Case Number: 1601450/2024

EMPLOYMENT TRIBUNALS

Claimant: **Ms R Jordan**

Respondent: **Cardiff Council**

Heard at: **Cardiff** **On:** **3 and 4 April 2025**

Before: **Employment Judge R Harfield**

Representation
Claimant: The Claimant represented herself
Respondent: Ms C Wigley (Counsel)

JUDGMENT

1. The claimant was not an employee of the respondent at the relevant time. The complaints of unfair dismissal, statutory redundancy pay, breach of contract, unauthorised deduction from wages and holiday pay are therefore dismissed because the Tribunal does not have jurisdiction to determine them (and the claimant did not argue in the alternative for worker status for the unauthorised deduction from wages and holiday pay complaints);

2. Further the complaints were not presented within the applicable time and I do not extend the time limits. The complaints would also be dismissed on that basis.

REASONS

Introduction

1. The Claimant presented her ET1 Claim Form on 31 May 2024. Early conciliation took place between 24 March 2024 and 5 May 2024. A case management hearing took place before Employment Judge Sharp on 17 October 2024 when she listed this public Preliminary hearing to decide:

   1.1 Was the Claimant an employee of the Respondent. EJ Sharp noted that the Claimant was not arguing worker status in the alternative;

   1.2 What was the date the relationship between the parties ended?

   1.3 Did the Claimant present her claims within the statutory time limit and, if not, was it reasonably practicable to present the claims

(excluding redundancy) within the time limit? If not, was it presented within a reasonable period?

1.4 If any claims remain, then make further case management orders and list the next hearing.

2. By way of background EJ Sharp recorded that the Claimant was an ARC respite carer and there is a dispute whether she was an employee or self-employed. EJ Sharp noted the Claimant's case was that she was employed from 22 May 2017 to 26 March 2024 when the Claimant asserts the Respondent ended the relationship. EJ Sharp noted the Respondent's case was that the Claimant was self-employed with the ARC relationship ending on 22 September 2023. EJ Sharp noted the Claimant was bringing claims of unfair dismissal, right to a redundancy payment, and breach of contract (notice pay) that all required the Claimant to establish she was an employee. EJ Sharp noted the Claimant was also bringing complaints of unauthorised deduction from wages and holiday pay but was not arguing worker status in the alternative to employee status. Further, EJ Sharp recorded that the Respondent was arguing all the claims were out of time.

3. I had before me a hearing file of 165 pages. I had witness statements from the Claimant and Respondent (Luke Harrison and Rhys Simmons) and I also heard oral evidence from those witnesses. I had a note on statutory material from the Respondent's Counsel and also a written closing note from the Claimant. I heard oral closing submissions. I was also given some additional documents: the Foster Carer Certificate of Approval of 4 January 2023, an extract from an Annual Review of 9 March 2017, and from the Claimant (with no objection from the Respondent) a document headed "Fostering (Wales) Guide" dated 12 May 2016 produced by CommunityCare informChildren.

The legal framework – Employment Status

Statutory definitions of Employee and Worker Status

4. Section 230 of the Employment Rights Act 1996 ("ERA") states:

"(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.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"— (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and (b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly…"

5. Unfair dismissal and redundancy payment claims are brought under ERA and require employment status as defined in section 230(1). Deduction from wages complaints (which includes some holiday pay claims) are also brought under ERA and require worker status. Breach of contract claims are brought under The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. A claimant must be an employee to bring a claim. Holiday pay claims can also be brought under the Working Time Regulations 1998. A claimant there has to be a worker and under Regulation 2 of the Working Time Regulations there is the same definition of worker as set out as in section 230(2) ERA.

Is there a Contract? – Introduction

6. To be an employee or a worker there must be a contract between the individual and the employer. That is a baseline requirement to be met; there are ultimately other factors that also have to be satisfied to have ultimate employee or worker status. But on this initial, baseline point, the Respondent argues that there was no contract. The Respondent argues that the ARC respite carer arrangement was one prescribed by legislation not by contract. The Respondent asserts the Claimant was a foster carer and caught by a body of binding case law that says foster carers do not have a contractual relationship with the local authority. The Claimant asserts she was not a foster carer, but an ARC respite carer and her situation is distinguishable to the case law authorities. Amongst other things she points out that she was not caring for "looked after" children.

The Foster Carer Caselaw Authorities

7. W v Essex County Council [1999] Fam 90 concerned an attempt by foster parents to sue the local authority for breach of a fostering agreement, arguing it was a private law contract. The Court of Appeal reviewed the then statutory framework governing children in care and their placement with foster parents, including the Children Act 1989, the Foster Placement (Children) Regulations 1991, the Arrangements for Placement of Children (General) Regulations 1991 and the statutory guidance. The Court of Appeal noted these regulations included provision for matters such as the continuous review of suitability of particular foster carers, and the right to revise the terms of approval or terminate them. Before placing a child with the foster carer, the foster carer was required to enter into a written agreement with the local authority dealing with matters set out in Schedule

2 to the regulations. The schedule addressed matters such as training, reviews, changes in personal circumstances, the arrangements for meeting any legal liabilities of the foster parents arising by reason of the placement, corporal punishment, confidentiality and the right to remove the child from the carer's home. There was also a duty not to place a child unless the foster carer entered into a written agreement relating to the particular child and also covered matters such as financial and medical arrangements.

8. The Court of Appeal said:

"*There are, in my judgment, a number of reasons why the plaintiffs' claim in contract must fail. First, although the "Specialist Foster Carer Agreement" had a number of features which one would expect to find in a contract, such as the payment of an allowance and expenses, provisions as to National Insurance, termination and restriction on receiving a legacy or engaging in other gainful employment and other matters… I do not accept that this makes the agreement a contract in the circumstances of this case. A contract is essentially an agreement that is freely entered into on terms that are freely negotiated. If there is a statutory obligation to enter into a form of agreement the terms of which are laid down, at any rate in their most important respects, there is no contract (see Norweb plc v Dixon [1995] 1 WLR 646 at p643F)… 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.*"

9. In Rowlands v City of Bradford Metropolitan District Council [1999] EWCA Civ 116 the Court of Appeal applied that analysis and principle directly to an employment tribunal claim, overturning an earlier decision in that case that the claimant foster carer was an employee.

10. Lambert v Cardiff County Council [2007] EWHC 869 was a further attempt to argue a fostering agreement had contractual effect. HHJ Hickinbottom again reviewed the statutory framework and the agreement reached between the parties. He held that the agreement, although it covered some matters beyond the required scope of the then applicable regulations, primarily covered matters required by the 1980 Act and the 1988 Regulations and 1991 Regulations. He again held that the ratio of W applied to the statutory provisions before him which were sufficiently similar to and indistinguishable from W. HHJ Hickinbottom also said that even if W was not binding he would have followed the same reasoning.

11. In Bullock v Norfolk County Council [2011] UKEAT/0230/10 the EAT upheld a decision a foster carer was not a worker, again concluding it was bound by the judgments of the Court of Appeal in W and Rowlands that the relationship between foster carer and local authority is not contractual. That there was by then a new set of fostering regulations made no difference to the analysis. The EAT also rejected an argument that W was no longer good law.

12. NUPFC v Certification Officer [2021] WLR(D) 206 is a further Court of Appeal authority that concluded the Court of Appeal (and the courts and tribunals below) remain bound by the decision in W that foster carers do not provide services under a contract. LJ Bean observed that W was puzzling

because there are other types of work such as teaching and nursing where pay and conditions are determined nationally pursuant to statutory powers which cannot be varied by the parties, but individuals can still hold a contract. He acknowledged the Court of Appeal was bound by W but suggested the authority may merit reconsideration by the Supreme Court or parliament. Nonetheless at the current time W clearly remains binding authority for cases that fall within its ambit.

Other professions or occupations or office holders where there has been a similar issue

13. Foster carers are not the only profession or occupation or officer holders where question of the existence of a contract has been in issue. The issue has affected, for example, the clergy, police officers, and judges.

14. Gilham v Ministry of Justice [2019] UKSC 44 concerned district judges. Judges hold a statutory office. There the Supreme Court identified the issue to be determined is whether the work or services is performed pursuant to a contract with the recipient of that work or services, or pursuant to some different legal arrangement. The Supreme Court said office holders do not necessarily hold office under a contract, as they may hold their position subject to rules about matters such as duties, terms of the office, remuneration, removal and the like. It was said whether an officeholder holds office under a legally binding contract depends on the intentions of the parties. It was said: "*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?"* To assess that, it was said, there is a need to look at the manner in which the individual is engaged, the source and character of the rules governing the service and the overall context.

15. In Gilham for example on its facts, the manner of appointment as a judge was statutory and nothing in the appointment letter spoke in contractual terms or of contractually binding obligations. There were some terms and conditions such as maternity pay which were not derived from statute. But the essential components of the relationship were derived from statute and not a matter of choice or negotiation between the parties such as pay, pension, retirement, and the application of statutory disciplinary procedures. District judges therefore held no contract with the Ministry of Justice or anyone else. (The Supreme Court went on to find judges did qualify for whistleblowing protection under Article 14 and Article 10 of the European Convention on Human Rights, but such principles are not advanced before me in this case).

The statutory provisions governing foster carers in Wales at the time of the Claimant's relationship with the Respondent

16. What therefore are the statutory provisions that the Respondent argues dictates the relationship in the Claimant's case? (The Claimant of course argues they did not apply to her).

17. Here I had a benefit of a note on the statutory framework from Ms Wigley because I pointed out in the course of the hearing that there was a need to

show me the actual statutory framework it was said applied bearing in mind I am looking at a particular time period and bearing in mind in Wales, the topic is a devolved function, the legislation will not be the same as England. It is not possible in this Judgment to summarise every regulatory provision and so I summarise some that show the overall picture. But I have considered all of the legislation I was referred to.

18. I am told that at the time the Claimant first became a foster care the applicable regulations were the Fostering Services (Wales) Regulations 2003 ["The 2003 Regulations"]. I have not been given details of the parent legislation, but those 2003 Regulations say they are made under powers conferred by the Care Standards Act 2000 and the Children Act 1989. Under regulation 10 each local authority had to appoint one of its officers to manage the local authority fostering service.

19. Under regulation 2 a "foster parent" meant a person with whom a child is placed, or may be placed under those Regulations, except that, in Parts IV and V of those Regulations it does not include a person with whom a child is placed under regulation 38(2). A "placement" meant any placement of a child made by (a) a local authority under section 23(2)(a) of the 1989 Act or a voluntary organisation under section 59(1)(a) of the 1989 Act which is not – (i) a placement with a person who falls within section 23(4) of that Act; or (ii) a placement for adoption; and (b) except in Part V of these Regulations includes a placement arranged by an independent fostering agency acting on behalf of a local authority.

20. Section 23 of the Children Act has been subject to amendment over the years, and I was not referred to it by counsel. But I understand it was concerned with the provision of accommodation and maintenance by a local authority for children whom they are looking after. I.e. a foster parent was defined by reference to the actual or potential placement of a looked after child.

21. The 2003 Regulations placed numerous requirements on fostering service providers which, as I have already said, is difficult to summarise given their extent. Some are set out in Ms Wigley's note. It included at regulation 17 that 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. It also provided that the fostering service provider must ensure, in relation to any child placed or to be place with them, the foster parent was given such information to enable the foster parent to provide appropriate care for the child including the child's health needs and the arrangement or giving consent for medical or dental examination or treatment. It also included regulation 20 which addressed the fitness of workers. Regulation 20(5) said: "*Subject to regulation 52(7), the fostering service provider must not employ to work for the purposes of the fostering service in a position to which paragraph (6) applies, a person who is – (a) a foster parent approved by the fostering service, or (b) a member of the household of such a foster parent.* Regulation 20(6) said: *"This paragraph applies to any management, social work or other professional position, unless in the case of a position which is not a management or social work position, the work is undertaken on an occasional basis, as a volunteer, or for no more than 5 hours in any week."*

22. The ”fostering service” was defined to mean (a) a fostering agency within the meaning of section 4(4) of the 2000 Act; or (b) a local authority fostering service. A “fostering service provider” meant, in relation to a local authority fostering service, a local authority. The “local authority fostering service” meant the discharge by a local authority of relevant fostering functions within the meaning of section 43(3)(b) of the 2000 Act.

23. The 2003 Regulations required the setting up of a fostering panel which under regulation 26 had to consider cases referred by the fostering service provider. That included for each application for approval to recommend whether the person was suitable to act as a foster parent, and recommend the terms of approval. The fostering panel also had responsibilities to recommend whether the person remained suitable to act as a foster parent, and whether the terms of the approval remained appropriate on the first review under regulation 29(1) and on any other review when requested to do so by the fostering service provider under regulation 29(5). The fostering panel were also to consider any case referred under regulation 28(8) or 29(9). Other fostering panel functions also included giving advice and making recommendations on such other matters or individual cases as the fostering service provider may refer to it.

24. Regulations 27 and 28 governed the assessment and approval of prospective foster parents, which included whether the household was suitable and the wider membership of the household. Regulation 28 provides that a fostering service provider, in deciding whether to approve a person as a foster parent and the terms of any approval, must take into account the recommendations of the fostering panel. Regulation 28(5) said: “*(5) If a fostering service provider decides to approve a person as a foster parent it must—*
(a) give the person notice in writing specifying the terms of the approval, for example, whether it is in respect of a particular named child or children, or number and age range of children or of placements of any particular kind, or in any particular circumstances; and
(b) enter into a written agreement with the person covering the matters specified in Schedule 5 (in these Regulations referred to as the “foster care agreement”).”

25. Schedule 5 to the 2023 Regulations set out the matters and obligations to be contained in foster care agreements as:

1. The terms of the foster parent’s approval.
2. The amount of support and training to be given to the foster parent.
3. The procedure for the review of approval of a foster parent.
4. The procedure in connection with the placement of children and the matters to be included in any foster placement agreement.
5. The arrangements for meeting any legal liabilities of the foster parent arising by reason of a placement.
6. The procedure available to foster parents for making representations.
7. To give written notice to the fostering service provider forthwith, with full particulars, of—
(a)any intended change of the foster parent’s address;
(b)any change in the composition of the foster parent’s household;

(c)any other change in the foster parent's personal circumstances and any other event affecting the foster parent's capacity to care for any child placed or the suitability of the foster parent's household; and
(d)any request or application to adopt children, or for registration for child minding or day care.
8. Not to administer corporal punishment to any child placed with him the foster parent.
9. 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 the foster parent 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.
10. To comply with the terms of any foster placement agreement.
11. To care for any child placed with the foster parent as if the child were a member of the foster parent's family and to promote the child's welfare having regard to the long and short-term plans for the child.
12. To comply with the policies and procedures of the fostering service provider issued under regulations 12 and 13.
13. To co-operate as reasonably required with the National Assembly and in particular to allow a person authorised by the National Assembly to interview the foster parent and visit the foster parent at any reasonable time.
14. To keep the fostering service provider informed about the child's progress and to notify it immediately of any significant events affecting the child.
15. Where regulation 36 applies, to allow any child placed with the foster parent to be removed from the foster parent's home.

26. Regulation 29 governed reviews and terminations of approval and under regulation 29(2) a review had to take place not more than a year after approval and thereafter whenever the fostering service considers it necessary, but at intervals of not more than a year. If the fostering service provider is no longer satisfied that the foster parent and the foster parent's household continue to be suitable or that the terms of approval are appropriate, it had to give written notice of a proposal to terminate the approval or revise the terms of the approval with reasons. A foster parent could also give notice in writing at any time that they no longer wish to act as a foster parent and the approval is then terminated 28 days later.

27. Regulation 30 governed the maintaining of case records for each foster parent approved by it which included (amongst other things) the foster care agreement, the approval notice, any report of a review of approval which must be retained for at least 10 years from the date on which that person's approval is terminated.

28. Regulation 34 governed the making of placements and required that before making a placement the responsible authority enter into a written agreement (the foster placement agreement) with the foster parent relating to the child covering the matters specified in Schedule 6.

29. Regulation 36 governed the termination of placements with the ability of an area authority to remove a child forthwith.

30. Regulation 37 permitted a responsible authority to place a child in a series

of short term placements with the same foster parent and the arrangement was such that (a) no single placement was to last for more than 4 weeks; and (b) the total duration of the placements was not to exceed 120 days in any period of 12 months. There was a provision for less stringent visiting obligations when there was a series of short term placements.

31. The 2003 Regulations were replaced by three sets of regulations that came into effect in April 2019: the Fostering Panels (Establishment and Functions) (Wales) Regulations 2018 ["the Fostering Panels Regulations"]; the Local Authority Fostering Services (Wales) Regulations 2018 ["the 2018 LA Regulations"] and the Regulated Fostering Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019. These regulations were made under the Social Services and Well-being (Wales) Act 2014.

32. The Fostering Panel Regulations govern such matters as the setting of fostering panels, their functions, and the assessment of prospective foster parents. Regulation 8 governs the approval of foster parents and states that there must be a notice specifying the terms of approval such as the number and age range of children or placements of a particular kind. The fostering services provider must also enter into a foster care agreement with the foster parent. Under regulation 8(2) the approval of each foster parent must be reviewed by the fostering services provider not more than one year after approval and thereafter whenever the fostering services provider considers it necessary, but at intervals of not more than one year. When undertaking a review, the enquiries to be made include seeking and taking into account the views of the foster parent, and (subject to the child's age and understanding) any child placed with the foster parent. At the conclusion of the review there must be a written report setting out whether that individual continues to be suitable to act as a foster parent and whether the terms of the approval continue to be appropriate. The fostering services provider must refer the first review under the regulation to the fostering panel for consideration and thereafter such a referral to the panel is at their discretion (but they must still do their own review). If the terms of an approval are considered no longer to be appropriate the provider must give written notice of the proposal to revise the terms of the foster parents approval together with reasons for that proposal and a copy of any recommendation made by the fostering panel. A foster parent can also give 28 days' written notice that they no longer wish to act as a foster parent under regulation 9(13). There are record keeping obligations under regulations 11 and 13.

33. Schedule 3 sets out the matters and obligations in a foster care agreement:

''1. Matters to be recorded—

(a) the terms of the foster parent's approval,

(b) 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,

(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 for 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 member 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 services 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 household, and

(iv) any request or application to adopt children, or for registration for child minding or day care under Part 2 of the Children and Families (Wales) Measure 2010,

(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 services provider,

(e) to provide care and support to a child placed with the foster parent in accordance with the child's care and support plan and in a way which maintains, protects and promotes the safety and well-being of the child,

(f) to maintain a good personal and professional relationship with a child placed with the foster parent,

(g) not to deprive the liberty of any child placed with the foster parent without lawful authority,

(h) to promote contact between a child placed with a foster parent and the child's parents, relatives and friends, in accordance with the child's care and support plan and any court order relating to contact,

(i) to comply with the policies and procedures of the fostering services provider,

(j) to promote the health and development of a child placed with a foster parent,

(k)to ensure that the premises, facilities and equipment used by foster parents are—

(i) suitable and safe for the purpose for which they are intended to be used,

(ii) used in a safe way,

(iii) properly maintained, and

(iv) kept clean to a standard which is appropriate for the purpose for which they are being used,

(l) to co-operate as reasonably required with the Welsh Ministers and in particular to allow a person authorised by the Welsh Ministers to interview the foster parent and visit the foster parent's home at any reasonable time,

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

34. The fostering service provider is defined to mean a local authority fostering service provider. In turn that is a local authority providing the local authority fostering services. Local authority fostering service is any service provided in Wales by a local authority which consists of or includes the placement of children with foster parents or exercising functions in connection with such a placement and "service" is to be construed accordingly. A "foster parent" is defined as a person who has been approved as a foster parent in accordance with those Regulations. A "placement" is the placement of a child with a foster parent under section 81(5), 6(a) and (b) of the 2014 Act.

35. The 2018 LA Regulations cover governance requirements. These include, for example, under regulation 13 an obligation on the local authority to ensure that foster parents give care and support to a child placed with them in accordance with the child's care and support plan, and in a way which maintains, protects and promotes the safety and wellbeing of the child. Under regulation 15 the local authority must monitor the foster parent's compliance with the requirements of the foster care agreement. Under regulation 19 the local authority must put in place arrangements to ensure that children placed by it are safe and are protected from abuse, neglect and improper treatment. Under regulation 26 the local authority must ensure that foster parents promote the physical, mental and emotional development of children place with them and in particular that includes (amongst other things) ensuring that foster parents have registered each child with a GP. They must ensure foster parents promote the child's regular attendance at school and participation in school activities. Other regulations are about ensuring, for example, that foster parents promote the leisure interests of children placed with them and support them to engage in play and recreational activities appropriate to their age, and to participate freely

in cultural life and the arts. Regulation 29 sets out the requirements to ensure the fitness of employees, volunteers and others who work at the service who may in the course of their duties have regular contact with children who are receiving care and support. "Staff" is defined as including persons employed by the local authority provider to work at the service as an employee or a worker, and persons engaged by the local authority provider under a contract for services. Under regulation 30 there are obligations for the support and development of staff, including appropriate supervision and appraisal and training as appropriate.

36. Under regulation 32 there must be a disciplinary procedure in place for employees. Under regulation 39 there are requirements relating to a complaints policy. Under regulation 33: "*(1) The local authority provider must not employ to work for the purposes of the fostering service in a position to which paragraph (2) applies, a person who is –*
(a) a foster parent approved by the fostering service or,
(b) a member of the household of such a foster parent
(2) This paragraph applies to any management, social work or other professional position, unless in the case of a position which is not a management or social work position, the work is undertaken on an occasional basis, as a volunteer, or for no more than 5 hours in any week." Under regulation 41 the local authority provider must ensure that foster parents have the information they need to provide care and support to a child placed with them in accordance with the child's care and support to plan and must ensure foster parents receive such training, advice, and support as appears necessary in the interests of children placed. Under regulation 43 the local authority must ensure that foster parents are appropriately supervised. Under regulation 44 the local authority must maintain good professional relationships with foster parents and encourage them to maintain good personal relationships with children placed with them.

37. It is not something referred to by the Respondent, but the Claimant drew my attention also to the Care Planning, Placement and Case Review (Wales) Regulations 2015 ["The 2015 Care Planning Regulations"] which also sets conditions to be complied with before a child is placed with a local authority foster parent. The child may only be placed if the foster parent is approved and (other than short term emergencies), the terms of the approval are consistent with the proposed placement, and there is a foster care agreement in place.

38. Regulation 62 says it is concerned with modifications for short breaks and states:

"*62.—(1) In the circumstances set out in paragraph (2), these Regulations apply with the modifications set out in paragraph (3).*

(2) The circumstances are that—

(a)C is not in the care of the responsible authority,

(b)the responsible authority has arranged to place C in a series of short-term placements with the same person or in the same accommodation ("short breaks"), and

(c)the arrangement is such that—

(i) no single placement is intended to last for more than 4 weeks,

(ii) at the end of each such placement C returns to the care of C's parent or a person who is not C's parent but who has parental responsibility for C, and

(iii)the short breaks do not exceed 120 days in total in any period of 12 months.

(3) The modifications are that—

(a)regulations 5 and 10 do not apply, but instead the care and support plan must set out the arrangements that have been made to meet C's needs, with particular regard to—

(i) C's health and emotional and behavioural development, in particular in relation to any disability C may have,

(ii) promoting contact between C and C's parents and any other person who is not C's parent but who has parental responsibility for C, during any period when C is placed,

(iii) C's leisure interests, and

(iv)promoting C's educational achievement,

and must include the name and address of C's registered medical practitioner, and the information set out in paragraph 3 of Schedule 3, where appropriate,

(b) regulations 7, 14 and 63(2)(b) do not apply,

(c)regulation 31(2) does not apply, but instead the responsible authority must ensure that R visits C on days when C is in fact placed, at regular intervals to be agreed with the IRO and C's parents (or any person who is not C's parent but who has parental responsibility for C) and recorded in the care and support plan before the start of the first placement and in any event—

(i) the first visit must take place within the first 7 placement days of the start of the first placement, or as soon as practicable thereafter, and

(ii) subsequent visits at intervals of not more than 6 months, for as long as the short breaks continue,

(d) regulation 39 does not apply, but instead—

(i) the responsible authority must first review C's case within 3 months of the start of the first placement, and

(ii) the second and subsequent reviews must be carried out at intervals of not more than 6 months."

39. In the Social Services and Well-being (Wales) Act 2014, section 81 falls within Part 6 which is about "*Looked after and accommodated children."* Under section 74(1) a reference to a child who is looked after by a local authority is a reference to a child who is (a) in its care, or (b) provided with accommodation by the authority in the exercise of any functions which are social services functions, apart from functions under section 15, Part 4, or section 109, 114 or 115." Section 74(2) defines accommodation in 74(1) as "*means accommodation which is provided for a continuous period of more than 24 hours*." Section 81 sets out the ways in which looked after children are to be accommodated and maintained and sections 81(5) and (b) set out what is a "placement" which includes a local authority foster parent. Section 197 defines a "local authority foster parent" as a person authorised as such in accordance with regulations made by virtue of (a) sections 87 and 93; (b) paragraph 12F of Schedule 2 to the Children Act 1989 (regulations providing for approval of local authority foster parents). Section 87 provides that regulations may make further provision about children looked after by local authorities. Section 93 contains detailed terms, but in short form provides that regulations made under section 87 can put in place procedures for the approval of local authority foster parents, such as the setting up of a panel.

Case law principles about employee status

40. If I make a decision that there was a contract, then the next question to determine will be whether it was a contract of employment. The most referred to case law authority on this question is Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB497 where MacKenna J said (albeit with some outdated language):

"*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."*

41. The first condition is sometimes termed "mutuality of obligation." There is a need for an employee to provide his or her own personal service, in consideration for payment; sometimes called the "wage-work bargain." But the Supreme Court in Commissioners for His Majesty's Revenue and Customers v Professional Game Match Officials Limited UKSC/2021/0220 also observed that the requirement of payment for personal service is not by itself sufficient to establish a contract of employment because it is also an essential element of contracts for services where independent contractors agree to provide personal services for payment, and to the broader statutory category of "worker."

42. A sufficient element of control by the employer over the employee is also

essential to the existence of a contract of employment. The case law authorities emphasise that what matters is the lawful authority to command so far as there is scope for it, depending on the facts, and that control may be only in incidental or collateral matters. A much quoted example, for example, are surgeons where the duties depend on special skill or knowledge, and the employer or controlling management may have no more than a very general idea of how the work is done and no inclination to directly interfere with it. But there may still be some sufficient framework of control, for example, hospital management may intervene if duties were being performed in an unacceptable manner. Or in Uber BV and others v Aslam and others UKSC/2019/0029 there was control through a driver warnings system and ultimate termination of the contract. In Professional Game Match Officials Limited the Supreme Court observed that such control may also be present in the case of an independent contractor, so again it is not by itself determinative. Drawing on the Uber example, the Supreme Court observed the employer does not have to have a contractual right to intervene in every aspect of the performance of duties, and it is not confined to the right to give direct instructions. The right to impose sanctions can play a significant part in enabling the putative employer to exercise control over the performance of duties.

43. The Supreme Court also emphasised it is not correct to focus unduly on mutuality of obligation and control and treat all other terms of the contract and the surrounding circumstances as being of less significance. There is a need to look at the cumulative effect of the totality of the contractual provisions and all the circumstances of the relationship. Further if mutuality of obligation and control are established, they then do not drop out of the picture in the further analysis. For example, the extent of control remains a relevant factor at the final assessment stage, as does the nature and extent of mutual obligations. The Supreme Court approved the approach in The Commissioners for Her Majesty's Revenue and Customs v Atholl House Productions Limited [2022] EWCA Civ 501 that the question for the tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties.

44. The final assessment is not a mechanical exercise of running through a checklist but instead the object of the exercise is to paint a picture from the accumulation of detail, and then stand back from the detailed picture, view it from a distance, and make an informed, considered, qualitative appreciation of the whole. Not all details will be of equal weight or importance in a particular case; Hall v Lorimer [1994] 1 WLR 209. Again, it is not a checklist, but some of the factors that have been considered in other cases and may potentially be relevant include matters such as:

- The express or implied rights or duties of the parties;
- The degree of control exercised over the person doing the work;
- Whether the person doing the work provides their own equipment and the nature of the equipment involved in the work;
- Whether they hire staff to help them;
- The degree of financial risk, for example with delays in the

performance of the services agreed;

- The degree of responsibility for investment and management;
- How far the person providing the services has the opportunity to profit from sound management in the performance of the task;
- The understanding or intention of the parties;
- Whether the person has set up a business like organisation of their own;
- The degree of the continuity of the relationship between the person performing the services and the person they perform them for;
- How many engagements are performed and whether they are performed mainly for one person or for a number of different people;
- Whether the person forming the services is accessory to the business of the person to whom the services are provided or are part and parcel of the organisation;
- The extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of their talents.

45. The assessment is not just a matter of looking at any written agreements. There may be a need to look at all the relevant evidence, including any written terms read in the context of the whole agreement, and evidence as to how the parties conducted themselves in practice and what their expectations of each other were. It is a matter of discerning the true agreement, which sometimes will have to be gleaned from all the circumstances of the case, and where the written agreement is only a part: Autoclenz v Belcher [2011] UKSC 41. In Uber it was said this approach was a matter of statutory interpretation rather than a traditional contractual construction analysis; to have regard to the purpose of a particular provision and, so far as possible, interpret it in a way which gives best effect to that purpose.

Findings of fact relevant to employment status

46. Before the relationship in question the Claimant was a foster carer for short term respite placements. This was for "looked after" children. The Claimant has not sought to argue employment or worker status during this earlier period. I do not have much information about this earlier period. There is a foster carer certificate of approval dated 8 August 2014 saying the Claimant had approval to look after one child in the age of 5 – 12 years for short term and respite placements [55]. It states it is valid until annual review of approval.

47. I then have an extract from an annual review report dated 9 March 2017 which says: "*Rachel was Approved 09/07/14 for one child, either gender 5-12 yrs short term, Respite this is now extended to 5-18 years.*

7. RECOMMENDATION IN REGARD TO FUTURE APPROVAL: (please note that if there is a recommendation to increase the carer's current approval the carer will need to return to be returned to the Fostering Panel for a review of approval). Approval to remain the same.

8. SUMARY OF SPECIFIC ISSUES AND ACTIONS TO BE TAKEN: Additional issues discussed. ARC project discussed with Rachel, joint visit with Carys Davies and Nadia to be arranged to discuss further. Computer

for Rachel/foster children to be looked into, Nadia to complete a CP12 and send to Ros. Rachel to discuss some marketing ideas for the fostering service. Rachel to commence the QCF. To get a lockable/security box. Rachel's approval to change from 5 to 12 years to 5 to 18 years due to [x] being older and Rachel grown in confidence and experience." From what I understand of this form, the Claimant in her respite foster care role for looked after children was to have her approval changed from 5 to 12 years to 5 to 18 years.

48. There was dispute at the hearing before me as to when the Claimant was first given a computer. The Respondent says it was not at this stage as there is only an indication that it would be looked into and there is no evidence of the Claimant subsequently using a computer to, for example, file reports. It is said that there was only the much later provision of a tablet and then a computer (dealt with below). The Claimant asserted she did have a computer at this stage. In my judgement, I accept on the balance of probabilities the Claimant did have a computer at this time. The Claimant was the only witness to give direct evidence from this period of time. But I also find that the provision of a computer was in fact initially at this time in March 2017, given the reference made to this in the annual review, and that it actually related to the Claimant's original respite foster carer role, rather than ARC. That finding is supported by the email sent by the Claimant's supervising social worker, Nadia Chaletzos [NC] to the Claimant on 16 March 2017 asking the Claimant if the Claimant had received a "computer agreement form." That all pre-dates the Claimant being successful at interview for the ARC role.

49. At that 9 March 2017 annual review it was also floated with the Claimant whether she would be interested in being involved in a new initiative: the Adolescence Resource Centre Project (ARC). The Claimant says the Head of Fostering, Roslyn Rees had initially approached her to discuss a Government initiative of the ARC. The head of ARC, Carys Davies [CD], then contacted the Claimant to explain the project and said the Claimant would be the perfect candidate given her experience. The Claimant then attended a formal interview with CD, a Sally Westwell and a Daniel Jones on 12 April 2017. A young person was also present. On 12 April 2017 CD told the Claimant by phone she had been successful at interview [16]. When the Claimant told NC she wrote "*I said to them.. but I will still have Nadia with me wont I… yes they said! So inadvertently I've roped you in too!!"*

50. On 12 May 2017 CD emailed the Claimant saying: "*Lovely to speak to you earl[ier] and we are really looking forward to having you on board. As discussed, finance will be all set up and ready to go for w/c 2nd May. Payment of the retainer plus the 3 nights stay will be with you between the weds and the Friday of each week. The total payment will be £272 per week."* CD asked the Claimant if she was available on 22 May to come in and look at the paperwork and they could look at having some case discussions about potential placements [17].

51. On 23 May 2017 CD emailed the Claimant and NC thanking them for coming in the day before and the opportunity to talk through some of the cases they had. CD said they were excited the Respite Support Scheme was up and running. CD wrote [18]: "*As promised, here is a summary of the*

main points from yesterday – let me know if you think I have missed anything:

- *3 way supervision with Rachel, Nadia and Carys will happen on a monthly basis.*
- *This will be reviewed in a few months' time to see if the set up needs to change.*
- *Nadia will continue to support Rachel from a Fostering perspective. All ARC queries will be made to Carys.*
- *All case queries that have been agreed with Rachel and case manager, will go directly to case manager.*
- *All potential young people to access respite will be discussed with Rachel and Nadia prior to matching. The case manager will complete the relevant paperwork which will be provided to Rachel. A matching meeting will be arranged for all young people who are deemed suitable following these discussions, and the final decision will be made following this meeting. (This process will be reviewed following the first few placements to check its suitability)*
- *Rachel will be provided with the ARC Seniors contact details in absence of ARC Manager.*
- *Rachel will keep a log of incidents in a book that will be provided by Nadia. In addition, Rachel will contact the case manager following each night of respite to give a verbal update, which the case manager will record on CareFirst."*

52. The ARC project as I understand it was about young people who were not looked after children, but who had difficulties at home and were at risk of becoming looked after children; sometimes termed "the edge of care." The aim was to support these young people and try to prevent them becoming looked after children. The ARC project provided a range of support services, and one aspect was to provide a series of planned overnight respite stays with a carer. Each stay would be 23 hours or less. The young people were not looked after children; the whole point of the project was to try to keep them from becoming looked after children. The Claimant was initially the only carer of that type. She was paid a set retainer to make herself available for 3 nights a week. The retainer was paid regardless of whether she had a young person with her on any of the given nights. What the position was in relation to tax and national insurance contributions I do not know as neither party gave me that information. The Claimant's role came out of the ARC budget rather than the fostering service budget.

53. On 13 June 2017 CD emailed the Claimant and NC about suggested supervision dates for the following week, saying it would be good for the three of them to touch base [106]. On 31 July 2017 the Claimant signed a document. I do not have the full version but it was about access to the Council's network [33]. The Claimant's position is said to be "ARC Respite Carer." As I understand it the Claimant at that time was being provided with a mobile phone.

54. There is a document at [57] that I do not know the date because it is incorrectly dated 9 July 2024 and is about a placement update. It says a young person had been coming every Thursday but this has now ceased. It says there had been a joint visit with CD from ARC and they discussed

the issues around the Claimant being used for emergency looked after children, and CD confirmed that had been discussed with senior management and would not happen again. The Claimant was to be used only for ARC children in a planned way as agreed at the beginning. It says: "*Carys confirmed that myself and Rachel would both have the paperwork regarding the ARC child and we could discuss whether is was a suitable child for Rachel or not. Carys complimented Rachel and informed her that 3 of the ARC children she had worked with were doing really well and things in their home life had very much improved and their attitude has also changed".* This partial document is a fostering precedent document because it has entries such as "Foster Carer Visit" although not all entries were completed. I also do not have the whole form. Its content tends to suggest it was produced at the early part of the Claimant's ARC role, and was an early stamping out of the notion that the Claimant would still be utilised to provide care for looked after children; she was only to work with ARC children. The Claimant accepted in evidence that it was part of the arrangement that she would not act as a mainstream foster parent at all. She accepted (contrary to what her witness statement suggests) that there was otherwise no prohibition on other forms of work/employment; for example on the days she was not on retainer with the Respondent.

55. At Christmas 2017 the Claimant was included in a Christmas meal [58] because CD extended the invitation to the Claimant.

56. On 9 February 2018 NC emailed CD about some concerns [25-26] having undertaken a supervision visit with the Claimant the day before. The email recorded that the Claimant was sending emails after each respite to CD, Estelle and now NC, and that Estelle as the key worker was not responding to the suggestions within them. NC also expressed concerns about young people sometimes being dropped off at 1pm rather than the plan for it to be around after school at 4pm (regardless of whether the young person attended school or not) so that respite was not too long and the activities were focused, with the return the next morning either to school or home. NC also said Estelle was being too prescriptive about what activities the Claimant would be doing with the young person or food choices, and that the Claimant should be at liberty to decide the activities she thought were appropriate. NC also said the Claimant should not be being asked to pick a young person up from school and drop the young person off, and that the key worker should be bringing the young person to the placement. NC asked CD to address the issues with Estelle. There is a handwritten note recording there was a response from CD, but I do not have that.

57. On 6 March 2018 the Claimant messaged a Dan Jones at the ARC chasing a letter and asking if he had any news on when her new pay structure would be in place [80]. He replied to say he had typed it, and it should be in the post. The Claimant confirmed on 7 March she had received it [81]. I do not know what that letter was about, but the exchange shows the Claimant had been seeking an improved pay structure.

58. On 17 October 2018 there is a document signed on behalf of the Respondent headed "*ARC Short Break Carer Contract*" [37]. I do not know (because I have not been told in evidence) who drafted the document or how or why it came to be produced in October 2018. It says:

"*Payment and supervision agreement between ARC Management and ARC Short Break Carer:*

- *An allowance of £396.96 will be paid on a weekly basis to the ARC Short Break carer. This fee includes all food, sundries, laundry for up to 3 nights per week.*
- *The allowance will be paid for up to 4 weeks holiday per year, where no Short Break provision will be provided.*
- *In addition to the weekly allowance, the ARC Short Break Carer will be able to claim for activities as follows: £10 per activity (to cover cost of young person only) for 3 out of the 6 Short Break sessions. These activities should be from the list agreed at the Initial Short Break visit with the young person, Short Break carer, ARC support worker and parents, No meals outside the family home will be reimbursed or snacks at activities. This allowance can be "pooled" for a larger activity if in line with the young person's plan.*
- *No clothing allowance will be provided, as young people accessing ARC Short Breaks should have their own clothing and necessary items for the overnight stay. The ARC Short Break Carer will be reimbursed for any emergency necessary clothing expenditure, such as pyjamas or underwear.*
- *Mileage will be paid at 45p per mile. Mileage that can be claimed includes ARC meetings, initial matching meetings and supervision after the initial 20 miles per month.*
- *The ARC Short Break carer will be provided with a mobile phone and Cardiff.gov email address for use for contact with families and secure email purposes.*
- *All session with the Short Break carer will be written up in report format, and emailed via Cardiff.gov email to the relevant ARC Support worker, who will add to CareFirst database and respond to any queries and action any concerns.*
- *Supervision will be provided on a monthly basis by an allocated supervising social worker from the Fostering Team. Joint supervision with the ARC Manager will happen on a bi-monthly basis. This will be an opportunity to discuss cases, training needs and any other issues arising.*
- *28 days' notice is required by either party to terminate this contract, unless in exceptional circumstances, where this can be reduced if agreed with Senior Management.*

This agreement will be reviewed in 6 months from the date of signature."

It is not signed by the Claimant.

59. On 31 December 2018 the police asked the Claimant to support a young person in an interview as an appropriate adult, because the Claimant was the only person the young person fully trusted. The Claimant checked with CD who confirmed the Claimant could attend.

60. In February 2019 there is an example of the Claimant emailing CD about taking leave [19], which CD approved [20].

61. In April 2019 there is an example of Samantha Upcott [SU], by then the ARC key worker, contacting the Claimant about collecting a young person from high school at 3pm [110]. In July 2019 there is an example of SU messaging the Claimant about meeting with a young person at Costa coffee at Tesco [109].

62. In May 2019 there is an example of the Claimant messaging SU to say her mum had a fall and asking if a respite could be moved to a different day or over the weekend [84]. SU said she would phone the family to explain about that day and check to see if they could swap days. In October 2019 there is another example of SU asking the Claimant if she could see a young person earlier and pick them up and then drop them at 3pm for a medical appointment with their nan [104].

63. In August 2019 Rhys Simmons [RS] became the ARC – Edge of Care Team Manager. RS is a professionally qualified Youth and Community Worker.

64. On 12 September 2019 there was an annual review. There is an extract at [24] which says: "*Rachel regularly deals with young people who exhibit challenging behaviour such as sexualised behaviour, knife crime, gun crime, arson, violence, Self harm, Drugs and alcohol, Suicide attempts, children being delivered by police throughout the night, children wandering the house in middle of the night, running away while out on respite, tantrums, dealing with police sex crime unit as a significant other. Rachel has been contacted over the xmas period to be an appropriate adult, child threatening suicide, Violent outbursts, ADHD, Gaming addiction, Agoraphobia. Many young people are excluded from school*." It appears to be a precedent annual review form used for foster carers as there is a reference on the page to potentially attaching a significant event form about "Use of any measures of control, restraint, or discipline in respect of children accommodated in a foster home."

65. On 17 October 2019 there is message from SU saying it was fine for the Claimant to take a young person on the Monday [108]. The Claimant also mentioned about trying to work her new tablet. So she must have by then have been provided with a tablet as well as the mobile phone.

66. There is an updated version of the ARC Short Break Carer Contract at [38] signed by the Claimant and RS on 21 November 2019. This provides for an increase in the allowance to £425 a week. Its terms are otherwise similar to the previous "contract", albeit worded differently. It was to be reviewed in 3 months. RS's evidence was that the increase came about because the Claimant made an approach that her allowance was different to a regular foster carer. He said that he set up a meeting with the operations manager and Kate Hustler from fostering and the Claimant stated her case for progression in line with mainstream foster carers and the increase to £425 was agreed. The Claimant disputed this, saying she did not know what mainstream foster carers earned. On this point I prefer the evidence of the Respondent. RS' recollection was clear and given he had not long taken up that post in August 2019 I consider his recollection is likely to be a good one. It is also supported by LH's evidence that when he later started in post and reviewed documents relating to the ARC respite scheme that the ARC

respite carers were being paid the same rate as mainstream foster carers. It is further supported the Claimant's evidence in her witness statement that the pay increase had been backdated to October 2018, authorised by Kate Hustler which again tends to suggest there could be a link to the uprating of mainstream foster carer rates. The Claimant there also denies that she was negotiating her pay and says she was merely complaining about her ever increasing workload and that she should be paid for it. But saying you should be paid more for your workload is a pay negotiation.

67. On 23 December 2019 SU messaged the Claimant apologising for contacting her on her private number, and asking whether a young person was due to come for respite that day and, if so, SU would get the social worker to arrange times [36].

68. On 27 February 2020 NC messaged the Claimant and RS about a supervision meeting on 31 March 2020 at the Claimant's house [31].

69. By March 2020 the Covid pandemic had of course struck. On 13 May 2020 the Claimant emailed RS. The email is headed "adjustment of payments" and in it the Claimant said she was desperate to retain her salary and desperate to get back to work. She said she appreciated that children could not move between houses at that time, but asked if there was something she could do in the community [62]. On 20 May 2020 the Claimant emailed RS saying she had spent some time with IT trying to sort her phone out, but she thought new software had been installed at county hall and RS was going to need to help her because she could not access emails at the moment and it may be better to use her personal mobile to talk the next day [140]. There is also an undated message about ordering the Claimant a new phone [141]. On 21 May 2020 the Claimant emailed RS [64] referring to hearing the news that her salary would be reduced by 60% if she could not start work again, and she said could not take the risk of restarting work because of the risk to her mother who was shielding.

70. In the initial period of the pandemic the Claimant was not working because the respite care visits were stopped. The Claimant asserts she was placed on furlough. RS denied that in evidence saying that his understanding was the Claimant could not be furloughed because she was self-employed and it was not the case (as asserted by the Claimant) that everyone was furloughed. RS said they were not furloughed because they were front line staff. I do not find the Claimant was furloughed because it strikes me that if she was there would be some documents recording that and there are none put before me. I consider it likely, and find, that initially respite care visits were stopped because of Covid restrictions and that it was simply the case that the Claimant carried on being paid her retainer. The start of the pandemic was of course a time of great uncertainty, and no one knew how things would unfold and over what time period or that we would have the yoyoing of restrictions that we did. At some point by May 2020 there was a proposal to resume the respite provision but the Claimant felt unable to do so because of her mother's shielding status and therefore the Respondent indicated they were going to drop her pay to 40%. In the event that never happened because RS devised a plan for the Claimant to meet with the young people in the community instead of at her home.

71. Quite when that new arrangement started I do not know, but certainly the arrangements were up and running by October 2020 because there is evidence of SU emailing the Claimant about arrangements to meet some children in town for their sessions [113]. SU was also emailing the Claimant about arrangements for other children (see, for example, [111], [112], [135] and [103]). On 23 October 2020 the Claimant messaged SU saying she had spoken to RS and respite will be continuing, and she would continue going to McDonalds for walk ins and Tesco or to the bay for takeaway pizza [134]. On 2 November 2020 there are messages with SU about being able to now claim food for children such as McDonalds or a Tesco meal deal [72] with a budget of £50 a month per child [72-73].

72. On 14 October 2020 there is a message exchange with an unidentified person where the Claimant was asked if RS had agreed her leave. The Claimant replied to say no, and RS had phoned her, and she got the feeling if she did not work she might lose her job. She said he did not say that, but she was going to work as she could not survive without her salary [63].

73. On 20 November 2020 the Claimant messaged SU about postponing that day's respite as she had some sort of virus. SU encouraged the Claimant to take a Covid test, and asked the Claimant if the Claimant wanted her to contact families to explain respite was cancelled that week [85].

74. On 27 November 2020 the Claimant had an annual review meeting ([87] and [126]). The notes say those present at the review included the Claimant, described as the foster carer, with the supervising social worker and RS also there as ARC manager. It was undertaken virtually. The notes record that the Claimant had not had children staying overnight since March 2020 and was working with 3 young people away from home and hoping to establish overnight provision with one young person. It records that the Claimant had been concerned about the financial position prior to restarting work. RS described the Claimant's input as being a crucial part of the ARC project and that the Claimant was able to adapt and her willingness was much appreciated.

75. I do not know what became of the Claimant's first computer, but during the course of the pandemic RS arranged for the Claimant to have a new laptop. RS said in evidence, which I accept, that the Claimant's tablet was not working which was affecting report writing, and also meetings had been moved to Teams, so the laptop would assist with that. The Claimant also already had the long term provision of a mobile phone. The Claimant had technological difficulties off and on over a sustained period with her mobile phone and laptop. For example, on 6 October 2020 she messaged RS about sending a report to him, NC and SU through to her personal phone as she was locked out of her work phone again [146]. On 8 October 2020 the Claimant emailed RS about problems signing in to her account, saying she thought it was probably something to do with her not signing in on the laptop [139]. The Claimant and RS ended up putting a workaround system in place where he would log in as the Claimant on his own laptop to generate new passwords he sent to the Claimant. For example, on 23 March 2021 RS messaged the Claimant to apologise he had not got round to changing her password yet as he was in a meeting and the Claimant replied to say it was running out the next day [145].

76. On 21 April 2021 there was a respite review [127] with Sian Maloney [SM] (then the supervising social worker) SU and a Richard Bowen. Covid restrictions were reviewed. The Claimant was due to start sessions from home using the garden and summer house and would also carry on taking children out into the community. She still had a budget of £50 a month for each child. The referral process was discussed and agreed that moving forward referral and risk assessment on care first to be completed and then share the information with SM and the Claimant. SM and the Claimant would meet face to face to discuss the referral and then update the ARC on whether the young person would be accepted. SU was dropping off more PPE to the Claimant. Respite reviews were to happen every 6 weeks between the Claimant and ARC worker and SU was to send the notes to SM, RS and Richard Bowen. It records the Claimant asking if they could filter through referrals for the best match, and that her request was acknowledged but that due to Covid and lots of young people being in similar boats, they felt it was fair at present to work through the list as referrals had come in, and they would leave it like that until back to full normal services [127].

77. There is also a feedback report from SU which talks about working with the Claimant, including the Claimant providing reports following each respite, and provided orally when the Claimant was waiting for her computer/phone to be fixed. SU noted the Clamant would engage with families appropriately around respite and confirmed times each week and raised worries when they occurred about parents/carers. SU noted that the Claimant would attend all respite reviews/discussion and planning meetings where she would highlight all positive changes, raise any worries and support with planning to identify areas of support that could promote making improvements for the young person attending the provision [128]. SU said the Claimant worked well with ARC managers and workers, but when issues continue to occur such as payments the Claimant would be more assertive to be able to solve the problem.

78. On 9 June 2021 the Claimant and SU exchanged messages about a change in time for meeting a young person and also about not having messages or contact details for a young person or their parents and asked if they would still be meeting at school [99]. On 18 June the Claimant and SM had a message exchange about a meeting on the Monday either in the garden at home or for a coffee at a restaurant nearby [129].

79. A second ARC respite carer was recruited, Leanne. On 21 June 2021 the Claimant messaged RS to say Leanne seemed perfect and well done and he replied to say thank you for meeting up and he thought they could do great work together and help develop it more going forward [148]. The Claimant said she was asked to train Leanne and she refused because it would be too big a commitment. RS denied this saying it was just an introduction. On balance, I do not find that the Claimant was asked to formally train Leanne as opposed to simply connecting with, and offering some informal support to someone who was joining to undertake the same role as her.

80. On an unknown date the Claimant messaged SU about her phone not working and having to take it to IT at City Hall [34]. But on 10 September 2021 [35] she sent a messaging saying she would probably do it on the Monday or Tuesday. SU said "no worries just take it when you can next week." On 23 September 2021 Claire Carson, by then the supervising social worker, emailed RS about getting the Claimant a new handset as the Claimant had ongoing issues with her phone [142]. On 6 October 2021 the Claimant messaged RS saying her new phone was set up, and she could now get email, so it was an issue with the old handset [143].

81. In October 2021 the Claimant messaged SU chasing up payment of receipts she had submitted [78].

82. On 22 November 2021 SU messaged the Claimant apologising for contacting on her day off, but saying SU may forget to text the next day and that a young person wanted to go trampolining the next day [79]. There is also a partial message from the Claimant asking after RS and saying she did not get paid the last… (the rest of the message is missing). On 30 November 2021 SU messaged the Claimant about whether a young person could be dropped off that day around 1:30pm and about whether another young person could be dropped home by 6:30 [95]. In early December 2021 the Claimant and SU exchanged messages about a meeting on a Monday [94].

83. On 7 December 2021 SU messaged the Claimant referring to the Claimant not being well and asking if the Claimant needed the rest of the week cancelled as SU was off for the rest of the week so could let people know that day. The Claimant replied to say it was a good idea as she was not feeling well at all [86].

84. On 10 January 2022 SU messaged about a mess up with payments again because it was authorised late and would not be in the Claimant's bank until that Thursday. SU said the office had apologised and said it would not happen again and asked about whether the Claimant wanted to make a complaint [130]. On 3 February 2022 the Claimant messaged SU asking her to check that Doris had her food receipts that the claimant had dropped in [32].

85. In March 2022 Luke Harrison [LH] became the Service Manager for the Intervention Hub. Prior to that LH had worked for the Respondent as a social worker and then Team Manager for Support4Families. March 2022 also saw the amalgamation of the ARC into the wider Interventions Hub. LH was RS's line manager at the relevant time. On 16 March 2022 the Claimant's respite caring arrangements were placed on hold following an allegation.

86. On 2 November 2022 there is an email from the Fostering Services Manager to an unidentified individual asking for payments to the Claimant to stop and that they would not start again until the Claimant was matched with another young person [53]. There is a response to say that the recipient of the email did not pay the Claimant as she was an ARC carer and they did not process those payments and another individual was identified about stopping payments. I was not given any direct evidence about why the Claimant's payments were stopped at that time.

87. I have an extract from document headed “Foster Carer Annual Review Social Work Report” dated 7 November 2022 [27]. This records that the Claimant had been the only ARC Respite carer for ARC services but there was now another established ARC carer and another couple coming through panel approval. It records that the Claimant had offered informal support to the new ARC carer. It records that the Claimant was not currently providing any respite following the allegation on 16 March 2022. It says that on 29 March 2022 a home visit had been undertaken by the supervising social worker Clare Carson and RS, and that the Claimant had been told that the allegation was closed and actions were required including a training plan to support the Claimant and reduce the risk of further incidents. It recorded that no children would be placed until the training plan was discussed further and the Claimant had accessed online training and registered for mandatory training. ARC were to look to access training for the Claimant and scheduled training with the ARC team psychologist had been cancelled due to the psychologist leaving the team. The record says that it was then identified that the Claimant’s annual review was out of date so a decision was made that training would be identified and the annual review completed prior to respite placements to ensure the Claimant was up to date with her checks and training. The Claimant said in evidence, which I accept, that they were 2 years behind with her annual review.

88. The report says the annual review faced delay due to delays in gaining feedback due to changes in ARC staffing and management, the need to put systems in place to gain feedback as it was not previously in place, and delays in getting feedback about the individual who the allegation related to. The supervising social worker had also been off sick with Covid. It says: “*Rachel is now very keen to restart respite and states she is frustrated by the time period that it has taken to return to panel*.” It says that in discussion with ARC new procedures had also been put in place to ensure each respite carer was fully supported and feedback for annual reviews could be accessed with ease and that there was an evaluation of outcomes set for each period of respite.

89. The supervising social worker was also to meet with each child in placement on approximately week 4 and following the end of respite there would be an evaluation meeting. The ARC worker would also get feedback from the child and their family at the end of each period of respite, and the supervising social worker would seek feedback from the child’s social worker. It says: “*Following panel Rachel will provide respite to 3 children on a weekly basis for 12 weeks, this can be extended if needed.*” The Claimant was therefore awaiting a return to panel before she could resume respite care.

90. On 28 November 2022 the Claimant emailed LH saying that on 3 November 2022 her contract was terminated and her weekly payment stopped without any notice or correspondence. She said she was due to restart on 8 December, was looking forward to it, and in the meantime could not manage without her salary. She said she had spoken to Claire Carson her social worker who had contacted Joanne Kennedy at Cardiff Fostering who had given the Claimant LH’s name as the person to correspond with as her contract was legally binding with ARC not Cardiff Fostering. The Claimant said they also said that ARC was responsible for her payments and not

Cardiff Fostering. The Claimant said any termination of her contract should be given with 4 weeks written notice as outlined in her current contract and she had notice whatsoever. She said she believed she was due at least 4 weeks' salary. She said she had no correspondence so was in the dark about what happened [116].

91. On 1 December 2022 there are email exchanges between unidentified people where the Service Manager (so probably LH) said he would like to have 1:1s arranged with all of ARC respite carers to go through expectations, occupancy rates etc and set the standard of what they require as a service. He also asked for monthly updates of occupancy rates [121]. LH says in his written witness statement that in late November he had undertaken an initial review of the ARC respite scheme and had been told by RS there was no available data on tracking occupancy of the scheme. He says RS told him there were a high number of voids since Covid and that RS voiced concerns that the Claimant refused to take some young people referred to her.

92. On 2 December 2022 someone sent an email about the Claimant saying when they saw her that week the Claimant had a query in relation to holiday allowance because she had not taken a holiday in the last year, and the contract had an allowance for 4 weeks paid holiday a year. The Claimant had also mentioned a letter she had sent to LH and RS and had not heard anything back. The email said the Claimant was finding it hard to cope without her salary. The email asked about a meeting that was due to take place with the Claimant on 7 December following the foster panel [121]. There was then a reply to instruct back payment of the Claimant's pay, but which also said that going forward they needed to work closely with the Claimant to ensure that they are getting value for money and "*if the issues of not taking young people continues I will issue 28 days notice."* It may be that this instruction came from LH but I do not know because the emails are redacted (I do not know why), and he did not give evidence about it.

93. On 5 December 2022 a Rachel Preece [RP] emailed an Emma Pakes in an email headed "Rachel Jordan foster panel" asking if she was the panel adviser on Wednesday and saying that she wanted to be clear about something before they got to panel. It appears that by then RP may have become the Claimant's supervising social worker. RP said that the Claimant had texted with a query about her approval, saying: "*Rachel's approval is/was as a mainstream foster carer. I explained that current assessments for ARC lead to ARC specific approval. I enquired with Rachel was her understanding that she would be a foster carer specifically for ARC going forward…"* I do not have the rest of that email from RP but there is a response from Emma Pakes. The response says: "*I am and we can word the approval terms as best we can. The issue was that the approval on previous AR reports were not consistent and did not seem to reflect ARC service correctly e.g. ARC is not 5-12 is it? Which was why I tried to make this clearer on my front sheet. Her terms were also changed with no return to Panel etc. It is for Panel to make the recommendations so we can discuss tomorrow what is best approval wording wise*." RP replied to say: "*My concern is that Rachel was initially approved as a mainstream foster carer but currently has an ARC contract, I wanted to be clear with Rachel that she will be an ARC specific foster carer following panel as Rachel didn't know*

this when we spoke yesterday, she was happy to do ARC through "fostering." While panel will be making the recommendation Rachel will need to be in agreement. I don't think Rachel has been told at any point that if she wants to return to mainstream fostering then she would have to go back to panel for a change of approval." I do not have the emails after that. I do have the foster carer certificate of approval dated 4 January 2023 stating the Claimant had been approved as a foster carer to look after one child age 11 to 18 years with the type of placement of "Respite care specifically for the Adolescent resource centre."

94. On 5 December there is an email from someone at ARC to an unidentified person about resuming payments for the Claimant and backdating them to the date she stopped receiving payments [114]. There were 4 payments on hold dating back to 7 November 2022.

95. On 8 December 2022 there is an email exchange between two unidentified people saying that RP had advised that the recipient of the email was speaking to someone that morning post panel. It says that an unidentified person's view was that payments to the Claimant should recommence as the issue with her DBS did not appear to have been caused by her. It said that the writer had been asked in view of the arrangements re placements if in the interim ARC could seek a PNC and assuming this is clear complete a risk assessment to enable any placement arrangements to continue until a new DBS is completed [50]. There was a response to say two people had spoken that morning and agreed the Claimant would need to be paid as it was not her fault, and they were happy for a risk assessment and then to start ASAP as there were young people waiting and the Claimant was keen [50]. My understanding is that the respite care provision did then restart.

96. On 10 January 2023 SU messaged the Claimant about whether she was available the next day on Teams for a discussion and planning meeting about a referral [92].

97. On 21 March 2023 SU confirmed that RS was happy for the Claimant to take a period of leave [21], and she would send the Claimant the next referral for the Claimant to read through and they would hopefully have a meeting on 3 April [21].

98. On 2 May 2023 the Claimant messaged Leanne asking if she wanted to meet for coffee or lunch [150]. The Claimant said she felt there was steady stream of stuff to do on top of the work with the children and she was tired and worn out [151]. Leanne talked about having extra training. The Claimant said there was too much paperwork and meetings [152] and they were being over managed.

99. On 6 June 2023 SU emailed RS [23] about the Claimant's annual leave and whether she could move two young people so they would only miss one week instead of two weeks from their short break session. On 7 June 2023 the Claimant had an exchange with SU and SU said RS was in agreement with this plan provided the families were happy with the change. SU said she would email the worker to check with the families [22]. SU also asked the Claimant if she was moving a young person to the Monday and another to a Tuesday so they were both able to stay overnight [22]. On 20 June

2023 SU asked the Claimant if she could collect a young person on Thursday as they had no duty worker and two other staff members were on leave. The Claimant agreed to do so [90].

100. In January to May 2023 LH undertook a more detailed review of the service. His evidence is that he concluded that due to a small number of referrals coupled with a low uptake of respite offers from the carers, that the scheme was no longer financially viable. He passed his findings to his Operational Manager and the Director of Children's Services and the decision was made to end the scheme.

101. On 8 June 2023 LH attended a meeting with the Fostering Operational Manager, Kate Hustler [KH], and the Fostering Service Manager, Joanne Aspinall [JA]. They advised that RS was to visit the respite carers and tell them about the end of the scheme and once this was a done a formal letter would be sent from Fostering informing them the scheme would end on 1 September 2023.

102. According to LH's witness statement, on 30 June 2023 RS met with all respite carers and they were told the scheme was ending.

103. On 3 July 2023 JA wrote to the Claimant [48]. The letter is headed "The Fostering Services (Wales) (Amendment) Regulations 2018 and says: "*I refer to your recent meeting with Rhys Simmons of the Edge of Care Service. During that meeting you were advised that Cardiff is working with North Yorkshire to implement their No Wrong Door model, named "The Right Place" for Cardiff and this will change how our Edge of Care service operates. As part of the discussion, you were advised that the ARC Foster Carer role will no longer be part of the service going forward, but that there are several other options for you to consider, to continue your work with Cardiff. These are:*

- *Continue as a mainstream foster carer. This can be anything from a respite carer, full time carer, parent and child or teen scheme. There are a number of fostering opportunities available, and we would very much wish to continue to support your journey with us.*

- *Be considered as a foster carer for the North Yorkshire model, supporting our most vulnerable children, young people, and their families with wrap around support when it is required.*

  The ARC short break service will end as of 1st August 2023, therefore please accept this letter as notice that the service you currently provided will end as of that date. I understand that you will have a number of questions and would appreciate the opportunity to discuss these with you. Please do not hesitate to contact me to discuss."

104. On 18 July 2023 the Claimant met with KH. Her evidence, which I accept, is that KH told her that they did not want to lose her and wanted her to work for the new delivery model based on the North Yorkshire Model. The Claimant would work more days and earn more. KH agreed that the Claimant could continue on her ARC retainer until October when it was anticipated there would be developments with the new model. On 20 July 2023 the Claimant messaged RP about that meeting, writing: "*the meeting*

went well Kate is going to keep me on my retainer until October they will have more idea of what they want me to do regarding the North Yorkshire project by then" [41]. The Claimant's handwritten notes are at [56]. It records KH talking about the new proposed The Right Place project. There is an entry with "October – mainstream fostering, respite." Below it there is an entry saying "for me Panel North Yorkshire model cover 5 day week."

105. On 30 August 2023 there is an email between unidentified individuals about whether there was going to be a discussion about whether the Claimant could fulfil the ARC role. It refers to some mixed messages about a taxi or whether the Claimant would transport and that as the carer did not usually accept children in the Vale there was a risk she may withdraw from it due to the time getting there and back if transport was not provided. The author said they were not involved in the exploring of a match so on a back foot of what the needs were/ were not shared. There is then an email between two unidentified individuals on 31 August 2023 saying that as they understand it the Claimant had turned down yet another person and it had been discussed with someone else, and they no longer feel she is the right fit for ARC [164]. Why I only have redacted versions of these types of emails I do not know because the Respondent should be disclosing unredacted versions. But there is a dispute in this case about whether the Claimant turned down young people referred to her. She said in evidence that there was one particular occasion on which she refused a young person because of highly sexualised behaviour that represented a risk to her own all female household. She accepted there was also this situation where she was asked to take a child from the Vale of Glamorgan when she worked with Cardiff Council and where there was a need to take the young person to Cadoxton which was too far. She said there was also another situation with a young person with severe bed wetting issues where she did not refuse them but requested they be put on a different programme first and that her issue in that regard was the difficulty in getting the bedroom ready for the next child attending. She accepted there may also be occasions where a young people could start and then there may be, for example, an incident with a knife, and if the situation meant it was not safe to continue with the respite care she may decline the ongoing placement. She would also be involved in assessing, for example, 8 presented young people, and with working out who was best suited for ARC respite and who may not yet be ready. I accept the Claimant's evidence about these circumstances. I did not hear evidence from the Respondent to the contrary. But it is also evident that at least some individuals in the ARC, whether correctly or incorrectly, thought that there had been a pattern with the Claimant unreasonably or excessively declining young people referred.

106. On 12 September 2023 KH wrote to the Claimant saying: "*As you are aware from recent conversations, the ARC service has recently undertaken a review of its service model. Whilst it was initially hoped we would be able to sustain ARC short break provision within the service, this has not proved viable. Unfortunately with the current climate, the ARC short breaks service is not functioning to the capacity that is required to remain sustainable. We have therefore reached the decision that the service will be disbanded on the 22nd of September 2023. Retainer payments will remain in place until the 30th of September 2023 at which point all payments in relation to the ARC service will be no longer be payable. Whilst the ARC service will have*

disbanded you will retain your approval status as an approved foster carer for Foster Care Wales Cardiff. As was previously offered, you can continue your fostering journey with Foster Care Wales Cardiff, we would invite you to remain as a registered foster carer and consider the opportunity to consider providing any of the following types of placements:

- *Respite/ Short Breaks*
- *Short term*
- *Long term*
- *Parent and Child*
- *Teen Scheme*
- *Unaccompanied Asylum Seekers*
- *Right Place Model*

Due to this decision, there will be no further introductions or new arrangements made with children and young people, and arrangements will be made for current placements to end prior to the 22nd of September 2023. May I take this opportunity to thank you for working so closely with some of the most vulnerable children and young people of Cardiff, the ARC service, and their colleagues. We hope that you choose to remain with Foster Wales Cardiff, and I will be in touch to discuss details and options with you shortly, in relation to your onward journey."

107. On 13 September 2023 the Claimant messaged RP saying: "*Any news on why new respite is taking so long Rachel? I'm eager to set up meeting and begin."* [45] She also had a message exchange with SU where SU said someone was phoning the Claimant about arrangements that day for a young person. The Claimant replied asking about another young person she thought she would have had by then [91]. It may well be that the Claimant had not received KH's letter at that point. To my understanding the Claimant did not provide any respite care after September 2023. The Claimant says, which I accept that the last payment she received was on 26 October 2023 and she received 4 weeks annual leave pay.

108. On 11 October 2023 RP visited the Claimant [45]. On 2 November 2023 KH telephoned the Claimant and said that they were no longer moving forward with the "No Closed Door Project" and said there were other roles and options available to the Claimant that she should discuss with RP. On 8 November 2023 RP contacted the Claimant to say that KH had requested RP discuss the "Teen Scheme" with the Claimant. RP told the Claimant it was a full time fostering role 7 days a week and the Claimant said it was not suitable due to her family circumstances. RP then suggested work as an occasional emergency foster placement which paid £50 per 24 hour period and the Claimant said this was not financially viable for her. The Claimant says she told RP she was upset that her job was being withdrawn and asked to speak to RP's manager, JA. The Claimant says that she was becoming increasingly concerned about being at risk of redundancy.

109. On 18 December 2023 the Claimant contacted RP as she believed that the ARC project was still running and asked if she could continue working on it. RP said that it was not an option and that the only available options where

the Teen Scheme or Foster respite care. The Claimant said she felt she was being pushed into resigning and that she was being sidelined. It resulted in RP saying she would send the Claimant a template resignation letter. On 20 December 2023 RP emailed Fostering admin asking them to send a resignation by first class post for mainstream foster carer and then gave the Claimant's name and address [160]. The Claimant received the template resignation letter and contacted RP. She did not sign the letter. RP then suggested that the Claimant wait for a meeting with JA. On 21 December 2023 RP messaged the Claimant to say she would call in the new year to collect the laptop and phone [158]. On 9 January 2024 RP messaged the Claimant about a time for her to pop in [158] and on 18 January 2024 sent through some proposed dates. On 30 January 2024 RP visited the Claimant and was keen to collect the laptop and mobile phone saying they related to the Claimant's work with ARC and should be returned to ARC. The Claimant says she had envisaged the devices moving to her new position with her. The Claimant says that after that her enquiries were being ignored and RP would state she did not know what was happening.

110. On 8 March RP messaged the Claimant saying she and her manager JA could meet on 13 March and they could have a chat then about respite [161]. The meeting was cancelled on the day because JA was unwell.

111. On 26 March 2024 RP emailed the Claimant with an email from JA [82]. JA wrote: "*I am aware that there have been ongoing conversations in relation to your fostering role with Rachel and I hope to be able to clarify some of your questions in relation to options. Sadly we remain in the same position and the ARC foster carer service remains disbanded. I have spoken with our ARC service manager today and there continue to be no paid carers for their service and there are no plans for this to return under the model we knew as ARC foster carers. I am aware that you had conversations with Kate Hustler in relation to the "No Wrong Door" model and possible involvement in this. This model continues yet to be launched as the details of the overall project are being considered and reviewed. Including the role of "foster carers" within this as they would be a full time role that fluctuates in terms of requirements, based on whether they would be needed in the hub, family home or their own home*…" JA said there was currently no imminent time line for conclusion.

112. JA said in terms of the Claimant's approval status, the Claimant remained approved as an ARC foster carer at this time, as were the other ARC carers, and therefore they were currently unable to consider the Claimant for any referrals that they had for short breaks. JA said for the Claimant to continue with her fostering journey, in line with Fostering Regulations, they would need to undertake a report and return to panel to amend the Claimant's approval. The Claimant would need to consider whether she wanted to consider a full time role or short breaks only. JA wrote: *"I appreciate that you are in a difficult position in terms of finance and that teen scheme has been raised."* JA explained how that initiative worked and that it fell within being a short break carer, which would also require a return to the foster panel.

113. On 8 April RP messaged the Claimant asking if there was a good time to give her a call [161]. On 10 April there is an email from the Claimant to Acas

saying she had filled out a questionnaire which had come back as employed for tax purposes [163].

Discussion and Conclusions: Was there a contract?

114. I find that there was a contract between the parties. My reasoning is as follows.

115. Firstly, the legislative provisions do not compulsorily govern the relationship in question. The young people that the Claimant was providing care for were not "looked after" children within the meaning of the legislation. The young people were not in the care of the local authority (in the statutory sense) and were not being provided with accommodation for a continuous period of more than 24 hours. These were not "placements" within the meaning of the legislation. In turn the complex legislative requirements in the various sets of legislation did not automatically bite. It follows, in my judgement, that the W line of authority does not, as a matter of precedent, compel me to conclude that there cannot be a contract for this type of relationship. This was not a classic foster parent/looked after child arrangement.

116. The Respondent argues that the above analysis does not matter because what matters is that the Claimant was a foster parent working as a foster parent. It is argued by the Respondent that the binding aspect of W is that foster parents whose appointments are covered by Foster Care Agreements do not and cannot have a contract with the local authority and that it does not matter that the Foster Care Agreement is not a statutory obligation. The absence of a statutory compulsion is, however, very relevant because it relates to the Norweb premise that if there is a statutory obligation to enter into a form of agreement where the essential elements are likewise dictated by statute there can be no contract because it has not been freely negotiated/reached through choice. The difficulty I also have here is that I have no evidence before me of a Foster Care Agreement being in place setting out all the proscribed elements. Ms Wigley told me that the Respondent was relying on the Foster Care Agreement the Claimant would have had in place under her previous foster care role before she started the ARC work, with that carrying over into the ARC role. But I do not have that Foster Care Agreement. I do not even have evidence as to its existence (let alone its terms) given it is not before me, and I heard no evidence about its existence at all. For example, the existence of the Foster Care Agreement and its ongoing affect was not put to the Claimant in cross examination. Its absence in evidence in an form is particularly notable given the Respondent's statutory obligations to maintain certain records. Its absence is also notable given the Foster Care Agreement is the cornerstone of the Respondent's argument as to the binding nature of W which is the Respondent's own argument that they have proactively run.

117. It is also odd, in my judgement, that there was no reference made to the alleged ongoing application of any Foster Care Agreement when CD emailed the Claimant confirming the ARC arrangements at the outset. If the intent was that the Foster Care Agreement was to still govern the relationship then it would be very important to mention it. Nor does the Foster Care Agreement feature in any version of the written "contract" that was later produced. That oddity is even more pronounced because of the

cross over between some elements of what should be in a Foster Care Agreement and what was covered in the arrangements that CD put in place and the subsequent "contract" terms. For example; the support to be given to the foster parent, and the procedure in connection with the placement of children. So why not include some reference to what was already in the ongoing Foster Care Agreement if that was the case? In these circumstances I do not accept that I can just accept as a given that there was a Foster Care Agreement in place, or what it said, or an intention that it was to continue in place once the Claimant started working for the ARC.

118. The Respondent argues that the "contracts" were not true contracts at all (and were incapable of being contracts) but were produced for the first time some 1 ½ years in to the arrangement, and were produced to document ancillary, residual and practical matters, such as the terms of the payment of the allowance and supervision provision. It is said some of the content is explicable from a practical perspective, because the placements were not one off and there needed to be consideration of breaks for the foster carer; which explains the provision for 4 weeks holiday a year. The Respondent argues that the documents being called a "contract" is not determinative and a local authority cannot enter into a contract with a foster parent. The Respondent submits the "contracts" were supplementary to the underlying Foster Care Agreement and matters required to be in a Foster Care Agreement are not in these documents. It is argued that the "contracts" do not change the substance that the Claimant was a foster carer and there cannot be a legally binding contract.

119. As I have already observed, it is not the case that all matters required to be in a Foster Care Agreement are not in the "contracts"; there are some overlapping matters such as supervision and the procedure for the placement of children. I have also already set out my observations about the absence of the Foster Care Agreement itself or any reference to it in CD's email or the subsequent "contracts." I acknowledge the Respondent's argument that there are matters that must be set out in a Foster Care Agreement (if that regime applies) that are not in the "contracts"; but it does not automatically follow that this means there must also have been a Foster Care Agreement in place and/or that it is inevitable that the Claimant was working as a regulated foster carer. Another potential explanation could be that the Claimant was not in fact working as a regulated foster carer, not working under a Foster Care Agreement, and hence the lack of reference.

120. The test I have to apply is whether, on the facts, the services were being performed pursuant to a contract or pursuant to some different legal arrangement, which involves looking at the objective intention of the parties (Gilham).

121. In my judgement, on the facts before me, the intention at the time of the arrangement was to recruit, as ARC respite carer, an individual who was an approved foster carer. There is an inherent safeguarding related logic in that given the immense responsibility of placing a young person in, in effect, a stranger's home overnight, and in ensuring that the individual is fit and proper and that their home (and others present in that home) are safe, secure and appropriate and the like. Hence, in part, the specific approach to the Claimant to invite her to interview for the role.

122. I also accept that there was an intention to incorporate an element of the fostering regulatory regime in to the ARC arrangement in that the Claimant would have a supervising social worker from the fostering team. I would also accept it is likely there was an intent to undertake an annual review given they did seem to sometimes take place (but not always).

123. But I do not accept that there was an intent to wholesale voluntarily adopt the fostering regulatory regime. Firstly, it is notable in that regard that the Claimant was not referred back at the outset to the fostering panel to re-set the terms of her approval for ARC young people. Indeed, the Claimant was working with a foster panel approval certificate that did not cover the age range of the young people she was providing respite care for. Second, as I have already set out I have before me no evidence of a Foster Care Agreement being in place setting out all the proscribed elements, CD did not refer to any ongoing application of any Foster Care Agreement when CD emailed the Claimant confirming the arrangements at the outset, and it does not feature in any version of the written "contract" that was later produced.

124. In my view it is also notable that whilst as I have said I accept there was likely to have been an intent to incorporate an element of an annual review, these did not always take place every year (and indeed became 2 years out of date). Moreover, if the annual reviews that did take place were purportedly happening under the legislative regime; they did not cover an important element. This being that the terms of the fostering panel approval did not match the age profile of the ARC work the Claimant was undertaking. Under the 2015 Care Planning Regulations a child could only be placed if the terms of approval were consistent with the proposed placement (and a Foster Care Agreement in place) so again, if the foster care regulatory regime was being applied why was this not picked up? Why is there, until the regulatory change in April 2019, no reference to foster placement agreements being in place for specific children, for example in CD's email? Further, not all the elements of the statutory fostering regime are easily applied to the ARC arrangement. For example, the obligation on a foster parent to register a child with a GP. But these are young people that would understandably stay registered with their own GP.

125. In my view the arrangement that was put in place was far more redolent of an intent to (a) use the foster carer qualification regime as a way to select the Claimant, and with it the Claimant's household, as an appropriate candidate, for safeguarding reasons; (b) mirror or select some elements of the foster care arrangements, such as having a supervising social worker, and having annual reviews; whilst (c) also having specific other arrangements in place for the ARC respite carer work that were set out in CD's original email and then went on to be more formally set out (and expanded upon) in the "contracts" later produced, and the everyday working arrangements that all involved were working to. But within that I am not satisfied that there was an intent for any pre-existing Foster Care Agreement to remain in place.

126. I do not consider that the essential components of the relationship were derived by statute. As already stated, the Claimant was not caring for

"looked after" children and therefore the statutory regime does not apply under a statutory compulsion. Whilst I was not referred to any particular statutory obligation, I accept the Respondent would have duties and responsibilities to ensure they had a safe and appropriate system for providing respite care in the ARC edge of care initiative. But it does not follow, in my judgement, that this is bound to mean that the Claimant was working as a foster carer with the terms of the arrangement derived from statute. The Respondent could have in place other systems, such as recruiting from the ranks of foster carers who have been through what the Respondent's witnesses referred to as the "Form F procedure," and through making sure they had other risk assessed supervision and monitoring arrangements in place. It is not an inevitability that the Claimant had to be working as a foster carer under the foster carer regulatory regime. Moreover, I am not satisfied on the evidence before me that the objective intention, or the practical reality in substance was that the Claimant was working as a foster carer under that regulatory regime as opposed to, as I have said, using the foster carer regime as a means of selection, and then putting in place bespoke arrangements, some of which mirrored certain parts of the fostering system, and some of which were other specific arrangements.

127. I acknowledge the similarities between the work the Claimant was undertaking and the work of mainstream foster carers and that the primary responsibility is to look after the child or young person in question, and with the aim to have a positive influence on them and their wider family. However, in my judgement, that does not mean that the Claimant must have been working as a foster carer within its regulatory framework. Further, that the Claimant was attending matching meetings, that she had a supervising social worker from the fostering team to safeguard her interests, that she attended supervision meetings, that she had some annual review meetings, and that she logged a record of her interactions and reported them back, likewise does not mean that she must have been working as a foster carer. Nor is the fact that the Claimant could refuse the allocation of a young person to her (albeit with the ultimate risk if the Respondent thought she was unreasonably doing so, it could lead to the Respondent giving notice of termination). As I have already said, it can also be explained, and in my judgement on the facts was explained, by the parties (led by the Respondent) putting in place bespoke arrangements that mirrored some aspects of the fostering regime.

128. I also accept as a matter of fact the allowance paid reflected payments made to foster carers. But again, I do not find that this means the Claimant must have been a foster carer as opposing to the parties choosing or agreeing to use that as a benchmark. It is also notable that on the facts the Claimant's pay was not automatically increased when foster carer allowances increased. If she was a foster carer why would that not have automatically happened? Also, why would the Claimant have to pitch for an increase to keep in line with mainstream foster carers rather than again it happening automatically? On the facts it is again more redolent of choosing to utilise elements of the foster care scheme rather than it simply being the foster care scheme or being an essential component of the relationship being derived by statute.

129. Moreover, what happened with the Claimant's allowance also demonstrates to me another important principle which is that the essential components of the relationship were not being imposed by statute but where a matter of choice or negotiation between the parties. On the Respondent's own account the Claimant was able to negotiate the increase to her allowance. The Respondent had the capacity to refuse it.

130. I have also considered the point the Respondent makes in relation to what happened when the Claimant faced an allegation, with her respite care arrangements being suspended whilst there was an investigation, and the need to undertake an annual review and a reference back to the fostering panel. The Respondent argues that this shows that the Claimant was a foster carer within that regulatory regime. It is argued that the final amended certificate in January 2023 is clear confirmation that it is a foster parent post held in ARC with clear limits on the approval to work. There is no right to suspend within the "contracts" but that the Respondent chose to do so and for much of it maintain payment, as opposed to for example serving notice of termination, does not necessarily mean that this was happening under the foster care regime. Quite what was going on with the Respondent in November 2023 is difficult for me to entirely discern on the limited evidence before me, as one arm of the Respondent appears to have been belated (given the allegations were closed in March 2023) supporting the Claimant through the overdue annual review process and the return to panel whilst another arm appears to have decided to stop paying the Claimant. LH held the view the Claimant had been refusing placements of young people, but how that slots in with the fact the Claimant had been suspended from providing that care, I do not know. Although of course the Claimant was being paid from the ARC budget. But in my judgement it does show that ultimately the Respondent was of the view that they could simply stop paying /could potentially terminate the arrangement which in my mind does not accord with the Claimant being a foster carer in the standard fostering regime.

131. What happened when the Claimant faced the allegation is also, in my judgement, more indicative of the Respondent not having systems in place and belatedly realising that and the risks involved. With then an (albeit slow) process of catching up on an out of date annual review, referring the Claimant back to the fostering panel to because her approval did not cover ARC children or children of the right age, and putting training measures in place that were not there before (hence the Claimant's later complaints to Leanne of there being too many training demands). In my judgement that is more indicative of the Claimant not actually falling with the foster carer statutory regime because otherwise these things would have been ordinarily happening as a matter of rote. The Respondent then later appreciated the risks they faced and took measures to mitigate those risks by again putting arrangements in place, some of which may mirror parts of the fostering regime (such as ensuring there was foster panel approval of the specific work the Claimant was doing). But in my judgement, that was a matter of choice (particularly on the part of the Respondent, who had the greater influence given the relative imbalance of the parties' negotiating positions) as a way to have safeguarding measures in place, as opposed to being directly imposed by statute or that having been the intention or agreement from the start. It was something the Respondent did down the line in

response to a specific situation that identified risks to them as opposed to being the intent when the relationship was formed. This can be seen in the email exchange between RP and the fostering panel lead where RP wrote about the Claimant not knowing she would be an ARC specific foster carer, and that current assessments for ARC led to an ARC specific approval (i.e. that this was a more recent development).

132. Overall, looking at the manner in which the Claimant was engaged, the source and character of the rules governing the service in which the essential components were in my judgement ultimately a matter of choice or negotiation between the parties rather than being by way of statutory compulsion; where there had been a choice to mirror certain elements of the fostering regime; it was not under operation of a Foster Care Agreement; and in the overall context, I do not find it established there was an intent for the relationship to be defined by the complex statutory regime for foster carers. There was room in this particular arrangement for there to be a contract between the parties; it was not governed by a statutorily imposed Foster Care Agreement. I then also find that there was a contract in place between the parties. There was the offer of work, the acceptance of that offer by the Claimant, consideration, and contractual terms in place, including the essential terms, reached by negotiation and choice rather than being statutorily imposed.

133. The Respondent also argues that Regulation 20 of the 2003 Regulations (and the 2018 equivalent) prohibits there being a contract in place because it would involve employing the Claimant to work for the purposes of the fostering service in a position that is a professional position, by a person who is a foster parent approved by the fostering service. It would not fall within the exemption of being an occasional basis, as a volunteer, for now more than 5 hours in any week. I do not agree with the Respondent's argument because the Claimant's work as a respite carer for ARC was not work "for the purpose of the fostering service" because it did not involve the discharge of the local authority of their fostering functions given the Claimant was not providing care for looked after children.

Was the contract a contract of employment?

134. I turn therefore to the question of whether the contract was a contract of employment. Here the Respondent firstly argues that any residual matters that are in a contract outside of being a foster carer is not capable of being a separate contract of employment because it only covers residual or top up matters, such as the exact working of the retainer payment system, and it does not cover the core work of the care of a young person. I reject that argument because I have not found that there is in place a statutorily imposed Foster Care Agreement that could serve to be supplemented by other ancillary contractual top up or residual matters. I have found that the Claimant was not in fact governed by a Foster Care Agreement and that there was, in effect, one contract in place that regulated the terms of the relationship.

135. I therefore turn to the classic assessment of whether the contract was a contract of employment. The Respondent argues that there was no mutuality of obligation, arguing that the Claimant had the absolute right to

say no to a young person at a matching meeting and would always be paid the same retainer amount. I find that there was sufficient mutuality of obligation. The Claimant was agreeing to provide personal service in consideration for payment. I accept the Claimant had the right to say no to a particular young person whether at a matching meeting or later on, but there was a limit to that. She could not have sat back and said no to every young person and never work. She was always at risk (as the facts show) of the Respondent threatening to, or actually terminating, her contract if dissatisfied with her occupancy rate. She had obligations to work with the Respondent to identify and take suitable young people and to make herself available, under the retainer arrangement, for 3 days/nights a week. As was said in Match officials it does not follow that because a party has the right to cancel an specific engagement without penalty that, while the contract remained in being, the parties were not under mutual obligations to each other. The Respondent was obliged to pay the retainer payment irrespective of whether the Claimant was providing respite care to three young people each week. There was sufficient mutuality of obligation.

136. The Respondent argues that the control through supervision and annual review came only through the statutory regime, but I have already rejected their argument that it was statutory rather than contractual. There was sufficient control of the Claimant through those means but also important control through the fact that the Respondent had the leverage of the potential termination of the contract as a means to exercise control over the performance of duties. This is shown on the facts where in 2020 the Claimant feared if she did not work she would lose her job, and when LH indicated he was considering giving 28 days' notice of termination because of concerns about occupancy rates.

137. I turn then to the overall multifactorial assessment. I have to assess objectively did the parties intend to create a relationship of employment looking at the contract, and the circumstances in which it was made. There is no "checklist" of relevant factors, and what is relevant are the circumstances known or reasonably supposed to be known to both parties.

138. If I look at the nature and extent of the mutuality of obligation and that of control (as they are here interlinked) it is relevant to note that the Claimant did have the ability to reject a young person whether at the matching stage or later on. It was ultimately at the risk of the Respondent terminating the arrangement, but it also gave the Claimant a significant element of (understandable) independence. She also, in my judgement, had fairly significant discretion in how time would be spent with each young person that best met that young person's needs and the Claimant's own household; hence the email that NC sent to CD about Estelle from the ARC overstepping the mark. I do not accept the Claimant's assertion that she worked with no personal autonomy at the direction of SU as a line manager and above SU, at the direction of CD and RS. I consider that the Claimant in her evidence significantly overstated that position. The reality of the situation was that SU would work with the Claimant in terms of practical arrangements for the young people in terms of timings, locations, if there was some appointment for the young person to attend, or a preference for a particular activity, but SU was not ordering or line managing the Claimant. Things were understandably different in the Covid period, but the Claimant

in my judgement still had some discretion over activities such as meeting in her garden, or taking a walk via McDonalds or Tesco for refreshments. I accept that the Respondent would ultimately have been able to direct the Claimant not to do a particular activity, or if not, terminate a placement or a particular session, if for example, it was considered unsafe or inappropriate for a young person. But the Claimant still had considerable day to day discretion in terms of the young people that would be matched with her, and how the time would be spent on their allocated respite sessions.

139. CD and then RS did have some control in the sense of approving annual leave requests. There needed to be arrangements in that regard because it had an impact on young people's sessions, as weeks would either have to be missed and reallocated or sometimes by agreement they were moved to different days so that they did not miss out on consecutive weeks. Likewise it is relevant to note for the overall assessment that the Respondent did provide the Claimant with paid annual leave which could be a factor pointing towards an employment relationship.

140. On the other hand, there were not in place any detailed provisions in relation to sick leave and sick pay that is often seen in an employment relationship. The Claimant did not have to, on my understanding, for example provide sick notes. She would notify the Respondent if she was unwell and SU would then take steps to cancel or reschedule the affected sessions. The Claimant was not paid sick pay as such, but it was the indirect effect in the sense that she carried on receiving her retainer payments even if she did not have young people with her on the allocated days because of sickness.

141. The Claimant asserts that the Respondent dictated set hours of work. I consider that significantly overstates the position. The contractual agreement from the outset was that she would make herself available for 3 days/nights and a week and would be paid a retainer payment for that. It was then a matter of working with SU to arrange specific hours for specific matched young people depending on the particular circumstances.

142. The Claimant points to the fact that when an allegation was made against her she was suspended or her placements placed on hold, and she carried on being paid whilst that was investigated and then the various steps undertaken in relation to training, annual review and referral to the fostering panel, and the Respondent getting their own house in order. I accept that is a factor that could point towards an employment relationship and that the Respondent was going beyond what they could have contractually done in the sense of simply terminating the arrangement. But it is relevant to also note that in the context of dealing with a professional, and in a safeguarding context, an organisation could potentially choose not to terminate, but to instead keep on paying an individual, whilst the organisation took the steps they needed to take, particularly if their own arrangements were lacking, and even where that professional is an independent contractor. I would also note as relevant that the very long period that the Claimant was left suspended with significant delays in the Respondent getting their house in order is not necessarily indicative of an employment relationship in terms of the duty of care owed to employees or the integration of the Claimant into the organisation. On one view an employer would have acted with far more expediency when responsible for an integrated employee. It is also relevant

to note that there was no mention of the Respondent's disciplinary policy or procedure being engaged at all as might be expected in the case of an employee.

143. The provision of annual reviews and regular supervision meetings is a factor that could point towards an employment relationship. But it is also relevant to note that they were an important safeguarding measure in the particular arrangement.

144. The provision of training is also a factor that could point towards an employment relationship. Although it is also relevant to note that it is possible for an organisation to provide training to the truly self-employed they work with; for example about safeguarding responsibilities or the organisations practices and procedures.

145. The Claimant had to comply with some of the Respondent's policies and procedures, for example regarding confidentiality and mobile phone use. Again, that is a factor that could point towards an employment relationship but likewise a professional independent contractor working with an organisation may still need to comply with certain policies.

146. It is relevant to note that there was, for example, no annual pay award to the Claimant as is often the case with employees, particularly in large public sector organisations. The Claimant had to take steps herself to negotiate an increase. It is also relevant that whilst the Claimant termed her income a salary, the contractual language was couched in terms of retainer payments or payments of allowances. What was happening in terms of tax and national insurance I do not know and therefore take no account of. I have also been given no information about pensions.

147. In my view, it is also relevant to note how the parties conducted themselves in relation to the arrangement. Cardiff Council is a large employer, their employees would generally receive detailed contracts of employment/statements of particulars of employment with details of policies and handbooks and the like. It is certainly not a determinative point, but the Claimant did not have this and nor did she ever seek it from the Respondent. What she did do in the currency of the arrangement was seek to hold the Respondent to the short written contracts that she did have which were not couched in terms of being an employment contract. For example, when her payments were stopped she pointed out there was no contractual provision for that, and she pointed out that 28 days' notice was required as to the termination of the contract.

148. I have not found that the Claimant was furloughed which may have been a factor to point towards an employment relationship, albeit as I have already noted they were unusual times in any event. The Respondent indicated if the Claimant did not return to work then her payments would be dropped to 40%. Again, it could be said that was indicative of an employment relationship in the sense of obligation to the Claimant (rather than terminating the contract) but also control. But it is also indicative in my judgement of the Respondent generally considering that it was relatively unencumbered in terms of how it could behave towards the Claimant. That can also be seen in terms of the Respondent just unilaterally stopping the

Claimant's payments without contacting her about it, or suggestions of terminating the contract, or giving notice to terminate the contract. The point being that in my judgement it is a relevant factor that the Respondent was approaching the relationship as, in this sense, a commercial one, rather than how one would envisage a County Council engaging with an employee.

149. The Respondent provided some equipment to the Claimant in terms of a mobile phone, tablet and laptop, and an email account. They were needed to access the Respondent's systems for the Claimant's role, and so that she could write and file reports, attend Teams meetings, and also have contact with young people's families and the Respondent. In the pandemic she was provided with PPE including facemasks with the Respondent's logo. The provision of equipment is a factor that could point towards an employment relationship. The Respondent says that the ARC engaged with other service providers who were not employees such as art, music and equine therapists. But I have before me no evidence about those type of individuals being given, for example, email addresses and mobile phones. But I also note that the Claimant was also providing significant "equipment" herself in the sense of the provision of her home, a bedroom, bedding and the like. She also provided things like food and drink, albeit the retainer allowance was designed to cover those costs.

150. The Claimant was providing personal service that could not be delegated; that was inherent in her role, albeit that can likewise be the case with a professional independent contractor. It was not the type of situation where anyone would hire other staff to help, albeit the very nature of the role potentially involved engagement between the young person and the Claimant's wider household. This is not the kind of situation where there were considerations of the adoption of financial risk, or the ability to profit from investment and management.

151. The Claimant had not set up a formal business or organisation of her own. She was not proffering the same services to other local authorities. It was part of the arrangement that she would not do mainstream foster caring. She was able to work for others on days that she was not contracted to the Respondent but in fact did not do so, and therefore (as the facts show) had significant financial dependency on the Respondent.

152. The question of integration into the organisation is in my judgement an important consideration. The Claimant asserts that she was significantly integrated and that she was part of the ARC team and always being contacted, always "out in the field." She says that CD had offered her a desk in the office and had integrated the Claimant into social events such as work gatherings, leaving dos, baby showers, and Christmas parties. There is one documented example of CD extending a Christmas meal invite to the Claimant. The Claimant says she attended team building events at Boulders and white water rafting, and attended group training, and for coffees and catch up with staff. She says she attended the office for ARC team meetings, multi agency meetings, supervision meetings and other events, and training.

153. I would accept that early on CD made efforts to try to make the Claimant feel part of the ARC team. However, nothing in the evidence of the Claimant and RS and the documents I have been given suggests to me that as time went on the Claimant was a fully integrated member of the wider ARC team. The documents to me show that certainly the Claimant and SU had a good and friendly working relationship as did the Claimant with her supervising social worker, at least when it was NC. But the documents also to me show this ultimately being an arm's length relationship. I do not consider the reality was that the Claimant was a fully integrated member of the ARC teams in the sense that, for example, SU would have been. The Claimant was a step beyond that. SU was there as the conduit between the ARC team and the Claimant in terms of making practical arrangements for young people and liaising with CD and RS about annual leave requests. Sometimes the supervising social worker also worked as this middle person; for example, in giving feedback to the ARC about how things were going or requesting the Claimant be given a new mobile phone. I do not consider that general ARC employees worked in that arms' length way. I do not consider that the Claimant was always "out in the field" or "always on call" as an integrated member of the team. Her work primarily involved attending matching meetings, arranging and taking the particular respite placements, reporting writing, and feedback about the sessions. She also had supervision meetings with her supervising social worker and some also involving the ARC. I accept the Claimant may have, as part of her professional role, attending multi agency meetings, training, respite review meetings and other ARC general meetings including planning meetings. But my overall analysis on this point is that this was not full integration and remained an arms' length relationship for the provision of a particular, but important, service to the ARC.

154. I do not consider it to be of particular relevance to the employment relationship test that the Claimant was providing care for young people in her own home. I do not consider that there is anything about the provision of caring services to young people, or the fact that it was in the Claimant's own home that somehow precludes the potential existence of a contract of employment. It would actually be important to have standards in place.

155. In my overall assessment there are factors here that point in both directions and it is not simply a matter of undertaking a mathematical tick box exercise. My ultimate conclusion is, looking at the contract, the circumstances in which it was made, and the whole context, that the parties did not intend to create a relationship of employment. Rather, there was a contractual engagement for the Claimant to provide the services of an ARC respite carer to the Respondent's business. As I have said, there are factors that point in both directions. However, for me, what is particularly relevant in the overall assessment is the way in which the arrangement was reached and subsequently reflected in the written contractual documents which were about the provision of a service, and not an employment relationship and how it was then treated by both parties in that way; such as the commercial way in which the Respondent considered stopping payments or terminating the contract; the ways in which the Claimant was not treated as one would expect an employee to be treated by an employer such as Cardiff Council in terms of, for example, pay reviews, sickness and sick pay, or disciplinary policies; the degree of professional discretion the Claimant held; and finally

how from various perspectives on the facts the Claimant was at an arms' length and not fully integrated into the ARC team. She was a provider of a service to the Respondent and not an employee.

156. It follows that the Claimant's complaints must be dismissed because she was not an employee of the Respondent.

157. I would add by way of an observation rather than a finding, that if the question of worker status had been before me, on first blush I would have been inclined to find that the Claimant was a worker. There was a contract between the parties under which the Claimant agreed to personally provide work or services for the Respondent. I did not hear submissions about the point, but on first blush I would not have been inclined to find that the Respondent was a customer or client of any profession or business undertaking carried out by the Claimant. But the point is not before me because the Claimant did not advance those elements of her case that she could on the alternative basis of worker status. EJ Sharp had clearly identified that with the Claimant the outset of proceedings. As I come on to below, the Claimant would in any event have faced the same time limit difficulties with the worker status based claims of unauthorised deduction from wages and unpaid holiday pay in any event.

The legal framework: time limits

158. For the purposes of an unfair dismissal claim, under section 95 ERA a dismissal occurs where the contract under which the employee is employed is terminated by the employer with or without notice. Whether a communication amounts to a dismissal is a matter for objective determination by the tribunal, construed in the context of the circumstances and matters known to the parties at the time. Where notice is given the effective date of termination is the date on which the notice expires. Subject to the rules on early conciliation extensions of time, a claim for unfair dismissal must be presented before the end of the period of 3 months beginning with the effective date of termination (section 111(2) ERA). In essence this means that early conciliation must commence within 3 months less 1 day of the effective date of termination. Time can be extended where the tribunal is satisfied it was not reasonable practicable for the complaint to be presented in time. The complaint must then be presented within a further period that the tribunal considers reasonable.

159. Breach of contract claims (for example for notice pay) are brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. A claim must be presented (again subject to the early conciliation provisions) by the employee within 3 months beginning with the effective date of termination of the contract giving rise to the claim. There is the potential for an extension of time applying the same reasonably practicable test.

160. Under section 13 ERA a worker has the right not to suffer a deduction from wages. Section 23 gives a worker the right to present a complaint to an employment tribunal where an employer has made a deduction of wages that contravenes section 13. Section 23(2) says: "*Subject to subsection (4), an employment tribunal shall not consider a complaint under this section*

unless it is presented before the end of the period of 3 months beginning with –

(a) In the case of a complaint relating to a deduction by the employer, the date of the payment of wages from which the deduction was made…"

Section 23(3) says that where the complaint is about a series of deductions the reference in 23(2) to a deduction refers to the last deduction in the series. I.e. where there is a series of deductions the time limit starts to run from the last deduction. Again this is subject to the rules relating to early conciliation. Section 23(4) also says: "*Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

161. Under the Working Time Regulations a worker can bring a complaint about the failure to pay the whole or any part of any amount due for holiday pay at the time of taking the holiday, or for accrued but untaken holiday at the termination of employment, but the worker again has to present the claim to the tribunal before 3 months beginning with the date on which each individual payment should have been made (subject to any extension for Acas early conciliation). There is again the same power to extend time where the tribunal is satisfied that it was not reasonably practicable for the complaint to have been present in time and the complaint has been presented within such further period the tribunal considers reasonable.

162. Two issues may therefore arise in all such complaints: firstly whether it was not reasonably practicable for the claimant to present the complaint within time, and, if not, secondly whether it was presented within such further period as is reasonable. The burden is on the claimant to establish to the tribunal's satisfaction that it was not reasonably practicable to present the claim within time and it was presented within such further period as is reasonable.

163. Ultimately, each case is to be assessed by the tribunal on its own facts. There are, however, some guiding principles that can be taken from case law in the field.

164. The test is a strict one compared, for example, with the more generous test of "just and equitable" that applies in discrimination cases. It was said in London Underground Ltd v Nowel [1999] IRLR 621:

"The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", or even where the tribunal, "considers there is good reason" for doing so."

165. In Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA, the Court of Appeal conducted a general review of case law authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means

something like 'reasonably feasible'. Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07 explained it in the following words: '*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.*

166. Complete ignorance of one's rights at all may make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. Lord Scarman commented in Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: '*What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?*' In Porter v Bandridge Ltd 1978 ICR 943, CA, the majority of the Court of Appeal said the correct test is not whether the claimant knew of his or her rights but whether he *ought to have known of them*. In Trevelyans (Birmingham) Ltd v Norton 1991 ICR 488, EAT, it was said that, when a claimant knows of his right to complain of unfair dismissal he is under an obligation to seek information and advice about how to enforce that right. Similarly in Cygnet Behavioural Health Ltd v Britton [2022] EAT 108 it was said: "*A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply: it is their responsibility to do so."* The EAT said that on the facts of that particular case: "*it makes no sense, in my judgment, that the claimant would not have been able to type a short sentence into a search engine and to seek information about unfair dismissal time limits, or to ask an acquaintance by email to search for that information"* and: "*it would be the work of a moment to ask somebody about time limits or to ask a search engine."*

167. Ultimately the question in an individual case is whether the claimant was reasonably ignorant of the time limits: John Lewis Partnership v Charman EAT 0079/11. A relevant factor in that case was also that the claimant was waiting the outcome of an appeal process against his dismissal before investigating his other options. That was, however, a decision on its own facts and it is certainly not the case that an appeal will necessarily mean it was not reasonably practicable for a claim to have been brought in time.

168. It can also be relevant if a claimant has been given incorrect advice about time limits, albeit generally if a professional advisor gives unsound advice the failure of the advisors will be attributed to the claimant, and will not provide a good excuse for not presenting the claim in time. Here, the case law suggests the remedy for defective advice would instead potentially lie in a negligence claim against the advisor.

169. The time limit provisions for statutory redundancy payments are different. Generally, under section 164 ERA, an employee will lose their right to a statutory redundancy payment unless one of the following four events occurs within the six-month period beginning with the relevant date (which where notice is given is the date of expiry of the notice period):

- The payment is agreed and paid by the employer;
- The employee makes a written claim for payment to the employer;
- The employee's right to a redundancy payment (or the amount of the

redundancy payment to which they are entitled) is referred to an employment tribunal;
    - The employee presents a claim of unfair dismissal to an employment tribunal.

170. Once an employee has established their right to claim under section 164(1) of ERA, the right to claim to an employment tribunal is preserved indefinitely (in other words, there is then no time limit for making a subsequent application to a tribunal).

171. Where none of the events specified above has occurred within the first six-month period covered by section 164(1) ERA, the tribunal has a discretion to extend the time limit for an employee to present a claim for a redundancy payment by a further six months (immediately following the initial six-month period) if both of the following are satisfied (164(2) ERA):

- During the second six-month period, the employee has:
    - made a written claim for their statutory redundancy payment to the employer;
    - presented a claim to a tribunal for determination of their right to a statutory redundancy payment or how much their statutory redundancy payment should be; or
    - presented a claim for unfair dismissal to a tribunal.
- The tribunal considers it just and equitable that the employee should receive a redundancy payment.

172. In deciding whether it is just and equitable to extend the time limit, the tribunal must consider the reasons given by the employee for having failed to take any of the three steps identified in section 164(2) ERA within the initial six-month period and all the other relevant circumstances. The time limits can also be modified by the early conciliation principles.

Discussion and Conclusions: time limits

173. The unfair dismissal and breach of contract (notice pay) complaints cannot proceed because of my finding that the Claimant was not an employee of the Respondent. But if I am wrong about that I would in any event find that the complaints were not brought within time, and it was reasonable practicable for the Claimant to have done so, such that time should not be extended.

174. Both these complaints run from the same effective date of termination. The Claimant argues that her effective date of termination was 26 March 2024. She says that despite the letter of 15 September 2023 stating that the ARC short breaks service was disbanding on 22 September 2023 with placements ending by that date and payments ceasing at the end of the month that she still considered she was an ongoing employee. She says that she thought she was just waiting for KH to finalise details of her new job offer in the Yorkshire Model and that when that happened any missed wage payments would be backdated because that backdating had happened before. She says that when KH told her on 2 November 2023 that they were no longer moving forward with that model, that she was then discussing alternative employment and that it was only on 26 March 2024

she considers that her employment terminated when she considered the alternative employment options were not viable, including the fact that she would have to go back through the foster panel process.

175. If the Claimant was an employee when she was an ARC respite carer then I consider the effective date of termination was 22 September 2023. On an objective reading based on what was known at the time I consider that the letter of 12 September 2023 was giving notice of the termination of the employment contract on 22 September 2023. The letter stated that the ARC short break service was disbanding on that date, that placements would cease, and thereafter retainer payments would cease. That the Claimant was paid for 4 weeks after that, which included accrued holiday pay does not affect the position. As Ms Wigley submitted, the ongoing conversations were about new potential opportunities for the Claimant. They cannot be objectively read as a maintenance of the existing contract given the clear language used in the letter of 12 September 2023. The Claimant waws simply being invited to have discussions about various options whereby she could return to different forms of fostering. If KH had previously talked about the potential to keep the Claimant working with ARC until the North Yorkshire Model was ready, that position had clearly changed with the final disbanding of the ARC short break service and clear notice being given of its end.

176. It follows that the unfair dismissal claim and breach of contract claim were presented out of time. To be in time Acas early conciliation needed to commence by 21 December 2023. The Claimant did not commence early conciliation until 24 March 2024, which ended on 5 May 2024 with the ET1 claim form being presented on 31 May 2024. The Claimant entered early conciliation around 3 months late and indeed given early conciliation started late the early conciliation period would not serve to extend the tribunal time limit at all.

177. In my judgement it was reasonably practicable for the Claimant to have commenced early conciliation within the ordinary time limit. On a reasonable reading of the letter of 12 September 2023 the Claimant was able to know that the ARC respite carer contract was coming to an end. If she thought the circumstances or process of that dismissal were unfair, or that she was not given the contractual notice she was due, the Claimant was in my judgement reasonably able to appreciate that. It was reasonably feasible for the Claimant to have then sought some advice or undertaken her own research about her employment law rights, and the relevant time limits that would have allowed her to start early conciliation within time and a tribunal claim thereafter within time.

178. I do not consider that the Claimant was anticipating further discussions about future potential roles reasonably affected the feasibility of the Claimant to undertake the above steps. KH's letter of 12 September 2023 made no promise that the Claimant would definitely be offered a job with under the North Yorkshire Right Place Model with the backdating of pay. The letter simply said that it was hoped the Claimant would choose to remain as foster parent in some way and there would be future discussions about such options. If the Claimant did presume that the Right Place Model job would come through with the backdating of pay, then that was, as Ms

Wigley submitted, an entirely unreasonable leap on the Claimant's part. Previous backdating of pay had been in very different circumstances. One was the backdating of a pay increase. The other was in response to the Claimant's complaint about not being given her 28 days contractual notice. Here the Claimant had clearly been told that the ARC respite care service had ended, her placements had ceased, her retainer payments were to cease and did so in October, and she had been left with no guarantee of a future alternative role and no promise that if one did come through there would be backdating of payments. That would have been even more obvious to the Claimant when on 2 November 2023 KH told the Claimant the No Wrong Door Model was not progressing at that time. Again it was reasonably feasible for the Claimant to have considered her position, and taken appropriate advice at that time and to have commenced early conciliation within the original time limit. That the Claimant still went on to have various other conversations about differing fostering opportunities does not in my judgement mean it was not reasonably feasible for her to have appreciated there had been a termination of her employment on 22 September 2023 without (on the Claimant's analysis) proper consideration of alternative options before that termination, and to then take appropriate steps to safeguard her interests in terms of employment tribunal proceedings. I acknowledge there were the discussions with RP about whether the Claimant was resigning or not. But that was in the context of the Claimant being a registered foster parent, it was not about the ARC respite carer employment that had terminated. If the Claimant were an employee, I would therefore not extend time for the unfair dismissal and breach of contract complaints.

179. The unauthorised deduction from wages and holiday pay claims would also be out of time. Time here runs from the date that payment should have been made. I do not have the detail what it is exactly the Claimant says she was owed. However, it appears to me that the last date she could argue payment should have been made was when she received her last payments on 26 October 2023. If so, early conciliation should have been entered into by 25 January 2024 and it did not commence until 24 March 2024. Similar to the above analysis, I consider that it was reasonably practicable for the Claimant to have commenced these pay claims within time. She reasonably should have known her contract had terminated, and that her payments were to cease and did cease. She knew what her last payment was that included some accrued and untaken holiday pay. If she considered that she had been underpaid pay or holiday pay the Claimant was reasonably able to appreciate that and to take steps to take advice or do her own research about her rights, and about time limits in order to commence her claim within time. I therefore would not extend time for the unauthorised deduction from wages or holiday pay complaints.

180. For the statutory redundancy payment claim, the complaint is not viable in any event because I have found the Claimant was not an employee. On the evidence before me I cannot see that the Claimant took any of the four steps required within the initial 6 months that expired on 21 March 2024. In particular early conciliation did not start until after that date. The Claimant did present the redundancy payment claim within the second 6 month period, but I would not in the circumstances consider it just and equitable to award the statutory redundancy payment. I acknowledge the test is less

stringent that the reasonably practicable test. However, I consider it particularly relevant that there was no good reason for the Claimant not to have brought the claim within the original 6 month time limit. As already stated, she reasonably should have known her ARC respite carer contract had terminated with the disbanding of that service on 22 September 2023 such as to trigger (if the Claimant were correct) entitlement to a redundancy payment. The Claimant had plenty of time available to have undertaken the appropriate research to know how to pursue her claim for a statutory redundancy payment within that time limit. Any presumption that there was a promise of a North Yorkshire No Wrong Door work with the backdating of pay was not a reasonable presumption on the Claimant's part. In November she also knew that the No Wrong Door model was not happening at that time in any event. That the Claimant was in various discussions about future foster parent opportunities does not change the position on the entitlement to or claim for a redundancy payment on the termination of the ARC contract and the Claimant has given no explanation as to why she would have considered that it did. I would not consider it just and equitable to award the statutory redundancy payment.

Postscript

181. I should add that since this case was heard there has been the Presidential Case Management Order of 9 June 2025. At the time of this hearing the first instance decision in Oni and others v London Borough of Waltham Forest and Others (3204635/2021 and others) had been handed down and it looked likely there would be an appeal. The Presidential Case Management Order stays cases raising common issues of fact and law with Oni, pending completion of the appeal process in Oni. I do not consider that applies to this case because the Claimant was not a foster carer providing foster care to looked after children working under the compulsory statutory foster care framework for looked after children. The Claimant was a respite carer for young people not within the care system/ not for looked after children. I do also apologise for the delay in the delivery of this Judgment, which was caused by the pressure of other judicial work and the need to give careful consideration to some detailed points of law that it was important to do justice to.

Approved by:
Employment Judge R Harfield
31 July 2025

JUDGMENT SENT TO THE PARTIES ON

04 August 2025
Katie Dickson
FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there

are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here: www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/