tribunal must interpret the domestic legislation, as far as possible, in a manner consistent with that right or, in the case of the Working Time Regulations, potentially recognise that they are of direct effect[15].

189. The Claimants do not invite me to undertake the exercise of interpreting the WTR 1998 in a manner consistent with any EU right afforded by the Working Time Directive. What I am asked to do is to say that the Claimants have the rights under the directive and to leave it to parliament to devise an appropriate scheme.

190. The Respondents and the Secretary of State's position is that (1) the Claimants are not workers for the purposes of EU law (2) that foster carers fall outside the scope of the Working Time Directive and (3) that in the case of discrimination complaints the EA 2010 provides an effective and equivalent remedy in the County Court.

[15] Not a point expressly argued before me but one that is quite clear from ***Smith v Pimlico Plumbers Ltd*** **[2022] EWCA Civ 70** certainly for claims that predate 'completion day'.

Can the Claimants show that they are workers for the purposes of EU derived rights/law?

191. I shall deal with the authorities that deal with the question of whether foster carers can bring themselves within the definition of employment set out in Section 83 EA 2010.

192. The first of these is ***Rowlands v City of Bradford Metropolitan District Council*** where a concession was made by Ms Crasnow on behalf of Ms Rowlands and the Commission for Racial Equality that, in the light of ***W v Essex***, Ms Rowland, who was applying to be a foster carer, could not bring herself within the definition of 'employment' found in Section 78 of the Race Relations Act 2010 (and identical to the same definition in Section 83 of the EA 2010). The Court of Appeal agreed that the concession was rightly made.

193. The Claimants' argument that an employment relationship not founded in a contract is a sufficient qualification for rights derived from EU law does not sit comfortably with the observations both of Underhill LJ and of Bean LJ in the Court of Appeal in ***NUPFC*** where Underhill LJ said at paragraph 140: *'In my view it is fairly clear that the Secretary of State is concerned not so much about the actual issue raised by the NUPFC's claim as by the risk of it representing the thin end of the wedge in forcing open the door to full worker (or indeed employee) status. I do not believe that it does so. That door is still barred by the decisions in W v Essex County Council and Rowlands (unless and until reconsidered by the Supreme Court, in which case the Secretary of State will have a much bigger problem), and the wedge opens a crack no bigger than the effect of Convention rights requires'*.

194. Underhill LJ reached the conclusion above having expressly considered the arguments by the Secretary of State in respect of justification and in particular the concerns raised in the Narey report about the effect on the children of foster carers obtaining employment rights. It is inconceivable that Underhill LJ did not recognise that the employment rights that the Secretary of State was concerned about included at least some that were derived from EU law. Underhill LJ expressly refers to employment rights being 'barred' by ***Rowlands***. If that is right then Underhill LJ cannot have considered that an 'employment relationship' was sufficient to establish that the foster carers were entitled to be treated the same as workers for the purposes of claims deriving from EU law.

195. I have considered whether the reasoning in ***NUPFC*** is of itself sufficient to dispose of the Claimants arguments. That requires me to ask whether the conclusion that a finding of an employment relationship for the purposes of an Article 11 right did not mean that foster carers would have individual employment rights was an essential step in the reasons of the court. Underhill LJ accepted at paragraph 130 that it was *'legitimate for the state to seek to*

avoid undermining the familial nature of the relationship when taking measures that affect foster carers'. He went on to find that that legitimate aim was not undermined only by allowing foster carers to have a trade union. It therefore seems to me that the conclusion that a finding of an employment relationship for the purposes of Article 11 rights did not involve a finding that the foster carers were entitled to rights derived from EU law was an essential step in the reasons and, unless that part of the reasoning is inconsistent with any higher authority or *per incuriam*, is binding upon me.

196. In ***R (Cornerstone (North East) Adoption and Fostering Services Ltd) v Office for Standards in Education, Children's Services and Skills*** **[2021] EWCA Civ 1390** the Court of Appeal refused an application by Cornerstone to reopen the question of permission to appeal on grounds that relied upon the prospective foster carers being able to bring claims under Part V of the EA 2010 (i.e. that they were in employment) – see the judgment of Peter Jackson LJ paragraphs 9 through to 14. At paragraph 14 the court said: *'Further, the decision in W v Essex County Council [1999] Fam 90 means that, at the level of this court, the ordinary appeal test was in any case unlikely to be satisfied'*. I note that a refusal of permission to appeal is not binding upon me. It is however persuasive and as I have indicated above ordinarily I would be bound by the decision of the High Court. However, having read the arguments advanced by Cornerstone in the High Court it does not appear that it formed any part of their case that a prospective foster carer could bring a claim under Part 5 of the EA 2010. It was argued that the recruitment of a foster carer was a private and not a public act. That argument was rejected by Knowles J at paragraph 259 who relied on ***W v Essex*** for the conclusion that the recruitment of foster carers was the exercise of a public function.

197. I find that, unless I can say that the authorities I have identified above are inconsistent with higher authority or per incuriam, then I am bound by the conclusion that ***W v Essex*** bars the Claimants from bringing claims under Part 5 of the Equality Act 2020 or any other claims where in domestic legislation a contract is required as a precondition of access to the right.

198. The parties referred me to ***Gilham v Ministry of Justice*** **[2019] UKSC 44** mainly in the context of submissions in respect of the Human Rights Act claims. However, the case is of assistance in resolving this issue as well. At paragraph 8 of her judgment Lady Hale says (emphasis added):

> 8 *In February 2015 the claimant made a two-part claim in the tribunal. Both parts of her claim depended upon her being a worker within the meaning of section 230(3) of the 1996 Act (or having the same protection as such a worker). One part of her claim was for disability discrimination under the Equality Act 2010, as a result of failure to make reasonable adjustments to cater for her disability. This claim is derived from European Union law. It is therefore accepted that, as a result of the*

decision of this court in O'Brien v Ministry of Justice (formerly Department for Constitutional Affairs) (Council of Immigration Judges intervening) [2013] 1 WLR 522, in the light of the guidance given by the Court of Justice of the European Union ((Case C-393/10) [2012] ICR 955), a judge is a worker for the purpose of European Union law and national law has to be interpreted in conformity with that. That case concerned discrimination against part-time workers, but the same result was reached by the Court of Appeal for Northern Ireland in Perceval-Price v Department of Economic Development [2000] IRLR 380, that tribunal judges were workers for the purpose of discrimination on grounds of sex. Hence the disability discrimination claim will continue in any event.

199. As I have discussed above Lady Hale decided in ***Gilham*** that a judge did not work pursuant to a contractual relationship (see paragraph 21). It followed that as a matter of purely domestic construction she had no right to bring a claim relying on protected disclosures. The court recognised at paragraph 9 that : *'This means that a judge may have a different status in employment law, depending upon whether or not the employment right in question is derived from EU law'*.

200. If the Supreme Court in ***Gilham*** accepted that Mrs Gilham could pursue her disability discrimination complaint despite a lack of a contract because the provisions of the EA 2010 implement the Framework Agreement in Directive 2000/78 then it follows that same must apply to the other protected characteristics under that directive which include age. For myself I see no basis for drawing a distinction between the approach taken in respect of 'worker status' by the CJEU in the Framework Agreement in Directive 2000/78 in respect of the protected characteristics of disability and age and the approach that should be taken in respect of race under the Race Equality Directive.

201. Whilst what Lady Hale says about the issue of EU derived claims is highly persuasive it does not form any part of the reasoning in the case and is therefore not binding upon me – or put a different way does not provide me with the basis to disregard binding authority in the Court of Appeal.

202. The effect of the concession made in ***Gilham*** is that the Supreme Court did not consider for itself whether Mrs Gilham was a worker for the purposes of her claims derived from EU law. However, the Court clearly accepted that she did not need to establish that she had a contract to be a worker for the purposes of rights derived from EU law. In ***Gilham*** at paragraph 8 Lady Hale referred to the case of ***Perceval-Price v Department of Economic Development*** **[2000] IRLR 380, CA(NI)** with apparent approval noting that the Court of Appeal in Northern Ireland had accepted that tribunal judges were workers for the purposes of Article 141 of the EEC Treaty. The Equal

Pay Directive 75/117/EEC and the Equal Treatment Directive 76/207/EEC. In that case it appears to have been assumed that the tribunal judges did not work under a contract of employment. A decision of the Court of Appeal of Northern Island is highly persuasive but is not binding.

203. Just because a judge is considered to have the benefit of EU derived rights does not necessarily mean that a foster carer is in the same position. It is necessary for me to go back a stage and examine the basis of the concession made in ***Gilham***. That involves an examination of the litigation (or at least the early stages of that protracted litigation) in O'Brien v Ministry of Justice.

204. A history of the status stages of the O'Brien litigation is set out in the judgment of Lord Hope and Lady Hale between paragraphs 1 to 12 – ***O'Brien v Ministry of Justice (Formerly the Department of Constitutional Affairs)*** **[2013] UKSC 6**. I acknowledge that this authority was not directly cited to me but it is so well known that I did not feel any necessity to call for additional submissions.

205. In ***O'Brien*** the Court of Appeal[16] had held that Recorder O'Brian's claims under the Part-time Workers (Prevention of Less Favourable Treatment Regulations 2000 should be struck out because he was not a worker for the purposes of the definition found in Regulation 1 (includes a requirement that the worker works under a contract) or under any other extended definition of worker. The Supreme Court had made a reference to the CJEU. The questions identified by the Supreme Court were:

> *"1) Is it for national law to determine whether or not judges as a whole are 'workers who have an employment contract or employment relationship' within the meaning of clause 2.1 of the Framework Agreement, or is there a Community norm by which this matter must be determined?*
>
> *2) If judges as a whole are workers who have an employment contract or employment relationship within the meaning of clause 2.1 of the Framework Agreement, is it permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions?"*

206. The decision of the CJEU is reported in full as ***O'Brien v Department of Constitutional Affairs*** **[2012] ICR 955**. The CJEU answered the first question by stating that it was a matter for the national courts to define the concept of *'workers who have an employment contract or an employment*

[16] Department of Constitutional Affairs v O' Brian [2008] EWCW Civ 1448, [2009] ICR 593

relationship' for the purposes of the Framework Directive on Part Time Work but that exclusion from the protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees, according to national law. A distinction between salaried and fee paid judges was permissible only if the treatment was justified by objective reasons[17].

207. The Supreme Court dealt with the question of whether judges were to be regarded as workers for the purpose of the Framework Agreement on Part-time Work. At paragraph 29 -30 of the judgment of the court it is said:

> *'The CJEU noted in paras 30 to 33 of its judgment that there is no single definition of worker in EU law. The PTWD and the Framework Agreement do not aim at complete harmonisation of national laws in this area, but only, as the agreement's name indicates, to establish a general framework for eliminating discrimination against part-time workers. It is for national law to determine whether a person in part-time work has a contract of employment or an employment relationship: Wippel v Peek & Cloppenburg GmbH & Co KG C-313/02 [2005] 1CR 1604, para 40. The discretion given to member states is however qualified by the need to respect the effectiveness of the PTWD, and general principles of EU law: paras 34 to 38. A member state may not remove at will, in violation of the effectiveness of the directive, categories of persons from protection. In particular, the sole fact that judges are treated as judicial office holders is insufficient in itself to exclude the latter from enjoying the rights provided for by the Framework Agreement: para 41. Such an exclusion may be permitted, if it is not to be regarded as arbitrary, only if the nature of the employment relationship is substantially different from the relationship between employers and their employees which fall within the category of "workers" under national law.*
>
> *30. The CJEU stated in para 43 of its judgment:*
>
> *"It is ultimately for the referring court to examine to what extent the relationship between judges and the Ministry of Justice is, by its nature, substantially different from an employment relationship between an employer and a worker. The court may, however, mention to the referring court a number of principles and criteria which it must take into account in the course of its examination." [emphasis added]*

[17] I have attempted to summarise the answers in the interests of brevity they are set out in full at page 980

The principles and criteria which it then set out include the following:

"(1) The term 'worker' is used in the definition of the scope of the Framework Agreement to draw a distinction from a self-employed person, and the court will have to bear in mind that this distinction is part of the spirit of the Framework Agreement on part-time work: para 44, referring to para 48 of the opinion of the Advocate General.

(2) The rules for appointing and removing judges must be considered, and also the way their work is organised. The fact that judges are expected to work during defined times and periods, albeit with a greater degree of flexibility than members of other professions, and that they are entitled to benefits such as sick pay are also relevant: paras 45 and 46.

(3) The fact that judges are subject to terms of service and that they might be regarded as workers within the meaning of the Framework Agreement on part-time work would not undermine the principle of the independence of the judiciary, or respect for the national identities of Member States. It merely aims to extend to those judges the scope of the principle of equal treatment and to protect them against discrimination as compared with full-time workers: paras 47 to 49.'

208. The Supreme Court applied the test set out by the CJEU and came to the conclusion that judges must be treated as workers for the purposes of the Part-time Workers Regulations. The Court then went on to deal with the issues of justification which, by their nature, are not of any wider application than the case before the Court.

209. Underhill LJ referred to ***O'Brien*** at paragraph 81 of ***NUPFC***. Noting that the Supreme Court had applied the concept of a non-contractual employment relationship he emphasised the wording of Article 2 of the Part Time Workers Directive that specifically said: "part-time workers who have an employment contract *or employment relationship*". His emphasis would suggest that he considered that it was that wording of this particular directive that permitted judges to avail themselves of the protection afforded by the directive. I can see no other basis for Underhill to conclude that ***Rowlands*** was consistent with the decision of the Supreme Court in ***O'Brien***. If that is right then ***O'Brien*** cannot be regarded as being of any wider application that the Part Time Workers Directive (and perhaps the Agency Workers Directive – see below).

210. The Framework Agreement on Part-time Work Directive 97/81 provides expressly in recital 16 that terms not defined (which included the definition of worker) were a matter of national law. I am concerned with discrimination claims relying upon age and race and claims concerning working time.

Discrimination on the grounds of age is prohibited by The EU Equal Treatment Framework Directive (No.2000/78) ('the Framework Directive'). Discrimination on the grounds of race is prohibited by the EU Race Equality Directive (No.2000/43) ('the Race Equality Directive'). Working time is regulated by the Working Time Directive No. 2003/88. The EU Directives requiring states to protect those rights do not expressly leave the interpretation of any terms to national law.

211. In respect of the rights under the Working Time Directive the CJEU has made it clear that the concept of a worker may not be interpreted differently depending on national law – see **C-428/09 *Union Syndicale Solidaires Isère*** and ***Sindicatul Familia Constanta v Direcția Generală de Asistență Socială*** **[2018] C-147-17 CJEU** at paragraph 41. The CJEU took the same stance in respect of discrimination on the grounds of sex under Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC in ***Sari Kiiski v Tampereen kaupunki*** **Case C-116/06** where it was said at paragraph 26:

> *'the Court has held that the sui generis nature of the employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of Community law (see Case 53/81 Levin [1982] ECR 1035, paragraph 16; Case 344/87 Bettray [1989] ECR 1621, paragraphs 15 and 16; Case C-188/00 Kurz [2002] ECR I-10691, paragraph 32; and Trojani , paragraph 16).'*

212. Whilst Directive 76/207/EEC and 2002/73/EC have been repealed and replaced with the EU Equal Treatment Directive (No.2006/54) ('the recast Directive') there seems no reason to think that that later directive narrowed the scope of protection.

213. In their written submissions the Claimants have referred to ***Danosa v LKB Lizings SIA*** **[2011] 2 CMLR 2** for the proposition that the concept of a worker in EU Law has a meaning which does not depend on the characterisation of the relationship in national law. I agree that the case does support that proposition as the following passages explain (my emphasis):

> *'38 By its first question, the referring court essentially asks whether a member of the Board of Directors of a capital company who provides services to the company must be regarded as a worker within the meaning of Directive 92/85.*
>
> *39 It is settled case-law that the concept of 'worker' for the purposes of Directive 92/85 may not be interpreted differently according to each*

national law and must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration (see, by analogy, in the context of freedom of movement for workers and the principle of equal pay for men and women, Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraphs 16 and 17, and Case C-256/01 Allonby [2004] ECR I-873, paragraph 67; and, in the context of Directive 92/85, Case C-116/06 Kiiski [2007] ECR I-7643, paragraph 25).

40 The sui generis nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law (see Kiiski, paragraph 26 and the case-law cited). Provided that a person meets the conditions specified in paragraph 39 above, the nature of that person's legal relationship with the other party to the employment relationship has no bearing on the application of Directive 92/85 (see, by analogy, in the context of freedom of movement for workers, Case 344/87 Bettray [1989] ECR 1621, paragraph 16, and Case C-357/89 Raulin [1992] ECR I-1027, paragraph 10).

41 Similarly, formal categorisation as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker for the purposes of Directive 92/85 if that person's independence is merely notional, thereby disguising an employment relationship within the meaning of that directive (see, by analogy, Allonby, paragraph 71).

42 It follows that, contrary to the assertions made by LKB, neither the way in which Latvian law categorises the relationship between a capital company and the members of its Board of Directors nor the fact that there is no employment contract between the company and the Board Members can determine how that relationship falls to be treated for the purposes of applying Directive 92/85.

214. The full title of Directive 92/85 continues as: 'on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)'. It is not one of the directives relied upon by the Claimants in these proceedings.

215. In ***Fenoll v Centre D'Aide par le Travail*** **[2016] IRLR 67** an issue before the CJEU was whether Mr Fenoll was to be regarded as a worker for the purposes of the working time directive. Mr Fenoll was not regarded as an employee for the purposes of the national legislation. He attended a work rehabilitation centre which *'offered opportunities for various work activities, medico-social and educational support, and living arrangements which encourage personal development and social integration*'. The CJEU held at paragraph 30 (and also 31) that; *'creating a legal situation for those persons that must be treated as sui generis, cannot be decisive when the employment relationship between the parties to the proceedings is assessed'* (see the reliance on ***Kiiski*** at paragraph 31). The Court had already – at paragraph 27- set out the definition applicable for the protection of the Working Time Directive as being *'So, any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'*

216. The next authority relied upon by the Claimants for the same proposition that the EU definition of a worker is autonomous and does not require the existence of a contract is ***Betribsratder Ruhlandklinik v Ruhlandklinik*** **[2017] 2 CMLR 13.** I accept that case does support those two propositions at least for the purposes of the Agency Workers Directive with which it was concerned. At paragraph 28 it is noted that the scope of the directive includes (in common with the Part-time Workers Directive) that the directive applies to those workers with a contract of employment or an employment relationship.

217. When the Supreme Court in ***O'Brien*** were considering whether a reference to the CJEU was necessary (see **[2010] UKSC 34**) it was noted in the judgment of Lord Walker (giving the judgment of the court) at paragraph 28 that: *"there is no single definition of "worker" which holds good for all the purposes of Community law: Martinez Sala v Freistaat Bayern C-85/96 [1998] ECR I-2691 para 31; Allonby v Accrington and Rossendale College C-256/01 [2004] ECR I-873, [2005] All ER (EC) 289, [2004] ICR 1328'.*

218. It follows that where in the case law I have been referred to there is reference to a single autonomous meaning of the expression worker (or similar) what is meant is that for the purpose of the particular source of EU law is that the definition must be the same in all member states. What it does not necessarily mean is that the expression worker must be the same across all sources of EU law.

219. I consider that for me to be able to say that I was bound by a decision of the CJEU justifying a departure from the reasoning of the Court of Appeal in ***NUPFC*** and ***Rowlands*** the issue of whether a national provision requiring a worker to work pursuant to a contract was a permissible precondition to the

protection afforded would have needed to be decided by the CJEU in respect of the directives affording the rights in the particular cases before me.

220. I consider that those conditions are met in the Working Time Directive. The case of ***Fenoll*** makes it clear that the definition or who is afforded the protection of the Working Time Directive cannot depend on the classification used in national law.

221. I do not find that the conditions are met in respect of rights derived from the Framework Directive or the Race Equality Directive. I do not believe that any of the authorities cited before me hold in terms that the same principle identified in ***Kiisli*** and ***Fenoll*** apply to those directives. I should say immediately that I cannot understand for a moment why if the principle applies in some EU directives protecting employment rights including the right to work free of sex discrimination it would not apply to other protected characteristics. If I were deciding the matter for myself I would have held that the principle applies across all the directives that give rise to rights in the EA 2010.

222. As I have indicated above ***O'Brien***, ***Gilham*** and ***Perceval-Price*** do not provide binding authority to allow me to depart from ***NUPFC*** or ***Rowlands*** no matter how persuasive each of those cases may be in supporting the proposition that for the purposes of discrimination claims derived from EU law the domestic requirement for work to have been done under a contract is of no application.

223. I therefore conclude that:

223.1. I should follow the decision of the CJEU in ***Fenoll*** in deciding whether the Claimants are workers for the purposes of the working time directive; and

223.2. That ***Rowlands*** and ***NUPFC*** remain binding authority for the proposition that working pursuant to a contract is a precondition of bringing claims under Part 5 of the EA 2010. I acknowledge that there is a considerable body of case law both domestically and in the CJEU that suggests that ***Rowlands*** is wrongly decided and that ***NUFPC*** was wrong not in its result but insofar as its reasons in respect of justification turned on the same point. I must faithfully apply the doctrine of precedent and accept that it is not open to me to decide otherwise[18].

Are the Claimants workers for the purposes of the Working Time Directive?

224. Just because I have concluded that the absence of a contractual

[18] Like Ronnie Corbet in the Class System sketch of 1966 'I know my place'.

relationship is not fatal to the conclusion that a foster carer is a worker for the purposes of the WTD 2003 does not mean that they will necessarily be workers. It is necessary for me to apply the test applicable in EU law which is set out in ***Sindicatul Familia Constanţa*** *'The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'*.

225. Whilst I am required to apply this test for myself unless I am able to draw any material distinction between the circumstances of the Claimants and those of the foster carers in ***Sindicatul Familia Constanţa*** then I am inevitably going to be driven to the same conclusion. This was the stance that Ms Crasnow KC and Mr Milsom took. They suggested that the conclusions of the Court of Appeal in ***NUFPC*** led to the same result. I bear in mind that Underhill LJ had specifically indicated that he did not consider that a finding in respect of Article 11 would have any bearing on access to employment rights. Nevertheless, he stated at paragraph 90 that:

> *'The essence of the relationship is that foster carers provide a service to the foster service which engages them, namely the service of accommodating and looking after the child who is placed with them: that is not altered by the fact that that service is quasi-parental in character and does not have regular hours or neatly specifiable duties. As appears from paras. 43-46 above, although foster carers have a great deal of day-to-day autonomy, they are obliged to work within the parameters of the care plan established by the local authority, they are* regularly supervised and are ultimately under its control.'

226. The evidence before me, and my findings above, are entirely consistent with those of the Court of Appeal in ***NUPFC***. In particular, I find that the Claimants performed services under the direction of the local authorities in return for the remuneration that each of them received. I find no basis whatsoever for distinguishing the position of the foster carers in ***Sindicatul Familia Constanţa***. I am comforted in that conclusion by the reliance placed by Underhill LJ on the reasoning in that case.

227. I therefore consider that the Claimants would have been regarded as workers for the purposes of the WTD 2003.

Do foster carers have the benefit of the rights afforded by the WTD 2003?

228. I should record that neither Mr Wilding nor Mr Moretto spent very much time dealing with the issues of whether, absent a contract, the Claimants could establish that they had the benefit of rights conferred by EU law. Both said that in respect of rights deriving from the Working Time Directive it had been conclusively established in ***Sindicatul Familia Constanţa v Direcția***

Generală de Asistență Socială și Protecția Copilului Constanța C-147/17 **[2019] ICR 211** that they do not because they fell outside the scope of the directive because of the nature of their work (whether workers or not).

229. The Claimants' position was somewhat more nuanced than the other parties sometimes appreciated in their submissions. It was said in the Claimants' written submissions[19] that: *'the [Claimants] have clarified they have not sought access to the full gamut of working time rights; rather they seek the* more *nuanced and limited type of leave that is provided by the example of the Essex respite policy'.*

230. The decision of the CJEU in ***Sindicatul Familia Constanţa*** is binding on me insofar as it interprets EU law. The CJEU held at paragraphs 50-52 that Article 1(3) of the Working Time Directive which sets out the scope of the directive by reference to Article 2 of Directive 89/391/EEC **(**'on the introduction of measures to encourage improvements in the safety and health of workers at work') preserved an exception to the scope of the directive found at article 2(2) which says:

> *2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.*
>
> *In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.*

231. When implementing the first iteration of the Working Time Directive into national law the UK government preserved the exception granted by Article 2(2) by enacting Regulation 18(2) of the Working Time Regulations 1998.

232. At paragraphs 54-59 of ***Sindicatul Familia Constanţa*** the CJEU hold that the concept of a 'public service' must have a single autonomous meaning for the purposes of the directive across all EU states. It held that the exception in Article 2(2): *'is thus applicable, in the same way, to* workers *who perform specific activities identical to the services of a public authority, whether their employer is a public authority or a private person charged with a task in the public interest that forms part of the essential functions of the State'*. That part of the decision is an interpretation of EU law and is binding on me.

233. I accept the Claimants' argument that I am not strictly bound by the aspects of the decision of the CJEU in ***Sindicatul Familia Constanţa*** which

[19] The discussion of this decision is found at paragraphs 329 – 340 of the Claimants written submissions which is in the section dealing with the Human Rights Act arguments. I have assumed from the way that oral submissions were developed that the same points were adopted for the purposes of the EU law arguments.

were concerned with the question of whether the particular foster carers in Romania fell outside the Working Time Directive. That said, unless I was able to detect any material differences between the Claimants before me and the Romanian foster parents the outcome of the decision in ***Sindicatul Familia Constanţa*** would be highly persuasive.

234. It was said at paragraph 60 that the foster carers in Romania *'are all employed by a public authority. In the context of that employment relationship, they are tasked with ensuring the harmonious development of the minors placed with them, ensuring their integration into their own family and preparing them for reintegration into their original family or integration into an adoptive family'*. I see no material distinction between the circumstances of those foster carers and those in this case. My conclusion that the Claimants are engaged in a 'public service' is reinforced by the decisions, primarily cited by Mr Moretto, that foster carers can challenge decisions concerning them by means of judicial review.

235. In assessing whether the role of a foster carer *'characteristics which mean that their very nature is absolutely incompatible with the planning of* working *time in a way that respects the requirements imposed by Directive 2003/88'*(see paragraph 680 The CJEU summarised the factual considerations as follows:

> *70. In that regard, it is clear from the order for reference that, save during periods such as those when the foster child is at school, foster parents perform their activity continuously, pursuant to the national legislation at issue in the main proceedings, including during weekly rest days, public holidays, non-working days and annual leave — unless the Directorate-General authorises their separation from the foster child during that annual leave. Accordingly, the Romanian authorities have conceived the role of foster parent in such a way that the minor placed with a foster parent is integrated, on a continuous and long-term basis, into the home and family of that foster parent. Such integration is intended to allow the child to develop, for as long as necessary, in a caring and educational environment conducive to harmonious development.*
>
> *71 The integration, on a continuous and long-term basis, into the home and family of a foster parent, of children who on account of their difficult family situation are particularly vulnerable, constitutes an appropriate measure to safeguard the best interests of the child, as enshrined in Article 24 of the Charter of Fundamental Rights of the European Union.*
>
> *72 In those circumstances, regularly granting foster parents the right to be separated from their foster child after a certain number of hours of work, or during periods such as weekly or annual rest days, which are*

generally considered opportune times to develop family life, would go directly against the objective pursued by the Romanian authorities to integrate foster children, on a continuous and long-term basis, into the home and family of the foster parent.

236. In reaching my conclusions on this particular point, I draw on my findings of fact about the 'always on' nature of a foster carer. I also accept that in common with the Romanian authorities the core purpose of foster care is to integrate foster children into the home and family or the foster parent. I do not think it matters whether the placement is for weeks, months or years.

237. I entirely accept that if a foster carer had an unfettered right to take a holiday during a placement leaving behind a foster child with other carers it would risk undermining the placement. I do not say that a placement would necessarily be damaged but it might be. That is to be balanced against the risk of harm to the placement if foster carers cannot cope without a break. The nature of shorter term foster care is that foster carers can take breaks between placements. The objective of the state to foster children within families can be met with the policies adopted by the local authorities in this case. Those policies do permit breaks from foster care during a placement but the local authority retains a discretion and will regard the interests of the child as paramount. That may point for or against granting a break but it depends on the needs of the child.

238. I do not consider it arguable that the rights afforded by the WTD 2003 and WTR 1998 in respect of rest other than annual leave are in any way compatible with the role of a foster carer. Having considered the evidence as a whole I see no basis for distinguishing the position in England from that considered by the CJEU in ***Sindicatul Familia Constanţa***. The primary objective of foster care is the same in England as it is in Romania. The 24/7/365 nature of the role means that it is incompatible with the regime for rest set out in the WTD 2003.

239. Where the rights under the WTD 2003 are excluded it falls on the state to ensure that there is sufficient protection for health and safety. However there is no reason to think that would necessitate importing aspects of the WTD 2003. I have asked myself whether that would require some right to annual leave whether as specified in the WTD 2003/WTR 1998 or otherwise. I think that it would require respite care to be actively considered. If there was a blanket policy of not permitting respite care then, that would in my view present an unacceptable risk to the health of foster carers. However, that is not the position adopted by the local authorities. They will each consider respite care on a case by case basis. It seems to me that that provided a sufficient provision to deal with risks to health. I do not consider the fact that Essex provides a scheme that is framed in terms of rights rather than a discretion makes any difference to my analysis. Even the Essex scheme

promotes the welfare of the children as a reason why safeguards need to be in place to avoid the perception that the foster child is being excluded from the family if left behind. My own view is that where a foster carer had placements intermittently the balance between the health and safety of the foster carers and the welfare of looked after children could be struck would be permitting and indeed insisting on 5.6 weeks of leave in any 12 month period to be taken in circumstances where that had a minimal impact on the welfare of the child. Ordinarily that would be between placements but in more intense care settings might not be. A case by case approach is plainly the only way to maintain the balance. There is an obvious case for this to be incorporated into legislation but that is beyond my remit.

If I am wrong about the binding effect of W v Essex and Rowlands in respect of EU Law derived discrimination claims

240. Given my uncertainty about the requirement for a contractual relationship in EU Law I shall go on to consider the additional argument raised by the Respondents and Secretary of State which is that if EU Law requires a remedy for discrimination claims then, the ability of the Claimants to bring a claim through Part 3 of the EA 2010 provides an effective and equivalent remedy.

241. The Respondents and Secretary of State, in support of their positions both in respect of the EU arguments and those under the Human Rights Act 1998 ('HRA 1998') say that the Claimants can bring a claim in respect of unlawful discrimination in the county court. The Claimants say that is not the case but even if it were, it is a less favourable regime. I understand them to suggest that this would amount to a breach of the principles of effectiveness and equivalence (as well as failing to support the Respondents case on justification for the Article 14 arguments).

242. I need to deal with the following issues:

242.1. whether the Respondents are correct in their assertion that discrimination claims could be presented in the County Court; and

242.2. If they are whether restricting the Claimants to such claims offends the principles of effectiveness and/or equivalence.

243. I consider that while the EU tests of effectiveness and equivalence and the test in an Article 14 case of justification may have some common features they are not the same. I deal here only with the position, as I understand it, derived from EU law.

Can a foster carer present a discrimination complaint in the County Court?

244. The Respondents and Secretary of State rely upon the decision of the High Court in ***R(Cornerstone (North East) Ltd) v Ofsted*** **[2020] EWHC 1679 (Admin)** for the proposition that the Claimants complaints could be made to the County Court. An issue (amongst many) in ***Cornerstone*** was whether Ofsted were correct that a policy of requiring potential foster carers to forsake any same sex sexual activity amounted to an infringement of the EA 2010 entitling Ofsted to issue a notice requiring changes to that policy. In the High Court Cornerstone argued that Ofsted was wrong to conclude that its activities fell within the ambit of the EA 2010 and specifically within Section 29. Mr Justice Knowles disagreed. There was an appeal to the Court of Appeal, but permission was refused to argue any point that Cornerstones activities fell outside Section 29 (see ***R (Cornerstone (North East) Adoption and Fostering Services Ltd) v Office for Standards in Education, Children's Services and Skills*** **[2021] EWCA Civ 1390** per Peter Jackson LJ at paragraphs 7 to 13. It follows that it is the decision of the High Court that I need to look at to determine whether it is open to a foster carer to bring a discrimination complaint in the County Court.

245. I shall deal briefly with a point made by the Claimants (paragraph 287 - 290 of the written submissions). They point to an argument advanced by Cornerstone in the Court of Appeal. It was argued that in the light of the ***NUPFC*** case in the Court of Appeal that permission to appeal ought to have been given to argue that the question of whether the policy in respect of homosexual conduct should have been considered under part 5 of the Equality Act (work) and not under part 3 (Services and Public Functions). The Court of Appeal refused to grant permission holding that, as it was bound by ***W v Essex,*** there was no proper basis to reopen the issue of permission to appeal on grounds that challenged the conclusions of Knowles J that foster carers were not in employment for the purposes of the EA 2010. I have dealt with the question of whether ***W v Essex*** remains binding above and with the Claimants arguments based on EU law. I have concluded that the Claimants cannot at this level bring themselves within the meaning of 'employment' as defined by Section 83 of the EA 2010. This means that the Claimants cannot bring themselves within Part 5 of the EA 2010 unless I conclude that Article 14 (coupled with Article 8) requires me to interpret the EA 2010 in a way that permits such claims.

246. Cornerstone (North East) Limited were an independent fostering agency. It's primary contention in respect of the suggestion that its policies amounted to a breach of the EA 2010 was to argue that it was not a service provider for the purposes of Section 29(1) of the Act. It further argued that it was not exercising a public function for the purposes of Section 29(6). It took other points both going to the question of exemptions for its activities and in relation to whether its policies were unlawful. Those points are not relevant to my decision.

247. Knowles J's reasons for concluding that Cornerstone provided a service to prospective foster carers are found between paragraphs 168 to 177. None of the Claimants before me were engaged through an IFA at the time of the events giving rise to their claims. I have not made any findings about the activities of any particular IFA. I do not consider that strictly I am bound by Cornerstone to find that the activities of a Local Authority amount to providing services for the purposes of Section 29(1). Furthermore, the complaints made by the Claimants would not fall under Section 29(1) in any event but, if at all, under Sub-sections 29(2) & (3) & (5). Those subsections proscribe discrimination, harassment and victimisation in relation to 'the service'. The services identified by Knowles J as being provided by Cornerstone were matters such as 'helping and assisting' prospective foster parents, training them, obtaining approval and matching them with children. I would not and cannot disagree that those features of the relationship would amount to the provision of services. However, I find it much harder to regard the actions of a local authority, as the person with parental responsibility for a looked after child, deciding who that child will be placed with and setting the terms of any care plan, deciding whether there has been a breach of any care plan or deciding to remove a child from a foster carer can properly be described as providing a service. The Claimants say at paragraph 290 of their written submissions *'it is misconceived to suggest a discrimination claim under Part V EqA should be circumvented in preference for a Part III case concerning "Services and public functions" claim before the County Court. It is, after all, foster carers who are providing a service to the local authority'*. I agree that in their day to day role foster carers are the ones providing a service to local authorities.

248. I would accept that a foster carer could bring a complaint under Sub-sections 29(1)-(5) only where the subject matter arose from any services provided by the local authority. I do not regard those provisions as covering a complaint arising out of the services provided by the foster carer once a child is placed with them. I therefore broadly accept an argument advanced by the Claimants that the conclusions of Knowles J in ***Cornerstone*** in relation to Section 29(1)-(5) do not mean that a foster carer could bring a complaint about any aspect of their treatment by a local authority in the County Court. Some conduct in respect of the actions of the local authorities is likely to fall outside the scope of those sub-sections. I agree with the Claimants that ***Tiplady v City of Bradford Metropolitan District Council*** **[2020] ICR 965** provides support for the proposition that conduct that falls within one part of the EA 2010 does not preclude the possibility that other conduct or aspects of the relationship will fall within another part or indeed wholly outside the scope of the Act.

249. Having reached that conclusion I consider that point academic because of the wide scope of Section 29(6) and for that matter 29(7)(b). Those sections proscribe discrimination, victimisation and harassment and impose

a duty to make reasonable adjustments for a person exercising a public function. In Cornerstone a number of points were taken in respect of whether the IFA carried out any public function Knowles J found that they did both for the purposes of Section 29(6) (see paragraph 182) and also for the purposes of the HRA 1998.

250. Whilst the reasoning in Cornerstone is not strictly binding on me because that case concerned an IFA the conclusion that Cornerstone's activities in recruiting foster carers and placing children with them fell within Section 29(6) is highly persuasive. Even in the absence of that authority I would have concluded for myself that the role of local authorities in discharging their duty under the legislation I have summarised above amounted to the exercise of a public function.

251. I am satisfied that, as long as they are unable to bring themselves within Part 5 of the EA 2010, a foster carer could complain of discrimination under Section 29 of the EA 2010. Specifically under Section 29(6) in respect of any public function and more narrowly under sub-sections 29(1) – (5) ad 29(7)(b) in respect of any services provided to the foster carer.

Does the County Court provide an effective and equivalent remedy?

Effectiveness and equivalence – Law

252. Article 47 of the EU Charter of Fundamental Rights requires member states to provide an effective remedy for any breach of EU law. It is well established that there are two facets to this. The first is that the remedy must be effective in the sense that there is an available practical legal route for the enforcement of the right before a domestic court or tribunal. The second the domestic route to a remedy for any breach of EU law must be no less favourable than for a breach of a similar domestic law. This second requirement has been referred to consistently as a requirement of equivalence.

253. In ***Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*** **ECJ Case 33/76 [1976] ECR 1989** the CJEU held that:

1.1. *'It is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law'*

1.2. *'in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.'*

254. In ***R (on the application of UNISON) v Lord Chancellor*** **[2017] UKSC 51** in the context of deciding upon the legality of the requirement to pay fees in order to bring tribunal claims enforcing EU rights the court addressed the issue of whether the fees order meant that claimants did not have an effective remedy. The basic approach is set out in the Judgment of Lord Reid in paragraphs 106 to 109. In particular:

1.3. *'EU law has long recognised the principle of effectiveness: that is to say, that the procedural requirements for domestic actions must not be "liable to render practically impossible or excessively difficult" the exercise of rights conferred by EU law'* – para 108

1.4. *In terms of article 52(1): "Any limitation on the exercise of the rights and freedom recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."* – para 107

1.5. *'The burden lies on the state to establish the proportionality of restrictions where, as in the present case, they are liable to jeopardise the implementation of the aims pursued by EU directives.'* – para 107

1.6. *one general point to note is the emphasis placed by the Strasbourg court on the protection of rights which are not theoretical and illusory, but practical and effective. That is consistent with the recognition in domestic law that the impact of restrictions must be considered in the real world*. – para 109

255. Questions of effectiveness and equivalence were raised in ***Chief Constable of the Police Service for Norther Ireland & others v Agnew & others*** **[2019] IRLR 792** and that case contains a useful summary of the relevant principles relating particularly to equivalence are set out at paragraphs 50 through to 57. The extensive quotes set out in those paragraphs make it impractical to reproduce them here. The key points are as follows:

255.1. *'The principle of equivalence is a qualification to the general principle of EU law that Member States have autonomy when it comes to setting the procedural rules governing how EU rights conferred on the citizens of the Union by EU enactments are to be enforced'.* – para 50

255.2. That *the* following principles can be extracted from ***Levez v T H Jennings (Harlow Pools) Ltd***:

255.3. *'The principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of*

Community law or national law, where the purpose and cause of action are similar; and

255.4. *However, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought, like the main action in the present case in the field of employment law.*

255.5. *In order to determine whether the principle of equivalence has been complied with in the present case, the national court - which alone has direct knowledge of the procedural rules governing actions in the field of employment law - must consider both the purpose and the essential characteristics of allegedly similar domestic actions.*

255.6. *Furthermore, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts'.*

255.7. *'When comparing procedures available to a claimant, it was appropriate to consider whether an action before the tribunal would be simpler and, in principle, less costly'* – para 52

255.8. *'there may be no similar action available in domestic proceedings for the purposes of the comparison' para 56.* In which case the principle of equivalence will have no bearing on any national procedural rules – see the judgment of Lord Clyde at paragraph 43 of ***Preston & Others v. Wolverhampton Healthcare N.H.S. Trust & Others and Fletcher & Others v. Midland Bank Plc*** **[2001] UKHL 5** ('*Preston* ***No: 2***) (which applied the ruling in that case of the CJEU).

255.9. *'The court is not therefore driven to find the nearest comparison but to decide whether there really is a similar action to enforce the rights in question'* para 56 and quoting the judgment of Lord Slynn in ***Preston No 2*** where he said:

> *"... one should be careful not to accept superficial similarity as being sufficient. It is not enough to say that both sets of claims arise in the field of employment law, nor is it enough to say of every claim under article 119 that somehow or other a claim could be framed in contract."*

256. The Claimants say that it is clear from the decision in ***Eckland v CC of Avon and Somerset Constabulary*** **ICR 606 (CA)** that requiring a foster carer claiming to be the victim of discrimination to bring proceedings in the

County Court as opposed to the Employment Tribunal amounts to a significant disadvantage.

257. An issue raised in ***Eckland*** was whether a claim in the County Court for a police officer claiming discrimination by a police misconduct panel through the mechanism of Section 29(6) of the EA 2010 amounted to an effective and equivalent remedy for a breach of the Framework Directive. The relevant analysis is set out in the judgment of Underhill LJ in the passages below (emphasis added for the purposes of the paragraph below):

> *'36 First, even if the peculiarities of the police disciplinary system mean that issues of misconduct fall to be determined by an independent body exercising public functions, those functions nevertheless arise out of, and in the context of, the employment relationship. In the British system it is the employment tribunal which has the appropriate expertise for determining discrimination disputes in the employment field. Lord Reed JSC makes this point in P: see para 29 of his judgment. He does so in response to an argument that the availability of an appeal to the PAT was sufficient to satisfy the effectiveness and equivalence principles, but what he says is equally applicable in this context. Mr Basu submitted that the County Court had equivalent expertise, referring to the power of a judge under section 63(1) of the 2010 Act to appoint an expert assessor. It may be doubted whether, even with the assistance of an assessor, a County Court judge will typically have equivalent experience of discrimination law to that enjoyed by an employment judge sitting with lay members: discrimination cases in the County Court are something of a rarity. But in any event the real point is that he or she will not have equivalent experience of claims of discrimination in the employment field.*
>
> *37 Second, the costs regimes in the County Court and the employment tribunal are fundamentally different. The normal rule in the County Court is that the loser has to pay the winner s costs, whereas the normal rule in the employment tribunal is that each party has to bear its own costs. Mr Basu pointed out that that cuts both ways: if an employee succeeds in a discrimination claim in the employment tribunal their net recovery may be seriously impacted by the costs of having instructed a lawyer. That is true as far as it goes, but for many, perhaps most, employees the risk of a substantial costs liability if they lose may be sufficient to deter them from bringing a County Court claim at all. It is at least partly because of that consideration that the employment tribunal has since its inception been (normally) a no-costs jurisdiction . In any event, whatever the relative proportion of cases in which the applicable costs regime may be an advantage or a disadvantage, the important point is*

that they are different.

38 Third, there were at the time that these proceedings were issued no fees payable for bringing a claim in the employment tribunal, whereas fees are payable for the initiation of County Court proceedings. This is probably a less significant consideration than the risk of liability for costs, but it cannot be wholly ignored.

39 Fourth, the employment tribunal has powers as to remedies in a discrimination case which a County Court does not. By section 124(2) it may:

> *(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b) order the respondent to pay compensation to the complainant;*
>
> *(c) make an appropriate recommendation.*

Subsections (3)—(7) contain various provisions supplementing subsection (2).

I note in particular that by subsection (7) the employment tribunal is empowered to increase any amount of compensation awarded if a respondent has failed without reasonable excuse to comply with a recommendation made under subsection (2)(b). By contrast section 119(2) empowers the County Court to grant any remedy which could be granted by the High Court (a) in proceedings in tort; (b) on a claim for judicial review. That empowers it to award compensation and declaratory relief but not to make a recommendation.

40 For those reasons I do not believe that the right to bring a discrimination claim in the County Court under section 29(6) can be regarded as equivalent to the right to bring such a claim in the employment tribunal under section 39(2) (read with section 42(1)). It may well be that for similar reasons it does not satisfy the principle of effectiveness either, but I need not consider that.

258. The Claimants say that their claims too arise in the context of *'an employment relationship'*. They rely on the finding to that effect in ***NUPFC*** at paragraph 95. Whilst the Underhill LJ's conclusion that foster carers were in an employment relationship was expressly limited to the issue of whether Article 11 rights were engaged his analysis drew on the Employment

Relationship Recommendation, 2006 (No. 198) of the International Labour Organisation which makes recommendations for the recognition of employment status for the purposes of rights wider than trade union rights. He also drew on the decision of the CJEU in ***Sindicatul Familia Constanţa v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa*** **C-147/17 [2019] ICR 211** in which the CJEU held between paragraphs 41 and 48 that foster carers in Romania were in an employment relationship and were therefore workers for the purpose of the Working Time Directive 2003/88.

259. It is in that context that the Claimants make their submission that it is 'misconceived' to suggest that they bring any claims in the County Court.

260. In the passages I have quoted from ***Eckland*** above Underhill LJ relied upon the judgment of Lord Reed in ***P v Commissioner of Police of the Metropolis*** **[2017] UKSC 65**. Paragraph 29 of that judgment says (my emphasis added):

> *29. The principle of equivalence entails that police officers must have the right to bring claims of treatment contrary to the Directive before Employment Tribunals, since those tribunals are the specialist forum for analogous claims of discriminatory treatment under our domestic law. They are expert in the assessment of claims of discriminatory treatment, and have the power to award a range of remedies including the payment of compensation, even in cases where the dismissal or other disciplinary action itself stands. They therefore fulfil the requirements of the principle of effectiveness. To leave police officers with only a right of appeal to the Police Appeals Tribunal would not comply either with the principle of equivalence, since analogous complaints under domestic law can be made to an Employment Tribunal, nor with the principle of effectiveness, since (for example) the Police Appeals Tribunal cannot grant any remedy in cases where the discriminatory conduct is not such as to vitiate the decision of the misconduct panel.*

261. When considering this point I was initially concerned that in neither the Supreme Court nor in the Court of Appeal had the judgments spelt out what the analogous complaints under domestic law might be. There is no reference to the exacting test adopted by the Supreme court in ***Totel Ltd v Revenue and Customs Commissioners*** **[2018] UKSC 44**. I have come to the conclusion that the justices of the Supreme Court considered the matter obvious. It is clear that the proper comparison is between the EU derived claim and some domestic cause of action. I can only speculate what *'analogous claims of discriminatory treatment'* Lord Reed had in mind. Some aspects of the EA 2010 do arguably go beyond the scope of EU law (for instance the definition of 'Race' Section 9). Perhaps a more obvious domestic

claim would be a claim under Section 47B of the ERA 1996 if one were to accept that a person who makes protected disclosures is in an analogous position to a person with protected characteristics. Ultimately I do not think it matters. The decisions in ***Eckland*** and ***P v Commissioner of Police*** are binding on me. ***Eckland*** is authority for the proposition that a claim under part 3 of the EA 2010 does not satisfy the requirement of equivalence.

262. In case I am wrong about the binding nature of those cases I shall deal with the arguments raised by Mr Wilding and Mr Moretto. It was Mr Moretto on behalf of the Secretary of State who made most of the running in seeking to persuade me that there was no particular disadvantage to the Claimants and foster carers in general if any discrimination claims were required to be made in the County Court. His written submissions separated the availability of remedies from what I might loosely refer to as procedural matters. I shall deal with his points the same way.

263. At paragraph 111 of his written submissions Mr Moretto comes to a conclusion that the powers of the County Court are 'better' than those of the Tribunal as the County Court can grant any remedy that could be given by the High Court on an application for judicial review – Section 119(2) of the EA 2010. Underhill LJ regards the absence of an ability to make a recommendation in the County Court to be a disadvantage. In both forums unlimited damages might be awarded. I accept Mr Moretto's argument that in certain circumstances there may be some advantage to a foster carer being able to seek an interim order in the County Court. It would certainly be swifter than obtaining a recommendation in the Employment Tribunal and then seeking additional compensation if it were not followed. However, that advantage needs to be weighed in the balance alongside the disadvantages identified by Underhill LJ.

264. The next point taken by Mr Moretto is to suggest that it would be an anathema to permit foster carers access to the Employment Tribunal in respect of decisions about foster children when they and any person with parental responsibility are restricted to the County Court. I do not regard this as a good point. The children and any parents are not in an employment relationship with the local authority. The foster carer in a discrimination claim would only be able to complain of their own treatment.

265. Mr Moretto suggests that the Courts are the proper place to deal with issues arising out of public functions. That may be true in respect of decisions about the placement and care of children but those matters would fall outside the confines of any claim that might be presented by a foster carer. They could complain only about their own treatment. Many employment disputes arise in the context of the carrying out of public functions. If a social worker could bring a claim in the employment tribunal complaining of discrimination in circumstances say of being removed as a social worker of a child then why not a foster carer? I would accept that in some respects the supervision of the

public functions of local authorities are best dealt with by the courts but do not accept that that means that the courts should have exclusive jurisdiction over disputes arising from an employment relationship.

266. Mr Moretto then turns at paragraph 114 of his written submissions to costs and funding. I shall not set out the full extent of his arguments. I accept that in some limited circumstances legal aid is available in the County Courts. I accept that if a claim succeeds in the County Court then a claimant would benefit from a costs order. I accept that Qualified One-Way Costs Shifting mitigates the 'winner takes all' default position on costs. I do not think that any of these points diminishes the analysis of Underhill LJ at paragraph 37 of ***Eckland***.

267. I do not think that the Respondents or Secretary of State raised any argument sufficient to persuade me that I should not adopt the reasoning of Underhill LJ in ***Eckland*** even assuming that it was open to me to decide the matter for myself.

268. In my experience very few discrimination claims would fall outside the scope of multitrack claims. If such claims were conducted in the County Court the risk of an adverse costs order would act as a substantial risk factor. At the risk of sounding self-serving I consider the fact that the Employment Tribunal has the skills and expertise to deal with discrimination claims in a very wide range of fields involving employment relationships and quasi employment relationships makes the Employment very much the natural home for a dispute brought by a foster carer against the local authority to whom they provide services.

269. I conclude that for the reasons given in ***Eckland*** being required to present a claim in the County Court under Section 29 of the EA 2010 offends the EU principle of equivalence.

Marleasing – Interpretation

270. The parties were in agreement that, if I were to find that the EA 2010 failed to properly implement EU law then the approach to interpretation that I should take is that set out in ***Marleasing SA v La Comercial Internacionial de Alimentación*** **SA C-106/89**. This was more fully explained by Sir Andrew Morritt C in ***Vodafone 2 v Revenue and Customs Comrs*** **[2010] Ch 77,** at paragraphs 37 and 38.

271. The Respondents and the Secretary of State say that any interpretation of the EA 2010 which allows claims to be brought through Part 5, as opposes to Part 3 goes against the grain of the legislation. I have dealt with the same argument below when considering the position under the HRA 1998. In short I cannot agree with the Respondents. The purposes of part 5 of the EA 2010 is to prevent discrimination and to promote equality. I see no tension

whatsoever between those purposes and permitting foster carers to bring their claims within Part 5. Neither do I consider that allowing such claims goes against the purposes of the Children Act 1989 or subordinate legislation. I am not persuaded that permitting foster carers to bring claims in the Employment Tribunal rather than the County Court goes against the statutory purposes of promoting the welfare of children. For a further explanation of my reasons for this I would refer to my discussion of the issue of justification in respect of the arguments under the HRA 1998.

Brexit

272. In the light of my conclusions above it is unnecessary for me to deal with the question of whether the UK's departure from the EU has any bearing on the question of whether domestic legislation requires to be interpreted in a manner consistent with EU law. If I am wrong in my primary conclusions above then it is my view that 'Brexit' would make no difference. No doubt if I am wrong about that it could be corrected by the upper courts and I shall not set out any reasons for the view I have expressed.

273. Notwithstanding my agreement with the Claimants in many respects my primary conclusions mean that the reliance on the EU law does not assist the Claimants in respect of their claims under the WTR 1998 or the EA 2010.

The Human Rights Act 1998 arguments

274. The Claimants advance a further route to the employment rights they say that they ought to benefit from through the obligation imposed on the Tribunal by Section 3 of the HRA 1998 to interpret the legislation providing employment rights to employees and workers to include foster carers. Section 3(1) of the HRA 1998 says:

> *(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*

275. It follows that in order to engage the interpretive obligations of Section 3 the legislation as drafted must me incompatible with convention rights. The Claimants say it is. They say that each of the rights that they seek to benefit from engages one or more of the fundamental rights protected by the Convention. They say that if foster carers are not employees or workers then they should be regarded as being of some 'other status' for the purposes of Article 14 of the Convention. That Article says (with emphasis added):

> *'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other*

opinion, national or social origin, association with a national minority, property, birth or other status.'

276. The parties before me were agreed that the questions that I need to address in asking whether the exclusion of foster carers from the employment rights they seek amounted to discrimination for the purposes of Article 14 were those identified by Lady Hale in ***Ghaidan v Godin-Mendoza*** **[2004] 2 AC 557 HL** where, drawing on the decision of Brook LJ in ***Wandsworth London Borough Council v Michalak*** **[2002] EWCA Civ 271,** she said (at paragraph 133-134):

> *"133. It is common ground that five questions arise in an article 14 inquiry, based on the approach of Brooke LJ in Wandsworth London Borough Council v Michalak [2003] 1 WLR 617, 625, para 20, as amplified in R (Carson) v Secretary of State for Work and Pensions [2002] 3 All ER 994, 1010, para 52; [2003] 3 All ER 577. The original four questions were: (i) Do the facts fall within the ambit of one or more of the Convention rights? (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (iii) Were those others in an analogous situation? (iv) Was the difference in treatment objectively justifiable? i.e., did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?*
>
> *134. The additional question is whether the difference in treatment is based on one or more of the grounds proscribed - whether expressly or by inference - in article 14. The appellant argued that that question should be asked after question (iv), the respondent that it should be asked after question (ii). In my view, the Michalak questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."*

277. Lady Hale gave a further summary of the principles to be applied in ***Gilham v Ministry of Justice*** **[2019] UKSC 44**. Whilst she sets out the questions in a different order they are essentially the same. At paragraph 28 she said:

This gives rise to four well-known questions: (i) do the facts fall within the ambit of one of the Convention rights; (ii) has the claimant been treated less favourably than others in an analogous situation; (iii) is the reason for that less favourable treatment one of the listed grounds or some other status ; and (iv) is that difference without reasonable justification put the other way round, is it a proportionate means of achieving a legitimate aim?

278. Mr Moretto in his written submissions refers to ***R(SC) v Secretary of State for Work and Pensions*** **[2022] AC 223**, where at para 37, Lord Reed PSC summarises 4 principles he drew from ***Carson v United Kingdom*** **(2010) 51 EHRR 13**. Lord Reed does not include the issue of 'ambit' but it is implicit that the Court accepted that a provision limiting child tax credit to the first two children born to a family was capable of engaging Article 8. The first three principles identified by Lord Reed correspond to the last three referred to by Lady Hale. The final principle identified by Lord Reed is a facet of the justification element identified in both decisions and concerns the width of the 'margin of appreciation' to be afforded to Convention states. That was a contentions matter before me, and I shall return to it below.

'Other status'

279. The Claimants identified the 'other status' upon which they relied for the purposes of their Article 14 submissions as being either their status as foster carers or persons working otherwise than under a contract. The Secretary of State, through Mr Moretto in his oral submissions, expressly conceded that foster carers had 'other status'. Mr Wilding had adopted the Secretary of State's position on the Human Rights Act claim and I do not understand him to have differed. In any event in my view the position is made entirely clear in the judgment of Hale LJ in Gilham at paragraph 32 where she says: *'An occupational classification is clearly capable of being a status within the meaning of article 14'.* It is therefore unnecessary for me to deal with the Claimants alternative formulation which I consider slightly more problematic as it is not so much a definition of what status foster carers have but rather a definition of what they are not.

'Ambit'

280. The Claimants have brought diverse claims relying on a variety of employment rights. The Claimants written submissions included a table setting out the claims to which they said that the Human Rights arguments applied and which convention rights they said were engaged. I shall deal with each of those in turn. I reproduce the table below (the right hand column being the one of importance for the present purposes):

Claim	**Status provision**	**EU Status**	**HRA Right**
UD	Employee: s230(1) and (3)(a) ERA 1996	NA	NA
Wrongful dismissal	Employee: s230(1) and (3)(a) ERA 1996; Art.3 ET Extension of Jurisdiction (E and W) Order 1994	NA	NA
Whistleblowing	Worker: s230(3)(b) ERA 1996	NA	Yes: A10 & A14
NMW	Worker: s54(1)-(3) NMWA 1998	NA	Yes: A1P1 and Art.14
Unlawful deductions[20]	Worker: s230(3)(b) ERA 1996	NA	Yes: A1P1 and Art.14
WTR	Worker: Reg. 2(1) WTR 1998	Employment relationship	Yes: A1P1 and Art.14
Discrimination	"in employment" S83(2)(a) EqA 2010	Employment relationship	Yes: Arts.6, 8 and 14
Payslips/particulars	Worker: s230(3)(b) ERA 1996	NA	NA

281. As there was no agreement that some claims advanced by the Claimants fell within the 'ambit' of some convention right I need to set out the test that I have applied when answering that question. In ***R(SC) v Secretary of State for Work and Pensions*** Lord Reed said at paragraph 39 *'[the ambit] is a wider concept that that of interference'* and cited the concurring judgment of Judge Bratza in ***Adami v Malta*** **(2006) 44EHRR 3** in support. Judge Bratza's opinion included the following passage (with my emphasis):

> *'The central question which arises is what constitutes "the ambit" of one of the substantive Articles, in this case Article 4. It has been argued that "even the most tenuous links with another provision in the Convention will suffice" for Article 14 to be engaged (see Grosz, Beatson and Duffy, Human Rights: The 1998 Act and the European Convention, 1st edition, Sweet & Maxwell, 2000, § C14-10). Even if this may be seen as going too far, it is indisputable that a wide interpretation has consistently been given by the Court to the term "within the ambit". Thus, according to the constant case-law of the Court, the application of Article 14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such right, but it does not even require that the discriminatory treatment of which complaint is made falls within*

[20] This point was not included in the list of issues or pursued before me.

the four corners of the individual rights guaranteed by the Article. This is best illustrated by the fact that Article 14 has been held to cover not only the enjoyment of the rights that States are obliged to safeguard under the Convention but also those rights and freedoms that a State has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention

282. What I take from this is that for a claimed right to fall within the 'ambit' of a convention right it is unnecessary to establish a breach of any convention right.

'Whistleblowing'

283. In respect of claims based on protected disclosures brought under Sections 47B of the ERA 1996 the Respondent and Secretary of State both accepted that, in the light of ***Gilham***, such a claim would engage the Claimants rights under Article 10 of the Convention which for completeness I set out below:

Article 10 Freedom of Expression

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

National Minimum wage

284. The Claimants argue that the right to be paid the National Minimum wage engages Protocol 1 Article 1. ('AiP1') That reads as follows:

'Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except

in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

285. The right to be paid the national minimum wage arises from Section 1 of the National Minimum Wage Act 1998. It applies to 'workers' over the compulsory school age who ordinarily work in the UK – See sub-section 1(2). Prior to the National Minimum Wage Act 1998 coming into force rates of pay in most, but not all, sectors were a matter of negotiation. Even after the introduction of the National Minimum Wage Act 1998 certain categories of persons fall outside its provisions including anybody working under the age of 18 or the self-employed who are not workers.

286. The Claimants' written submissions state starkly that the Secretary of State who had taken the stand that no human right was engaged was wrong. It is said: 'There is no justification for such a position. The blanket ban on the Claimants being able to claim any NMW or annual leave, let alone that accorded to other workers, is clearly sufficient to bring them within the ambit of art 1 P 1 read with article 14'. As a cri de coeur that submission is attractive in the sense that it is incomprehensible that those who do the work of foster carers could be remunerated at a level that would be unlawful for workers. However, I do not consider it any answer to the approach urged on me by the Respondent and the Secretary of State.

287. Mr Moretto's answer to the Claimants reliance on A1P1 was set out in his written submissions and adopted in his oral submissions. In short he said that A1P1 does not create rights to acquire property. He relied upon ***Roche v UK*** **(2006) 42 EHRR 30** in support of that proposition. In ***Roche*** the ECHR held that a former Crown Servant was not deprived of any possession (a cause of action against the Crown for personal Injury) because he never had an absolute right to bring proceedings in Tort (see paragraphs 127-129).

288. I consider that the purpose behind A1P1 is to prohibit the arbitrary deprivation of possessions. The essence of a possession is something that a person possesses. They need to be able to say, 'that belongs to me' or 'I have a right to that'. I accept that the 'that' may be a claim/cause of action but it must be a claim or cause of action that has accrued. The Claimants referred me to ***Zeïbek v. Greece*** **no. 46368/06** where, if I have properly translated the French only decision, the Greek government contested the suggestion that a refusal to pay a state pension could engage A1P1. The Court disagreed holding that at the time Mrs Zeibek gave birth to her children (which was a precondition of payment) she had the right to a pension in the future.

Subsequent legislative changes (relating to nationality requirements) deprived her of that right. This decision underlines the need to be able to point to something you had and have lost before it is possible to say that you have been deprived of a possession.

289. The Claimants' use of A1P1 relies on a circular argument. They say it is unjustified discrimination not to provide a right to bring a claim that they do not have because of the discrimination. I consider that absent any extant right A1P1 there is not even a tenuous connection between the Claimants' claims and A1P1. The existence of a moral claim is in my view not a sufficient basis to engage A1P1.

290. It follows in my view that the Claimants' argument that the HRA 1998 requires me to read Section 1 of the National Minimum Wage Act 1998 in order to include foster carers as persons entitled to the national minimum wage falls at the first hurdle. I do not find that a claim to national minimum wage falls within the ambit of A1P1.

Working Time Regulations

291. As I understood the Claimants claims they were brought on the basis that they had not been given the right to paid annual leave i.e. the composite right identified in ***Smith v Pimlico Plumbers*** **[2022] EWCA Civ 70**.

292. I do not consider that a right to take holiday (by itself) falls easily into A1P1 even if it were to exist. I would accept that a right to take paid holiday could be considered a possession. However the difficulty for the Claimants is that identified above in the claim for National Minimum Wage. By reason of the definition of 'worker' in Reg 2(1) of the Working Time Regulations the Claimants are excluded from the right to paid annual leave (unless they succeed on their other arguments). They do not have any 'possession' that they are deprived of. They are in the same position as the Claimant in ***Roche***.

293. I find that the Claimants cannot show that A1P1 is engaged because they cannot show that their complaint falls within the ambit of A1P1 even applying the very broad test approved in ***R(SC) v Secretary of State for Work and Pensions***. I accept the point made by Mr Moretto, A1P1 cannot be used to create a right/possession. It protects rights/possessions that exist.

Discrimination Claims

294. The Claimants say that their allegations of breaches of the EA 2010 fall within the ambit of Article 6, 8 and A1P1. The Respondents and Secretary of State disagree. Mr Wilding sums up the Respondents position in pithy language in his submissions. He says:

'The Respondents however submit that the Claimants cannot rely on

Articles 6, 8 and

A1P1 because:

a. Article 6 does not create or engage a substantive right.

b. Article 8 does not apply to employment disputes.

c. A1P1 cannot be used to create rights in domestic law.'

295. It is necessary to take each point in turn.

Article 6

296. For completeness I remind myself, and any reader of this judgment who is not a lawyer, of the scope of Article 6 the parts of Article 6 that apply to civil proceedings are as follows:

> *'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'*

297. In his submissions Mr Moretto relies on ***Steer v Stormsure*** **[2021] ICR 1671** as authority for the proposition that Article 6 cannot be used to create a substantive right. He further relies upon ***Roche*** for the same proposition. In ***Steer v Stormsure*** at paragraphs 31 to 33 Bean LJ drew on both domestic and ECHR case law to reach the conclusion that where there is no cause of action provided by domestic law there was no breach of Article 6 when a claim not recognised in law was not permitted.

298. I am satisfied that the arguments of Mr Wilding and Moretto are to be preferred. Article 6 is concerned only with the enforcement of existing rights. The fact that others have rights that the Claimants do not (assuming their other arguments fail) does not entitle them to say that their claims fall within the ambit of Article 6. In ***Roche*** the Claimant was unable to rely on the fact that non crown servants might have sued the crown for personal injury to support the suggestion that there was a breach of Article 6. No more was the Claimant in ***Steer v Stormsure*** entitled to point to the fact that others enjoyed a right to claim interim relief to establish that the claim fell within the ambit of Article 6.

Article 8

299. I have concluded that discrimination claims brought by foster carers against a local authority do fall within the ambit of Article 8. I have broadly accepted the arguments made by Ms Crasnow and Mr Milsom and hope they will not consider it unfair if I focus on why I disagree with the Respondents and Secretary of State.

300. In his written submissions Mr Moretto cites ***London Borough Council v Vining*** **[2018] ICR 499** extracting from that authority the proposition that '*the Convention confers no general right to employment or to the continuation of employment*'. In ***Vining*** the Claimants were made redundant when the parks police were disbanded. They could not claim unfair dismissal as they were not employees. They sought to rely on convention rights bestowed by Articles 8 and 14 to argue that the ERA 1996 needed to be read to give effect to what they said was a breach of Article 14[21]. Putting aside the status questions the dismissal was what might be described as a run of the mill redundancy situation (although the Court of Appeal recognised the unfairness). It is necessary to cite further passages to put the proposition Mr Moretto extracts into context. Whilst I regret the length of the extract I consider that the entirety of the reasoning of the Court of Appeal is relevant to my determination. Whilst the discussion of the ambit of Article 8 starts at paragraph 24 the Court of appeal draw the threads together in the following passages in the judgment of the Court handed down by Sir Terence Etherton MR:

> *43 We consider that it is clear that article 8 is not engaged by the mere fact of dismissal from employment. The Grand Chamber of the European Court of Human Rights set down succinctly the general principles in Martinez v Spain (2014) 60 EHRR 3. In that case, the applicant, who had children with his wife, was employed as a teacher of the Catholic religion in a state-run school. His personal situation having become the subject of a newspaper article, he was barred from teaching the Catholic religion and his and there had been interference with the applicant s article 8 rights but, having regard to the state's margin of appreciation, the interference with the Applicant's right to respect for his private life was not disproportionate.*
>
> *44 On the question of the application of article 8 to employment, the court said:*
>
> > *109. Whereas no general right to employment or to the renewal of a*

[21] The Trade Union relied on Article 11 and Article 14 in its challenge to the conclusion that it could not advance a claim for a protective award. That claim succeeded on appeal.

fixed-term contract can be derived from article 8, the court has previously had occasion to address the question of the applicability of article 8 to the sphere of employment. It thus reiterates that private life is a broad term not susceptible to exhaustive definition (see, among other authorities, Schuth v Germany (2010) 52 EHRR 32, para 53). It would be too restrictive to limit the notion of private life to an inner circle in which the individual may live his own personal life as he chooses and to exclude entirely the outside world not encompassed within that circle (see Niemietz v Germany (1992) 16EHRR 97, para 29).

110. According to the courts' case law there is no reason of principle why the notion of private life should be taken to exclude professional activities (see Bigaeva v Greece CE:ECHR:2009:0528JUD002671305, para 23, and Volkov v Ukraine [2013] IRLR 480, paras 165—167). Restrictions on an individual s professional life may fall within article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. In addition, professional life is often intricately linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession (see ðzpinar v Turkey CE:ECHR:2010:1019JUD002099904, paras 43—48). Professional life is therefore part of the zone of interaction between a person and others which, even in a public context, may fall within the scope of private life . . .

45 On the particular facts of the case the court held that article 8 was applicable for the following reasons:

111. In the present case the interaction between private life stricto sensu and professional life is especially striking as the requirements for this kind of specific employment were not only technical skills, but also the ability to be outstanding in true doctrine, the witness of Christian life, and teaching ability . . . thus establishing a direct link between the person's conduct in private life and his or her professional activities.

112. The court further notes that the applicant, who was not a civil servant but was none the less employed and remunerated by the state, had been a religious education teacher since 1991 on the basis of fixed-term contracts which provided for annual renewal at the beginning of each academic year subject to the bishop s approval of his suitability. Thus, whilst it is true that the applicant had never had a

permanent contract, a presumption of renewal had given him good reason to believe that his contract would be renewed for as long as he fulfilled those conditions and there were no circumstances that might justify its non-renewal under canon law. In the court's opinion, the facts of the case bear some resemblance, mutatis mutandis, to those of Lombardi Vallauri v Italy CE:ECHR:2009:1020JUD003912805, para 38. In the present case, the applicant had been a religious education teacher continuously for seven years and had been appreciated both by his colleagues and by the management of the centres where he taught, thus attesting to the stability of his professional situation.

113. In those circumstances, the court takes the view that as a consequence of the non-renewal of the applicant s contract, his chances of carrying on his specific professional activity were seriously affected on account of events mainly relating to personal choices he had made in the context of his private and family life. It follows that, in the circumstances of the present case, article 8 of the Convention is applicable.

46 Ms Criddle sought to undermine the significance of Martinez on the grounds that neither Sidabras v Lithuania 42 EHRR 6 nor IB v Greece CE:ECHR:2013:1003JUD000055210 was cited in the court's judgment and it was decided before Boyraz v Turkey [2015] IRLR 164. There is, however, nothing inconsistent between those cases and Martinez and it has not been suggested in either the Strasbourg nor our domestic jurisprudence that Martinez is in some way out of line with authority and principle.

47 It is clear from the statements of principle in Martinez and the reasoning in that case, as well as the reasoning in all the cases on which Ms Criddle relies, that the mere fact of termination of employment is not sufficient of itself to make article 8 applicable. In para 109 of Martinez the Grand Chamber clearly stated that the Convention confers no general right to employment or to the continuation of employment. In none of the cases did the European Court of Human Rights say that article 8 was engaged by the mere fact of dismissal but rather it went on to consider whether the consequences of that particular dismissal made article 8 applicable (in Volkov v Ukraine the effect on the applicant s reputation of dismissal for breaching the judicial oath; in IB v Greece the stigmatisation and impact on the applicant's private life; in Boyraz v Turkey the effect on the applicant's identity, self-perception and self-respect; in Sidabras v Lithuania the stigma, the impact on creating future social relations and the difficulty of obtaining future employment).

301. I would accept that Mr Moretto is correct when he says that 'in general' Article 8 does not apply to employment disputes. However, by itself that proposition is of little assistance. I am not concerned with generalities. I am concerned with discrimination claims brought by foster carers. The issue I am dealing with is whether such claims fall within the ambit of Article 8.

302. What is clear from the passages that I have cited above is that the general position is subject to exceptions. In ***Steer v Stormsure*** Bean LJ described the position in respect of the engagement of Article 8 as 'less clear cut'. He noted Underhill's acceptance in ***Vining*** that as a general proposition the Convention conferred no general right to employment or continuation of employment. He then cited part of paragraph 47 of ***Vining*** which notes the exceptions to that general principle before accepting that Article 8 was engaged by the facts of the case before the Court of Appeal. The nature of the claims brought by Ms Steer are set out in paragraph 6. They were claims of sex discrimination, harassment and victimisation. One feature of the claims was that the Claimant suggested that assumptions were made about her because of childcare responsibilities. Another was the fact that her work from home was monitored.

303. The conclusions I reach from the authorities cited to me is that whilst the Convention, through the mechanism of Article 8, provides no general right to employment or protection from dismissal that does not mean that Article 8 cannot be engaged in the workplace or from decisions taken about work. I shall not attempt to list all the decisions supporting that proposition many, but not all, of which were cited by Underhill LJ in ***Vining***. It is sufficient to quote briefly from a passage in ***Boyraz v Turkey*** **(2014) 60EHRR 30** where at paragraph 43 the court said (with my emphasis):

> *'Turning back to the circumstances of the present case, the Court reiterates that the administrative authorities dismissed the applicant from her post in 2004 on the ground of her sex. In the Court's view, the concept of "private life" extends to aspects relating to personal identity and a person's sex is an inherent part of his or her identity. Thus, a measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person's identity, self-perception and self-respect and, as a result, his or her private life. The Court therefore considers that the applicant's dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life (see, mutatis mutandis, Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI). Besides, the applicant's dismissal had an impact on her "inner circle" as the loss of her job must have had tangible consequences for the material well-being of her and her family (see Oleksandr Volkov, cited above, § 166). The applicant must also have suffered distress and anxiety on account of the loss of*

her post. What is more, the applicant's dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practise a profession which corresponded to her qualifications (see Sidabras and Džiautas, cited above, § 48; Oleksandr Volkov, cited above, § 166; and İhsan Ay, cited above, § 31). Thus, the Court considers that Article 8 is applicable to the applicant's complaint.'

304. I am conscious that I am not dealing with a formal test case but with the cases of three individual Claimants. Despite this the arguments before me did not focus on the individual discrimination claims identified by the Claimants but mor broadly on the question of whether discrimination claims brought by foster carers fell within the ambit of Article 8. I shall deal with the broad propositions first but lest I am wrong to do so I shall turn to the individual claims before me and deal with them on the narrower basis that each individual claim would need to be judged on its own merits.

305. I have reached the conclusion that where a foster carer who accommodates, or might accommodate children within the household raises a claim that they have been subjected to an act or omission that contravenes the EA 2010 then such a claim falls within the 'ambit' of Article 8. I set out my key reasons below.

306. At the heart of any complaint brought under the EA 2010 is the concept that the treatment is informed by protected characteristics. In the usual cases those are the protected characteristics of the complainant. In rarer cases they are the protected characteristics of others. The protected characteristics identified in Section 4 and defined in sections 5 to 12 are matters that are either innate or, by adoption, become a part of the make-up of the person. They are key aspects of identity. I see no reason to conclude that the remarks in ***Boyraz v Turkey*** about discrimination on the ground of sex leading to '*adverse effects on a person's identity, self-perception and self-respect'* should not apply in the same way in respect of other protected characteristics. I go further than that. Not all claims will arise from the protected characteristics of the complainant. However, if such claims are made out the effect of the treatment is likely to engage dignity in the workplace and issues of self-respect in broadly the same way as if the complainant was the primary victim.

307. A successful claim under the EA 2010 will usually result in an award for injury to feelings. Experience tells me that those awards are made to compensate for a wide range of upset from mere indignation at the lower end through to severe setbacks to mental health that can be life changing. I cannot envisage a claim under the Equality Act that would have no effect on professional relationships or impact on a workers wider relationships with others. These are factors which the ECHR has held are sufficient to engage Article 8.

308. If this were the only matter in play I would none the less be satisfied that a claim alleging discrimination within an employment relationship would of itself bring the claim within the ambit of Article 8. However, the following additional reasons re-force that conclusion.

309. In his written submissions Mr Moretto says, when dealing with this question: *'Of course, insofar as the reality of the Claimants' position is that their* argument *relates to their rights as foster parents, then one could see how they might have argued that their rights as foster parents fall within the ambit of Art 8, because foster parents and indeed foster children are exercising family rights (i.e. the essence of foster care is that it provides a family life for children and foster parents, and therefore that the rights of foster parents fall within the ambit of Art.8). However, that is not their case, and it is (presumably) intentionally not their case because if the basis on which their case falls within Art. 8 were that it impinges with the exercise of their family life, that fundamentally underlines that they are not in an analogous position to workers who are seeking to exercise employment rights'*. I am not at this stage dealing with the question of whether foster carers are in an analogous position to those able to bring quality act claims.

310. What I take from Mr Moretto's submission is a tacit recognition that the nature of foster care is that children are taken into the homes of those who provide foster care. They live as members of the family. Foster carers are expected to build relationships with the children they care for. In many cases they will care for foster children alongside their own children. The expectations of a care plan and the foster carers agreement include matters which are ordinarily considered part of a person's family and private life. The behaviour of the foster carers and other visitors to the family home is impacted by the obligations to and expectations of the Local Authorities. For example there are expectations around use of alcohol, tobacco, language and behaviour. There are many aspects of foster care that impact upon the private life of any foster carer. See ***EB v France*** **47 EHRR 21**, paras 41–51, an adoption case but nevertheless dealing with similar aspects of family life.

311. I consider that many interactions between a Local Authority and a foster carer may potentially impact the private life of the foster carer. Decisions to place or not to place children, directions on how those children should be treated, where they should go to school, what they should eat, what religious beliefs should be catered for, the list is endless. Decisions about the children almost inevitably will affect the private lives of the foster carer. It is an inevitable consequence of carrying out the role of a foster parent within the foster carers home. Whether, as Mr Moretto suggests, that means that foster carers are not in an 'analogous position' is a separate question.

312. Accordingly approaching the matter at a general level I have concluded that complaints by a foster carer about acts and omissions of a local authority brought under the EA 2010 do fall within the ambit of Article 8. I turn then to

consider the matter on the narrow basis of the claims actually before me.

313. Case management thus far has not focused on identifying the claims with any great precision. However doing my best with the ET1 of each Claimant I have identified the following complaints:

313.1. Ms Dawkins complains that the decision by LB Bromley to terminate the approval of her as a foster carer was an act of direct discrimination because of race contrary to Sections 13 and 39 of the EA 2010 (ET1 para 38). However, she has other complaints;

313.2. she says that she raised differences in treatment by the Local Authority between white and black children (ET1 para 46/48) which she says amounted to a protected act for the purposes of Section 27 of the EA 2010. She says that the decision to terminate her approval as a foster carer was on the grounds of making those complaints. I have set out a little further detail of the background to those complaints when dealing with the suggestion that the IRM provides an adequate remedy.

313.3. She also appears to complain of a social worker referring to 'you lot' (para 44 of the ET`1) as a further act of direct discrimination or perhaps harassment.

313.4. An allegation that she was falsely accused of being aggressive (two occasions see paragraphs 45 and 46) may also be put as an allegation of victimisation, direct discrimination or harassment.

313.5. An allegation that 'Tracy Dolby' said 'BAME are on the back or the bus[22]' (ET1 para 47) appears to be an allegation of direct discrimination or harassment.

313.6. Ms Reid complains of the decision by LB Haringey to terminate her approval as a foster carer and remove two children from her care. She says that the reason for this was a perception intimated to her by a social worker Marcia Hill that she was 'too old to look after children' and was direct discrimination because of age (which she implicitly says cannot be justified).

314. In both the cases of Ms Dawkins and Ms Reid the complaints include the removal of approval as a foster carer. In my view the decision to remove approval as a foster carer is at least as serious a step as a dismissal from particular employment. I go further and regard the decision as having more serious repercussions than that. The decision not only means that each foster carer would no longer be offered placements from the particular local

[22] This may be a typing mistake in the ET1 (and not mine on this occasion)

authority it would in my view act make it much harder to be approved by any other fostering agency (unless overturned by the Independent review mechanism).

315. If there is any distinction between the impact of the dismissal in ***Boyraz v Turkey*** and the impact on the Claimants of the decision to remove their approval as foster parents it is that Ms Reid had two children who she cared for deeply removed from her home and Ms Dawkins had to take steps to address the suggestion that she was unfit to care for children in her home.

316. Having dealt with the discrimination claims actually before me, even if I am incorrect in my general approach I am satisfied that the discrimination claims brought by Ms Dawkins and Ms Reid fall within the ambit of Article 8.

'Analogous situation'

317. ***In R(SC) v Work and Pensions Secretary*** Lord Reed PSC relied upon ***Carson v United Kingdom*** **(2010) 51 EHRR 13** in his conclusion that 'there must be a difference in the treatment of *persons in analogous, or relevantly similar, situations'*. The potential overlap between that question and the issue of justification is clear. It is clear that it is not the case that the person with whom a comparison must be made must be in an identical situation.

318. Mr Moretto's submission, adopted by Mr Wilding was that Underhill LJ had found at paragraph 93 of ***NUPFC*** that (with emphasis added):

> *'93. First, the character of the relationship between a foster carer and the fostering service from which they accept placements is sui generis. They undertake a highly responsible role, for which they have to undergo a rigorous statutory approval process, in order to enable a local authority to discharge an important statutory obligation. Their responsibilities are continuous as long as the placement lasts and cannot be confined to working hours or put aside in order to take leave.'*

319. Mr Moretto pointed to features which he said pointed to foster carers being in a unique role. I shall not list these exhaustively but they included the unique tax treatment of allowances and payments and the various avenues of redress which he said were available to foster carers nut not to employees. I accept that foster carers' remuneration is subject to a bespoke tax arrangement. I further accept that the IRM offers a bespoke form of redress for some particular complaints. I further accept that a foster carer has access to other forms of redress that are not available to local authority employees. I deal with those in more detail below.

320. Above I have set out circumstances where a foster care placement might be terminated by court order. In particular, if a child was removed by an

order of the family court (typically to return to a parent or to be placed for adoption). Whilst it might be very rare for employment to be terminated by the actions of third parties it is not at all unusual for dismissal to be contemplated where the requirements for employees has ceased or diminished. In many agency relationships the agency worker is often at the mercy of the end used in respect of work continuing to be available. Whilst the mechanisms relating to the work ceasing to be available are different in my view the differences are not very great.

321. Mr Moretto makes a far stronger point in his written submissions. He says that under the CA 1989 Act, a foster parent who has looked after a child continuously for more than a year has the right to apply for a special guardianship order (s.14A(5)(d) of the 1989 Act), adoption order (s.42(4) of the Adoption and Children Act 2002. I would agree with Mr Moretto that this is not a feature of any other working relationship that anybody has drawn to my attention.

322. I do not consider that a conclusion that foster carers have a unique occupation answers the question of whether they can be in an analogous or relevantly similar position to other people. That is to focus only on the differences. I consider that at this stage I am required to compare foster carers with others whose convention rights are engaged in the same way. I should then look at whether they are in a sufficiently similar position such that any difference in treatment would require to be justified.

323. I consider that the consideration of whether two people are in an analogous position requires me to have regard to the right that is invoked. I have identified 2 rights where I have found that human rights may be engaged. I shall only deal with those.

324. I shall deal with the claims relying on Section 47B/48 ERA first. The purpose of the Public Interest Disclosure Act 1998 was to proscribe retaliation against those who spoke up in a responsible way about wrongdoing or potential wrongdoing. The categories of people expressly protected are far wider than employees and workers. They include amongst others quasi agency workers, people who have worked in the health service under Section 43K and police officers under Section 43J. Crown Servants and Parliamentary Staff are brought in by Sections 191, 194 and 195 of the ERA 1996.

325. A common feature of all the persons who are protected is that they have a vocation a consequence of which is that they will ordinarily be subjected to a level of control or subordination to another person. What that carries with it is the possibility that, without protection, there might be a reluctance to speak up out of fear of the personal consequences (typically a fear of losing their livelihood). I find that the Claimants are/were in the same position as foster carers. A I have found above that foster carers do work at the direction of the

foster service provider. Decisions about whether a child will be placed or remain with a foster carer are taken by the provider. I regard the level of subordination to be as high as in a typical working relationship.

326. Amongst the persons deliberately included as qualifying for protection are health workers. The reason for that is obvious when one has regard to the history of failures within that sector. Workers within residential children's homes and teaches all fall within the usual definition of worker or employee. What all these groups have in common is that they work with people who are very vulnerable. I would place police officers into the same category. In this respect I find that there are compelling similarities with the situation of foster carers. Foster carers too work with the vulnerable. They are in circumstances where they may well receive information tensing to show some forms of wrongdoing.

327. In respect of claims under the EA 2010 I would repeat my finding above that foster carers provide their services to local authorities in return for remuneration. They work for local authorities in a position of subordination. A feature of any such relationship is the potential for the abuse of power. In common with workers of any other description there is the potential for unlawful discrimination.

328. I repeat my findings in respect of the engagement of Article 8. It seems to me that foster carers protected characteristics and those who they care for are a feature of the work that they do. They are expected to act as guardians of equality and diversity in their role. In that respect they have much in common with many other caring professions and in particular teachers and those who work with children in residential settings.

329. I conclude that foster carers are in an analogous position to workers protected from retaliation from whistle-blowing and discrimination. I make it clear that I recognise the considerable overlap between the questions of whether persons are in an analogous position and whether there is any justification for treating them differently I make it clear that in announcing the conclusion above I have taken into account all the points I have identified as going to the issue of justification. I accept that almost all these points could have been fairly considered in relation to both questions.

Is the treatment on the grounds of 'other status'

330. The answer to this question is plainly yes. The rights to claim under the ERA 1996 and Part 5 of EA 2010 are limited domestically to persons working pursuant to a contractual relationship. The decision in ***W v Essex*** is that foster carers as a vocational group do not work under a contract. They are excluded as a vocational group from the rights they seek. I have no difficulty in finding that the exclusion from the statutory rights is on the ground of the Claimants occupational status. That occupational status and the absence of a contract

are domestically so intertwined as to be inseparable.

Justification

331. Mr Moretto set out the matters said to be legitimate aims justifying any discrimination in his written submissions. These were:

> *202.1. Preserving and maintaining the special family nature of the foster parent and child relationship and/or of the foster parent role; and/or*
>
> *202.2. Ensuring that decisions relating to the care of children in foster care are made in the appropriate forum which will have expertise of social care and public/childcare law (such as the Independent Review Mechanism or Local Government and Social Care Ombudsman or in a Court); and/or*
>
> *202.3. Ensuring the continued ability of local authorities to place children in foster care which would be threatened if foster parents had rights of workers such as, for example, the right to annual leave, weekly and daily rest, and payment of the National Minimum Wage; and/or*
>
> *202.4. Ensuring the best outcomes for children placed in foster care.*

332. I can deal very briefly with the third of these. I have already rejected the Claimants' case that being excluded from the National Minimum Wage or being permitted rest breaks/holidays fall within the ambit of A1P1. I shall not then deal with the issue of justification in respect of those claims. The fact that these claims have fallen away is important to the question of whether being excluded from bringing the remaining claims can be justified.

333. The parties broadly agreed that *"The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of his margin will vary according to the circumstances, the subject matter and the background."* – See ***R(SC) v Secretary of State for Work and Pensions***. Where they differed was in the scope of that margin of appreciation. The position of the Secretary of State, adopted by the Respondents was that *'this is an area in which the widest margin of appreciation must be given to Parliament, and is not an area in which the Tribunals or Courts should properly intervene unless any difference of treatment is manifestly without reasonable foundation'*. The Claimants disagree but say that even if that is the test then the Article 14 discrimination is not justified in their case.

334. The argument raised by Mr Moretto was raised in almost the same terms in ***Gilham***. Baroness Hale PSC sets out the MOJ's argument at paragraph 33 and deals with it over the following two paragraphs. She accepted that the

'manifestly without foundation' test is appropriate in the field of socio-economic policy but points out that the cases where that test has been applied all relate to welfare benefits (see paragraph 34). She then held that the case before the court was not in that category but 'rather in the category of social or employment policy' where that test was not always adopted. She went on to say, at paragraph 35:

> *'The courts will always, of course, recognise that sometimes difficult choices have to be made between the rights of the individual and the needs of society and that they may have to defer to the considered opinion of the elected decision-maker: see R v Director of Public Prosecutions, Ex p Kebilene [2000] 2AC 326, 381. But the second problem is that in this case there is no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA. While there is evidence of consideration given to whether certain excluded groups should be included (such as police officers), there is no evidence that the position of judges has ever been considered. There is no considered opinion to which to defer.'*

335. There may be a fine distinction between 'social and economic policy' and 'social and employment policy' but it is one recognised by the Supreme Court. What is urged upon me is a conclusion that excluding these foster carers from bringing their claims is a decision made by parliament falling squarely within the field of social policy. The engine room of that argument is the proposition that if foster carers could present claims in the employment tribunal that would adversely impact on the children they care for.

Has there been a decision of parliament to which I should defer?

336. As in ***Gilham*** I am not persuaded that there was any active consideration of whether foster carers ought to have the protections afforded by Part IVA of the ERA 1996 at the point it was enacted. However, Section 43K(4) was introduced by the Enterprise and Regulatory Reform Act 2013. That subsection provides a power to the Secretary of State to make amendments as to what individuals count as workers. That power has been exercised to add further health workers - see subsection 43K(2)(c). The power is subject to the affirmative resolution procedure – see Section 236(3) of the ERA 1996. I would accept then that if there had been active consideration to the question of whether foster carers should be able to avail themselves of Part IVA of the ERA 1996 that is a matter which I would have to consider.

337. The position in respect of the EA 2010 and Part II of the ERA 1996 is different. There was no evidence before me that a positive decision had been made to exclude foster carers from pursuing these rights before an

employment tribunal.

338. Ms Langdale set out what she said was the Government (at the time)'s considered position. She did not distinguish between the various rights claimed by the Claimants. She referred to a response by Minister Quince in a parliamentary debate that took place on 21 April 2022 about the recruitment and retention of foster carers. I have carefully read the contribution of the Minister but other than the fact that he says that foster carers are not employees or workers he does not deal in terms with why they should not be afforded the rights sought by the Claimant. I do not think that his speech dealt with the issue at all. More on point, and also referred to within the evidence of Ms Langdale was a debate that took place on 3 July 2019 a proposition raised by Norman Lamb MP who called for a fundamental review of whistleblowing regulation to provide proper regulation for a 'broader range of people'. In his speech he expressly referred to a lack of protection for foster carers. As far as I can tell from reading the debate there was no official government response. The debate concluded with the following proposition: *'That this House calls for a fundamental review of whistleblowing regulation to provide proper protection for a broader range of people'*.

339. The final evidence that the government has taken a considered decision in respect of foster carers is in correspondence between Norman Lamb MP and Edward Timpson the Minister of State for Children and Families and latterly with Nadhim Zahawi MP the Parliamentary Under-Secretary for Children and Families.

340. On 23 May 2016 Edward Timpson MP responded to a suggestion made by Norman Lamb MP that foster carers be included within the scope of the Public Interest Disclosure Act 1998. He said that: *'we do not consider PIDA to be a suitable vehicle for foster carers to raise their concerns as they do not hold employment status. Any changes to give foster carers employment status may have unintended consequences that would not necessarily be favourable to them'*. He went on to suggest that there were moves afoot to strengthen other forms of support and encouragement to whistleblowers. The Minister's response suggests that were Part IVA of the ERA 1996 to include foster carers that would in some unidentified way change their employment status. I shall return to that point below.

341. Norman Lamb MP wrote again to Edward Timpson MP on 16 September 2026. He sought a meeting to discuss the issue having met with representatives from Protect. On 1 November 2016 Edward Timpson MP replied. He agreed to a meeting. His letter refers to alternative routes for foster carers to raise concerns. His reasoning why foster carers should not be brought within the scope of Part IVA ERA 1996 remained broadly the same. He said:

'Protections under the Public Interest Disclosure Act 1998 only cover

directly employed foster carers. As the majority of foster carers are not employed, this legislation in itself may not adequately protect foster carers or provide them with a route for redress. While I appreciate the concerns you mention regarding employment rights, changes to give foster carers employment status may have unintended and undesirable consequences. For example, foster carers currently benefit from favourable treatment in the tax and benefits system, which it may not be possible for them to maintain as employees'.

342. On 26 November 2018 Norman Lamb MP raised the same issue again with Nadhim Zahawi MP. There had been previous correspondence but that was not included in the bundle. The approach of Norman Lamb was to suggest that foster carers needed to be brought within the definitions of 'employee/worker to benefit from protection from whistle-blowing detriments. Nadhim Zahawi MP responded on 10 December 2018. He said: *'I apologise if I was not completely clear in my previous letter and if this led to any misunderstanding. It is not the government's intention to reconsider the employment status of foster parents. We have been clear and consistent on this point'*. He went on to say: *'we do not consider employee status as consistent with the best interests of children living with foster parents. We recognise that on occasion foster parents may need a break from their responsibilities. There are sensitive and appropriate ways that we expect fostering services to support foster parents to have these breaks from care. This does not mean that they should be afforded full workers' rights, including for example, annual leave and sick pay'*. Finally he stated that following an earlier intervention by Norman Lamb MP the former Department for Business and Skills had undertaken investigations in respect of '*including foster carers in PIDA'*. He suggested that that review had concluded that it was not within the powers of the Secretary of State and there was *'no further course of action available'*.

343. A strand of thinking runs through much of the evidence relied upon by the Secretary of State is that extension of the rights sought by the Claimants needs to be considered on the basis that if they are considered workers for the purpose of any right then they will be afforded all the rights available to workers. For example, if they are protected under Part IVA ERA 1996, then it would follow that they would enjoy the full range of rights afforded by the WTR 1998. That is the thrust of the passage of the letter from Nadhim Zahawi MP I have referred to above. The exercise I am conducting is not one where, within these arguments, I am deciding whether the Claimants should or should not have the status of workers or employees generally. I am looking only at the claims where they fall within the ambit of any Convention right and, assuming that I find that the Claimants are in an analogous position to others who enjoy those rights and assuming I agree that the reason for the exclusion is the Claimants 'other status' I am asking whether exclusion from those rights is justified. If it is not then I need to ask whether the domestic legislation can

be read down to accommodate those rights. Reading down is not a drafting exercise. The distinction was explained and applied in ***Gilham*** paragraphs 39 to 45. The interpretation is of a statute is not an amendment. It is a process of construing a statute so as to give effect to a particular right.

344. Focusing directly on the legitimate aims identified by the Secretary of State I am satisfied that those aims have been taken into account by the Government in decisions not to review the rights of access of foster carers to the tribunal system. Specifically I am satisfied that the inclusion of foster carers into Part IVA of the ERA 1996 has been considered and rejected. I am satisfied that part of the reasoning for that corresponded to the legitimate aims identified at paragraphs 202.1 and 201.4 of Mr Moretto's written submissions and reproduced above. I am not satisfied that there was any considered decision in respect of the rights to bring claims under the EA 2010. Nevertheless I do accept that the matters set out by Mr Moretto do represent the views of the Secretary of State.

345. I am further satisfied that the aims set out by Mr Moretto must be regarded as legitimate. They have a common focus being the welfare of children. The concern of the Secretary of State is that if the Claimants have access to the rights that they seek that will impact on the welfare of children. I examine below the extent to which I accept that evidence.

Impact upon the fostering relationship

346. I shall start with the suggestion that access to a tribunal to enforce the rights I have identified engage the Claimants' Convention rights would damage the fostering relationship.

347. Foster carers look after some of the most vulnerable children in society. They are expected to build a relationship with those children. They will commonly accommodate children during public law proceedings where decisions may be taken as to where a child should live or whether a child can safely be returned to its parents. Like school teachers, GPs and other professionals they can be the eyes and ears for the local authorities and the courts. Regrettably tragedies such as that in the case of 'baby P' (and several others since) highlight that failures by local authorities can have catastrophic consequences. If foster carers have no or limited protection against retaliation for speaking out then there is a real risk that their concerns about their own position would make them reluctant to step in and to speak out.

348. Given that foster carers care for children in their homes it is likely that any discrimination inflicted upon foster carers by the local authority would impact the children they care for. I note that in stark contrast to many professional fields Part 2 of Schedule 3 of the Fostering Services (England) Regulations 2011 requires the fostering service to obtain information about a foster carers marital status, their religious persuasion, their racial origin and

cultural and linguistic background. These are matters that may be taken into account in placing children with a foster carer. Such matters could quite possibly engage stereotypes conscious or subconscious bias. Disagreements between foster carers and the fostering service could very easily result in a placement breakdown.

349. The concerns I have raised above need to be taken into account when assessing the contentions by the Respondents and Secretary of State that allowing access to employment tribunals would harm the relationship between foster carers and the children they care for. In my view, not proscribing retaliation against whistle-blowers or discrimination will also impact children. In the former case with potentially serious consequences.

350. It was said on behalf of the Respondents and Secretary of State that the process of litigation would be potentially damaging to children. In particular, it was said that there was a risk that if foster carers could litigate in the tribunal children might be witnesses. I accept that it is possible to envisage a situation where a child might be a potential witness in complaints brought under Section 47B of the ERA 1996 or the EA 2010. Given that the nature of any such claim starts with the treatment of the claimant I do not envisage that those circumstances would arise frequently. Where they did arise then the Tribunal rules of procedure are flexible enough that any risk of harm to the child could be eliminated. I accept that where a child has witnessed events that resulted in a conflict between foster carers and the fostering service there is the potential for placement breakdown. I do not see that is exacerbated by allowing foster parents access to an employment tribunal.

351. On the one hand the Respondents and Secretary of state sought to justify excluding foster carers from enforcing the rights they seek in an employment tribunal by reference to what they say would be the corrosive effect of litigation on the looked after child. On the other hand it is said that foster carers can bring any discrimination claim in the civil courts and can bring any claim for a breach of their Article 10 rights in the High Court. I see no consistency in those arguments. If litigation is corrosive then I do not see that it is any less so in the more formal setting of the civil courts. If the reality of the submission is that foster carers are less likely to pursue claims in the civil courts then I agree.

352. Even absent a contractual relationship foster carers are not without redress in the courts. The fact that the payments to foster carers are said to be made pursuant to a statutory scheme does not mean that they are not enforceable – see ***East Berkshire Health Authority, Ex parte Walsh***. ***W v Essex*** is an example of a foster arrangement that gave rise to potential claims in the tort of negligence.

353. The fact that foster carers can already bring claims about various aspects of their treatment by local authorities undermines the suggestion that

giving access to enforce rights given to workers would automatically impact the family relationships that the arrangement is in place to provide. In my view what is important is to look at the effect of bestowing rights on an individual basis. Foster carers have some rights – what then is the effect of giving them others?

354. A spectre raised by Mr Moretto is a hypothetical situation where one foster parent complains about the other and says that the fostering service is liable for the actions of the offending parent. Mr Moretto suggests that simple domestic disputes could result in tribunal proceedings. I do not consider that this situation is very likely to arise in practice. A claim against a fostering service could only be brought in respect of an employment dispute. ***Tiplady v City of Bradford Metropolitan District Council*** provides an example of the courts delineating what is and what is not justiciable. A claim arising from a dispute about the division of domestic labour (an example discussed orally) is unlikely to fall within the jurisdiction of the tribunal.

355. A further example was suggested by Mr Moretto. He put forward a situation where one foster parent tolerated drug use and the other did not. He suggested that that might give rise to a claim under Section 47B ERA 1996. I agree that it might. However, speaking up to protect children from exposure to illegal drug use is to be encouraged. If retaliation was proscribed then I cannot see that there is any significant disadvantage to the child.

356. As the Claimants argued claims affecting family relationships are not unknown to employment tribunals. Tribunals are capable of properly policing the distinction between acts done in an employment relationship and those done outside it.

357. The next argument raised in the evidence of Sophie Langdale relates to the impact on children of foster carers being recognised as workers at all. She says that it is an anathema to regard the family home as a workplace. She then sets out in her witness statement the research that has been done in respect of the attitude of looked after children towards the professionalisation of foster carers.

358. I shall not set out the whole of the evidence relied upon by Sophie Langdale. I am satisfied that there is a body of evidence that suggests that foster children are troubled by the idea that their foster parents are motivated by money or are caring for them *'for a living'*. There was evidence that at least one former foster child thought that foster carers should not seek to form a trade union. The evidence is that children in foster care resent being commodified. I would agree that that would be upsetting for children.

359. The difficulty with setting up this evidence as a justification for not providing access to employment tribunals for whistle-blowing discrimination or wages complaints is that, with or without access to the employment

tribunal, foster carers are being paid to look after foster children. Denying them access to an employment tribunal has no impact on that. Equally insofar as foster children are disturbed by the unionisation of foster carers that ship has already sailed – ***NUPFC***. Having considered all the evidence in this case I find myself in full agreement with Underhill in that case where he said:

> *'Second, Ms Willison refers to the "message" which the recognition of trade union rights would send to children in foster care. This is the point that the EAT accepted (see para. 128 above), but I find it rather unpersuasive. No doubt, if the NUPFC is listed and begins to recruit, an older child whose carers become members may become aware of that fact, and perhaps also (if in due course this happens) that the union is representing them in negotiations for better remuneration. But I find it hard to believe that knowledge of that kind is likely to undermine the child's perception of the nature of the fostering relationship. Quite apart from anything else, any child who understands that much will certainly be aware that their carer receives money for looking after them. If that knowledge does not undermine the relationship, knowledge that the carer belongs to a trade union is not very likely to do so. It is true that as a matter of legal analysis such a right would derive from the foster carer being treated, at least for article 11 purposes, as a "worker" and as being in an "employment relationship", which I take to be the point that the EAT is making at para. 120; but it is hard to see how those abstractions would impact on a child'.*

360. Ms Langdale's entreaty that the family home should not be regarded as a workplace relies on the need for children to feel that they are loved as members of a family. For myself I do not think that a requirement that foster carers make their foster children feel loved as family members is inconsistent with them doing so as a part of a vocation for which they are remunerated. That conclusion is supported by a passage in the Neary report where the authors say: *'we are very clear that there is no conflict between being a caring or loving foster carer and being adequately compensated*'. Foster carers have been remunerated for many years. There was evidence that this can result in resentment from foster children but there is no suggestion that there is any realistic alternative. The evidence, and my experience in the family courts, tells me that there is a shortage of foster carers. The situation would be many times worse if fostering was only open to those who could afford to foster for purely altruistic reasons.

361. There is a strong recommendation in the Neary report that says: *'It may be for the courts to determine the employment status of carers. But we believe that were it to be obtained, employment would radically and negatively affect the heart of fostering and would not be in the interests of children in care. We encourage the Government and local authorities to resist such a fundamental*

change'. The problem with this passage is that the evidence said to support such a conclusion starts with a focus on the impact that access to the rights under the WTR 1998 would have on the ability of foster carers to care for children. It then supposes that a decision to give employment rights would afford sickness benefits and protection against dismissal. It is said that it would involve more oversight and impinge on the independence of foster carers. It is suggested that a consequence of any change in employment status would require a change in the tax and benefit regime. In my view the Neary repost makes the same assumptions as I have identified above. It assumes that facilitating access to some rights facilitates access to all rights. That is fundamentally flawed. The following examples illustrate the point. Police Officers can bring discrimination and whistleblowing complaints but have no access to Part II of the ERA 1996 and have very limited rights to claim unfair dismissal. Health workers provided with work experience falling within Section 43K(1)(d) (for example) have the protection of Part IVA of the ERA 1996 but almost no other rights under the ERA 1996.

362. There was no evidence from foster children themselves dealing with the issues I am faced with. They were not asked *'do you think your foster parents should be protected against discrimination or be able to draw attention to wrongdoing without fear of retaliation'*. These questions are very different from those addressed in the evidence which focused almost entirely with the issue of commodification.

363. Drawing these threads together I start with the position of the Secretary of State and the Respondents, it is already open to a foster carer to complain in the courts of a breach of Article 11 rights, to bring a discrimination complaint through part 3 of the EA 2010 and to enforce claims for payment of any sums due to a foster carer. Any such claims risk the corrosive effect of litigation and might possibly impact children. I find that that risk has been overemphasised. What needs to be justified is the exclusion of the Claimants from the rights I have identified as engaging Convention rights. The Secretary of State and Respondents were of course dealing with a wide ranging challenge from the Claimants and in that respect cannot be blamed for responding to that challenge in the same broad terms. However, once aspects of that challenge are stripped out, and in particular once the suggestion that foster carers are employees or have the full range of rights under the WTR 1998 the argument that the extension of rights would have a significant impact on the welfare of children is significantly diluted if not entirely extinguished.

<u>The purpose of protection</u>

364. A point which I regard as of considerable weight when assessing the arguments on justification is the purpose of laws that prohibit retaliation against those who draw attention to wrongdoing, laws that prohibit discrimination, harassment or victimisation and laws that protect wages. It is very easy, particularly for a judge, to regard the purpose of those laws as

providing redress when there are transgressions. That might be the purpose of the courts and tribunals, but it is my view an overly narrow view of the purposes of the legislation. Laws are made to be obeyed. The existence of a sanction for unlawful conduct is there to encourage that obedience. Part of the purpose and intent behind laws must be the fact that their very existence will reduce the behaviour the laws are directed towards.

365. The Respondents and Secretary of State do not go as far as to say that foster carers should not be able to obtain redress for discrimination or retaliation for whistleblowing. Instead they say that there are other avenues of redress which are sufficient.

Alternative remedies

366. The Respondents and Secretary of State rely on the alternative remedies that I have discussed above. I have included in my description of those avenues of redress some findings about the scope and adequacy of those remedies. I have taken that into account below. Again I consider that it is necessary to have regard to these alternative remedies in respect to each right claimed. As I find below the conclusions on justification are not apposite for one size fits all.

Whistle-blowing

367. In terms of remedies before a court the Respondents and Secretary of State referred to the possibility of either bringing a direct claim in the courts for a breach of Article 11 under the HRA 1998 or judicially reviewing any offending conduct.

368. The issue of bringing a claim under Section 7(1) of the HRA 1998 was considered in ***Gilham*** at paragraph 27 of the judgment of Baroness Hale PSC. She pointed out that there was the possibility of an award of damages in such a claim *'if this is necessary to afford just satisfaction for the wrong done'* . I take it that that is a reference to the fact that the HRA 1998 essentially imported the approach to compensation usually adopted by the ECHR. That approach is not equivalent to the approach taken in an employment tribunal. In the paragraphs that follow Baroness Hale makes it clear that the existence of some alternative remedy is not necessarily an answer. What is necessary is to justify the exclusion of the group from accessing that particular remedy – see paragraphs 35 and 36.

369. The limitations of Judicial Review as an alternative remedy were an issue in ***Medical Council and others v Michalak (Solicitors Regulation Authority and others intervening)*** **[2017] UKSC 71**. Whilst the case concerned whether the availability of judicial review precluded a claim to the Employment Tribunal under the EA 2010 the following passages are of assistance. Lord Kerr said:

(at paragraph 19) 'Quite apart from the range of remedies available to it, the employment tribunal, as a forum for dealing with complaints by employees concerning their employment, has distinct advantages for complainants. It is a specialist tribunal with expertise in hearing discrimination claims across a range of sectors; it is designed to be accessible to litigants in person; and it is generally a cost-free jurisdiction (rule 74 of the Employment Tribunals Rules of Procedure 2013)

(and at paragraph 21) *'Judicial review, even on the basis of proportionality, cannot partake of the nature of an appeal, in my view. A complaint of discrimination illustrates the point well. The task of any tribunal, charged with examining whether discrimination took place, must be to conduct an open-ended inquiry into that issue. Whether discrimination is in fact found to have occurred must depend on the judgment of the body conducting that inquiry. It cannot be answered by studying the reasons the alleged discriminator acted in the way that she or he did and deciding whether that lay within the range of reasonable responses which a person or body in the position of the alleged discriminator might have had. The latter approach is the classic judicial review investigation.'*

370. I do not consider that a claim in the civil courts under the Human Rights Act or a claim for judicial review provides anything close to the standards of scrutiny, expertise, informality of procedure and low risk of costs that is available in claims brought before the employment tribunal. If the Respondents are correct and these provided a similar regime to the employment tribunal then it is surprising that for years foster carers, and supporters such as Protect and Norman Lamb MP have ben pressing for access to the tribunal system. My attention was not drawn to any case which raised the same issues as a whistleblowing case (including seeking compensation) that have been dealt with in the civil courts.

371. I have set out the avenues of redress other than the court system above. I have identified both the advantages and the limitations. I need to compare those avenues of redress to the possibility of a claim in the Employment Tribunal. Perhaps the strongest candidate for an alternative means of redress put forward by the Respondents and Secretary of State is a complaint to the Ombudsman. However, the Ombudsman could not make a determination of whether anything said or written by a foster carer was a qualifying or protected disclosure. Such questions of law fall outside the ambit of the Ombudsman's role. Protected disclosure cases are fact sensitive. Often they turn on the state of mind both of the person said to have made disclosures and the person said to have retaliated. The procedures of the Tribunal are ideally suited to that. Those of the Ombudsman far inferior. Awards made by the Employment

Tribunal under Section 48 can include injury to feelings and personal injury. Schedules of loss can run from modest sums to millions particularly where a personal injury (usually psychiatric) was said to be a consequence[23].

372. In the light of my findings above whilst I would accept that there are some avenues available for a foster carer to raise complaints none in my view are comparable to those afforded through Part IVA of the ERA 1996.

Discrimination claims

373. The Respondents and Secretary of State have said, and I have accepted, that it is possible for a foster carer to bring a complaint in the civil courts under Part 3 of the EA 2010. I have set out my reasons for that conclusion and, in looking at whether that provides an effective and equivalent remedy considered the comparative advantages and disadvantages of each forum. Whilst I am concerned with a different test I consider the comments in both the Supreme Court ***P v Commissioner of Police of the Metropolis*** and the Court of Appeal in ***Eckland*** about the employment tribunal providing s specialist forum for discrimination claims to be instructive here. The comments made in ***Michalak*** that I have quoted above are consistent with the same theme.

374. For much the same reasons as I have set out above when considering the Part IVA claims I am driven to the conclusion that the Employment Tribunal is the specialist forum for dealing with discrimination claims that arise in the context of work. For the reasons set out above I consider that the relationship between foster carers and foster service providers is a relationship founded on the provision of services for reward. It is a working relationship albeit one with some special features. I do not consider the more formal route through the County Court provides the same expertise (see ***Eckland***). Overall I am satisfied that the informal procedure and low risk of costs in an employment tribunal is significantly more advantageous than a rout through the county court.

375. I do not need to repeat what I have said about the alternative redress available through the various complaints mechanisms identified by the Respondents and Secretary of State. I would make the same point that discrimination complaints require determinations of complex legal questions, complex enquiries about motivation and can concern very large monetary claims. None of the alternative complaints mechanisms are adequate to deal with those matters.

[23] See Jhuti v Royal Mail Group 2200982/2015 where damages were reportedly in the region of £2.3M for a modestly paid employee whose career had been ended through ill health caused by retaliation for whistle-blowing.

Justification, proportionality, analysis and conclusions.

Whistleblowing claims

376. What needs to be justified is not the fact that foster carers have no other redress for claims arising from protected disclosures, it is the fact that they are unable to pursue such claims before an employment tribunal under Part IVA of the ERA 1996.

377. I have accepted that the Secretary of State has identified legitimate aims. I would entirely accept that the welfare of children is a very weighty matter. What I do not accept is that extending the right to bring claims under Part IVA of the ERA 1996 is likely to have any significant impact on the welfare of children. Furthermore I do not think that allowing access to Part IVA means that employment tribunal would be placed in the position of making welfare decisions about children. They would not. They would be deciding whether there were protected disclosures, they would be deciding on whether there was any treatment that might be a detriment to the foster carer, they would be looking at the reason for the treatment and to issues of remedy. No welfare decisions about a child are involved in that process.

378. I have had regard to the risk of local authorities being drawn into disputes between foster parents. I accept a small degree of risk. I accept that there is a risk that a looked after child might be a material witness. I consider that that risk can be substantially mitigated by procedural safeguards available to the tribunal which can regulate its own procedure. I note that many of these risks are also present if the foster carer was only able to air any breach of her article 10 rights in the civil courts in a claim under the HRA 1998.

379. I consider that extending accessible rights to protection from retaliation for speaking up is likely to benefit children rather than act to their disadvantage. It was common ground before me that foster carers should be encouraged to speak out where they fear wrongdoing. Knowing that there is an accessible route to legal redress is likely to encourage speaking out and to discouraged retaliation.

380. Looking at matters overall I am not satisfied that the State has shown any sufficient justification for excluding foster carers from the rights afforded by Part IVA of the ERA 1996. Accordingly I find that there is a breach of the Claimants rights under Article 10 read with Article 14 of the Convention.

Discrimination claims

381. Again the matter that must be justified is the requirement of foster carers to bring any discrimination claims before the civil courts under Part 3 of the EA 2010 as opposed to in the Employment Tribunal. At first glance that would

suggest that less would be required to justify that position. On the other hand once it is accepted that discrimination arising from the position of being a foster carer can be brought before the courts many of the State's concerns about the impact of litigation simply fall away.

382. I have accepted that the role of a foster carer is to provide a service under the control of a foster service provider in return for remuneration. No matter how much that involves the provision of a loving family environment it is a vocation it sits firmly in the sphere of work.

383. I have set out by reasons why I consider that the Employment Tribunal is the specialist and appropriate forum for disputes about the sphere of work. Discrimination of all sorts is a scourge that should be tackled as far as possible by a legal process which is specialist, as informal as possible and accessible. The Employment Tribunal offers that. The other forms of redress identified by the Respondents and Secretary of State do not.

384. I do not find that the exclusion of foster carers from the right to pursue their claims under Part 5 of the EA 2010 is a proportionate means of meeting the legitimate aims of identified by the Secretary of State. I consider that providing an accessible means to complain of discrimination is likely to make it more attractive to be a foster carer and, through Section 27 of the EA 2010 encourage foster carers to speak up where they perceive any disparity in treatment whether it be between foster carers or foster children.

385. I have concluded that the exclusion of foster carers from Part 5 of the EA amounts to a breach of Article 8 read with Article 14. Or more narrowly I find that it is in the case of the Claimants who have advanced discrimination claims.

Section 3 of the HRA 1998 – Remedy

386. Section 3(1) of the Human Rights Act 1996 requires that *'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'*. The parties are agreed that the approach I must take is that set out in ***Ghaidan v Godin-Mendoza*** **[2004] 2 AC 557** at paragraphs 25-35. In particular the mere fact that the language used in the legislation is not convention compliant does not mean that it is not possible to interpret in a way that is. However, an interpretation which either goes against the grain of the legislation or is only one of a number of policy choices that might be made is not an interpretation it is possible for a court or tribunal to make[24]. On that last point I do not

[24] On that point Mr Moretto refers me to R(T) v Chief Constable of Greater Manchester Police [2014] 3 WLR 96; Chester v Secretary of State for Justice [2014] AC 271 and SG and JS v Secretary of State for Justice [2015] 1 WLR 1449.

consider that the present case falls into the category of cases where there might be a range of options. The foster carers either should or should not be permitted to bring claims in the employment tribunal. It might have been very different had I agreed with the Claimants on the working time issue.

387. Mr Moretto (whose submissions on this point were adopted by Mr Wilding) suggested that the 'grain or the legislation' required me to have regard to the purposes of the Children Act 1989 and to the requirement to provide children with a family life. The suggestion is made that allowing foster carers to share rights enjoyed by workers is so obviously harmful to the family relationship that any interpretation that afforded those rights goes against the grain of the legislation that establishes the regime under which foster carers work. I have dealt with the thrust of this submission when dealing with justification. I need not repeat myself here. I do not agree that the existence of these particular rights is inconsistent with the ability of a foster carer to provide a loving family home. On the contrary, I consider that proscription of retaliation against foster carers for speaking out and the proscription of discrimination harassment and victimisation by a local authority together with the provision of an effective means of redress is likely to promote the care of children by foster carers.

Whistle-blowing

388. It is not a fundamental feature of Part IVA of the ERA 1996 or the act as a whole that the rights afforded by sections 47B and 48 are afforded only to persons who work under a contract. They are not. They are afforded to a much wider group of people that those who fall within Section 230 of the ERA 1996.

389. In ***Gilham*** the court saw no difficulty in reading Section 230(3)(b) as including words that would protect an office holder. It was held that to do so would not cut against the grain of the legislation. The route was to interpret worker as including an office holder. I consider that the same result could be achieved in the present case by reading the word worker as including a person who is a foster carer approved under the Fostering Services (England) Regulations 2011. The Respondents and the Secretary of state say that that cannot be done without extending to the Claimants all the other rights that apply to limb 230(1)(b) workers. I accept that there is some support for that in Baroness Hale's judgment at paragraph 39 of ***Gilham***. However in ***NUPFC*** Underhill LJ made it clear that interpretation in accordance with Section 3 of the HRA 1998 for one purpose does not require the same interpretation to be used either in other legislation or in the same act in respect of other rights. As he says at paragraph 145 *'It applies only to the extent necessary to give effect to their Convention rights'*.

390. If I am wrong about the point made above then an alternative route to achieving the same result which would meet that objection would be to read

Section 43K (or perhaps alternatively Section 43KA) as including additional language. Reading in additional language into those sections would not in my view go against the grain of the legislation. Far from it. Those sections are specifically intended to offer protection to a wider class of persons that those who call bring themselves within section 230. Bringing in foster carers is entirely consistent with the purposes of the legislation.

Discrimination Claims

391. I do not accept that affording rights to foster carers to bring proceedings under Part 5 of the EA 2010 goes against the grain of the legislation. There is a large number of categories of people who are afforded the protection of that part who are protected against discrimination in their work or more generally in their professional lives. The rights are afforded to many non-contractual relationships. It does not offend against the purposes of the act, which is to proscribe discrimination, to interpret part 5 as allowing claims by foster carers.

392. The means to interpreting the EA 2010 as including foster carers is straightforward and does no damage whatsoever to the purposes of the legislation. Section 83(2)(a) can be interpreted as meaning *'employment under a contract of employment, a contract of apprenticeship or a contract or employment relationship personally to do work'*.

393. Such an interpretation addresses the breach of articles 8 and 14 I have identified. It is entirely consistent with the purposes of the legislation.

Omissions

394. In a judgment concerning as many issues as have been raised by the parties in this case there is a risk that I will have overlooked something. If the parties consider that is the case then they will be alive to the process of seeking a reconsideration.

Postscript

395. There have many months of delay in preparing and sending out this judgment. The reasons have been explained in a separate correspondence with the parties. They are in part personal and in part reflect the very large amount of material I have had to deal with against a busy workload. The Employment Judge recognises the additional stress that any delay causes the parties and apologises unreservedly.

Employment Judge Crosfill

Dated: 2 January 2025

Appendix – LIST OF ISSUES

1. Were each of the Claimants: employees and/or workers engaged by the relevant Local Authority pursuant to the following provisions (the "Status Provisions"):
   i. Section 230(1) (employees) or section 230(3) (workers) ERA 1996 (in respect of the claims under ERA 1996 and section 13 Employment Relations Act 1999);
   ii. Section 83(2)(a) EqA 2010;
   iii. Reg.2(1) Working Time Regulations 1998 (WTR);
   iv. Section 54(1) – (3) National Minimum Wage Act 1998 (NWMA)
   v. Art.3 of the ETs Extension of Jurisdiction (E&W) Order 1994 (for Ms Oni's and Ms Dawkins' wrongful dismissal claims)?

2. For the purposes of paragraph [1] above, do The Fostering Services (England) Regulations 2011 mean that the Claimants were not employed by the Local Authorities as employees or workers by reason of Regulation 2(2), Regulation 27 and Schedule 5 of those Regulations?

3. For the purposes of paragraph [1] above, did the Claimants, or any of them, ever enter into or work for the Respondents, or any of them, under a contract of employment?

4. Alternatively, for the purposes of paragraph [1] above, did the Claimants (or any of them):
   i. Enter into and/or work under a contract (other than a contract of employment) whether express or implied;

ii. Whereby the Claimant(s) undertook to do or perform personally any work or services for the other party to the contract; in circumstances where

iii. The status of the other party to that contract was not by virtue of the contract that of a client or customer or of any profession or business undertaking carried on by any of the Claimants?

5. Alternatively for the purposes of the EU-derived domestic employment rights on which the Claimants rely, specifically their discrimination claims and claims for holiday pay:

   i. Do the Claimants as foster carers fall within the scope of the EU Working Time Directive (2003/88/EC)?

   ii. Did the Claimants, or any of them, enter into and/or work under an employment relationship with any of the Local Authorities such as would entitle the Claimants to rely on EU-derived domestic employment rights?

   iii. Does the fact that the Claimants can bring discrimination claims under Part III of the EqA 2010 mean that they are adequately protected in terms of a right not to be discriminated against?

   iv. If there was a breach of the Claimants' EU law rights in respect of annual leave and/or discrimination, could and should the relevant UK law be read so as to prevent such a breach and if so how?

6. To the extent that any aspect of paragraphs [1]-[5] above is not resolved in favour of the Claimants on ordinary application of the statutory provisions (or in accordance with EU law) should an alternative reading to those provisions be

given in accordance with section 3 of the Human Rights Act 1998, so as to permit the Claimants to bring the following claims in the Employment Tribunal against their relevant Local Authorities:

i. A whistleblowing claim under Part IVA ERA;

ii. A discrimination claim under Part V ERA;

iii. A minimum wage claim under NWMA; and

iv. A claim for holiday pay under Reg XX of the WTR?

7. In particular:

i. Does the alleged discrimination fall within the ambit of one of the Convention rights, specifically:

a. In respect of the whistleblowing claim, Articles 6 or 10;

b. In respect of the discrimination claim, Articles 6, 8 or A1P1;

c. In respect of the minimum wage claim A1P1; and

d. In respect of the holiday pay claim, A1P1?

ii. If so, are the Claimants, as foster carers, in an analogous or relevantly similar, situation to workers who can bring such claims in the ET?

iii. If so, have the Claimants been treated differently to such others in the enjoyment of their Convention rights;

iv. If so, is the reason for the difference of treatment a difference based on an identifiable characteristic or "status" (the "status" contended by the Claimants being that of a foster carer or alternatively working other than under a contract)?;

v. If so, does that difference of treatment have no objective or reasonable justification, in that it is not a proportionate means of achieving a legitimate

aim, taking into account the margin of appreciation to be afforded to Parliament?

vi. Is a Convention-compatible construction of the Status Provisions and/or The Fostering Services Regulations (England) 2011 "possible" within the meaning of section 3(1) HRA 1998?