

The Scottish EAT finds that foster carers were employees of the Council, in Glasgow City Council v Johnstone

UKEATS/0011/18/JW

By [Grace Nicholls](#)

3PB

Facts

1. The Claimants saw an advert in 2010 for foster carers for Glasgow City Council as follows: “Glasgow needs foster carers to join us in our new treatment fostering service for young people (aged 11-17)”. The offer was a professional fee of £30,160 per annum and an additional allowance per young person of £172 a week and 4 weeks paid holiday a year.
2. The model advertised differed from the ordinary model used for foster care arrangements¹ as follows:
 - these foster carers could not undertake any other paid employment
 - They received a professional fee (paid whether or not a child was placed with them) and;
 - they were permitted to take holidays without the child placed with them (traditional foster carers would have to take the child with them)².
3. An intensive training programme followed the appointment of the Claimants and an agreement (the Connex Multi-Dimensional Treatment Foster Care Looked after Children (Scotland) Regulations 2009 Foster Care Agreement, herein after referred to as “**the Connex Agreement**”) was signed in March 2011.
4. Numerous obligations were contained within the Connex Agreement and the cumulative effect was a high level of control by the Council³. The Claimants were described in the

¹ Para 4 EAT judgment

² Para 4 EAT judgment

³ Para 5 EAT judgment

payment policy as “self-employed” and there was an expectation by the Respondent that the Claimants should be responsible for their own Income Tax and National Insurance contributions⁴. The Claimants were not compelled to take any child the Respondent suggested to be placed with them.

5. The Council’s position, perhaps unsurprisingly, was that the role of foster carer was statutory and non-contractual; namely Reg 24 (Agreements with foster carers) of the Looked After Children (Scotland) Regulations 2009 which provides that:

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

6. Schedule 6 (Matters and obligations in Foster Care Agreements) is as follows:

1. The support and training to be given to the foster carer.
2. The procedure for the review of approval of a foster carer.
3. The procedure for handling of complaints against foster carers.
4. The procedure in connection with the placement of children, and in particular–
 - (a) the matters to be covered in foster placement agreements and the respective obligations, under any such agreements, of the local authority and the foster carer;
 - (b) the financial arrangements which are to exist between the local authority and the foster carer, including any special financial arrangements in relation to particular categories of children who may be placed with the foster carer;
 - (c) the local authority’s arrangements for meeting any legal liabilities of the foster carer arising by reason of a placement; and
 - (d) the procedure available to foster carers who wish to make representations to the local authority which placed the child.
5. The foster carer’s obligation to give written notice to the local authority forthwith, with full particulars, of–
 - (a) any intended change of address;
 - (b) any change in the composition of the household, any other change in personal circumstances, any other event affecting either the foster carer’s

⁴ Para 6 EAT judgment

capacity to care for any child placed or the suitability of the household and any criminal convictions arising between approval and subsequent reviews; and

(c) any further request or application of a kind mentioned in paragraph 11 of Schedule 3.

6. The foster carer's obligation—

(a) not to administer corporal punishment to any child placed with them;

(b) to ensure that any information relating to a child placed with them, to the child's family or to any other person, which has been given in confidence in connection with a placement is kept confidential and is not disclosed to any person without the consent of the local authority;

(c) to comply with the terms of any foster placement agreement, to care for the child placed with the foster carer as if the child was a member of that person's family and in a safe and appropriate manner and to promote the child's welfare having regard to the local authority's immediate and longer-term arrangements for the child;

(d) to notify the local authority immediately of any serious illness of the child or of any other serious occurrence affecting the child; and

(e) where the placement is terminated, to allow the child to be removed from their home by the local authority.”

The ET decision

7. The EJ at first instance accepted that the agreement entered into between the Claimants and the Respondent Council was contractual in nature and contained the intrinsic elements of a contract of employment, with emphasis placed on the receipt of the fee of £32,000 per annum for the Claimant's fostering services. Such a sum gave the appearance of remuneration as opposed to money to cover costs.

8. The Respondent Council appealed to the EAT.

EAT judgment

9. The EAT agreed with the Employment Tribunal. Lord Summers, sitting alone, considered two key questions: (1) Is the arrangement with the Claimants contractual? (2) Are the Claimants employees of the Council?

10. In relation to the second question, the EAT focussed on the terms dealing with remuneration and holidays (i.e. that are indicative of a contract of employment). Further,

the EAT considered that *“another feature of the arrangement that points towards a relationship of employment is the degree of control that the Council exercised over the Claimants. Although the Mainstream Foster Care Agreement contains a variety of terms that exert a degree of control over the Claimants, the Connex Agreement exerts significant additional control. In particular they were required to give up other employment...They were required to attend training on a regular basis and when a child was placed with them report daily to the Council.”*⁵

11. Furthermore, the EAT held that: *“if the local authority narrates the terms upon which they are willing to authorise the foster parents to be foster carers and these terms involve exercising control over the foster parents provision of services, it will be matter of fact in every case to determine whether the degree of control is sufficient to constitute a relationship of employment. The foster placement agreements describe the way in which the service provided is to be delivered.”*⁶
12. English authorities such as *W v Essex County Council* [1998] 3 WLR 534 and *Norweb Plc v Dixon* [1995] 1 WLR 636 were considered. The EAT was satisfied however that, based on the facts found by the EJ, these indicate that the *“foster carers chose to enter the agreement having been trained by the Council and having had an opportunity to scrutinise the terms of the agreements offered”*. Had there been a *“legal compulsion as to both the creation of the relationship and the fixing of its terms [that would be] inconsistent with the existence of a contract”*⁷
13. The EAT agreed with the EJ, refused the appeal and remitted the case to the EJ to proceed with the substantive case accordingly.

Comment

14. This case is clearly one to watch; given the potential ramifications for this case I would not be surprised if this decision was the subject of an appeal elsewhere. Such a concern is clearly alluded to at paragraph 48 of the EAT judgment, namely the suggestion that the legal status of foster carers in general would become uncertain, especially in the context of the Respondent’s submissions that the Connex Agreement had not been drafted by lawyers and that it had not been appreciated by the Respondent that the use of a

⁵ Para 19 EAT judgment

⁶ Para 23 EAT judgment

⁷ Para 31 EAT judgment, p643 F-G *Norweb Plc v Dixon* [1995] 1 WLR 636

contractual agreement could potentially alter the legal status between a Foster Carer and the Council.

15. However, the EAT was not persuaded that the possibility that the Council may have inadvertently altered the status of the Claimants was a valid consideration in its decision making. Rather, they had to focus on the objective position and not the subjective opinion of the parties as to the nature of the relationship which they had entered into.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you wish to discuss this article further with the authors or to instruct one of our barristers on a matter relating to this or any other matter, please contact the [3PB clerking team](#).

7 September 2020



Grace Nicholls

Barrister
3PB

0330 332 2633

grace.nicholls@3pb.co.uk

3pb.co.uk