Browne Jacobson

Foster carers are not ‘workers’ according to the Employment Tribunal

For anyone who has followed the evolving case law in the social care sector, this title is likely to raise some questions. Most notably, “What about the decision in Armes?”

14 October 2019

For anyone who has followed the evolving case law in the social care sector, this title is likely to raise some questions. Most notably, “*What about the decision in Armes?*”

In a judgment handed down by the Employment Tribunal on 23 July 2019 in National Union of Professional Foster Carers v IWGB and Others UKEAT/0285/17/RN an appeal by the National Union of Professional Foster Carers (NUPFC) was dismissed, putting an end to the NUPFC’s application to be entered on the list of Trade Unions in England and Wales.

At the centre of the Tribunal’s finding was that the foster carers did not work under a contract. Instead the relationship between the foster carer and local authority was regulated by a Foster Care Agreement, the content of which was laid down by statute and regulations. As a result registration was not supported, as the NUPFC was not an organisation consisting “*wholly or mainly of workers*” within the meaning of section 1 of the Trade Union Labour Relations (Consolidation) Act 1992.

The Tribunal was bound by previous direct authorities which held that the relationship between the local authority and foster cares was not contractual.

Comparison of the judgments

Interestingly, the Appellant’s Notice of Appeal was lodged on 17 August 2017. The judgment by the Supreme Court in Armes v Nottinghamshire County Council [2017] UKSC 60 was handed down on 18 October 2017.

In Armes the Supreme Court were asked to consider (amongst other things) whether a local authority were vicariously liable for the wrongdoing of the authority’s foster carers. In Armes case the foster carers were approved, matched and supervised by the local authority.

Reflecting first on the doctrine of vicarious liability. This can apply where there is a relationship between the defendant and the tortfeasor (the wrongdoer). The classic relationship is between an employer and its employee but the doctrine can apply where the characteristics found in employment also apply, without a formal contract of employment. The judgment in Armes referred to cases such as the Various Claimants v Catholic Child Welfare Society [2012] UKSC 45, [2013] 2 AC 1 and Cox v Ministry of Justice [2016] UKSC 10. The position was summarised in Cox as follows:

“*The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an*
individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.”

However in the Employment Tribunal case of NUPFC the appeal did not consider the civil cases leading up to Cox (which was available at the time of their tribunal appeal) or Armes (available just a few months later). It didn’t even cover the developing judicial view on the

relationships between individuals and organisations behind the doctrine of vicarious liability and in particular, that a formal contract was no longer a bar to the doctrine applying, given the evolving relationships outside the classic employer/employee sphere.

Instead the Employment Tribunal focussed on the judgment of W v Essex County Council [1998] in which the case foster carers brought a claim against the local authority for placing a child under incorrect information. The foster carers' claims for breach of contract were struck out. S v Walsall MBC [1985] 1 W.L.R.1150, Rowlands v City of Bradford MBC [1999] EWCA Civ 116 and Bullock v Norfolk County Council UK EAT/230/10 were all considered and supported the proposition that there is no contract in play between a local authority and foster carer.

So where does that leave us?

On first reading it may appear confusing. On reflection it seems the Tribunal had a very narrow focus in front of them; whether a contract was freely entered into between the parties.

It is however surprising that the appellant in NUPFC didn't introduce the cases which point to the development of relationships "akin to employment" in order to persuade the Tribunal that the interpretation of the wording of the Trade Union Labour Relations (Consolidation) Act 1992 (TULRCA) required further consideration. A worker is defined in the TULRCA as:

"*(a) under a contract of employment or*
(b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or
(c) in employment under or for the purposes of a government department (otherwise that as a member of the naval, military or air forces of the Crown) In so far as such employment does not fall within paragraph (a) or (b)."

The appeal Tribunal held "*it is clear, therefore that save for those falling within the terms of subsection (1)(c), work must be done under a contract in order to be a worker.*"

Perhaps looking at the development of the cases dealing with vicarious liability would have assisted the appellant in revising the understanding of what constitutes a worker by looking at whether a 'contract' can be defined so narrowly now. That's not to say a different result would have been achieved but a discussion on the point would have been interesting in light of Armes and other decisions.

Cox and Armes are therefore still binding decisions for local authorities when considering the doctrine of vicarious liability. Nothing has changed.

The fact that this Employment Tribunal appeal has considered a very narrow issue does not in our view impact on the wider issues considered by the Appeal and Supreme Courts in providing guidance on the application of the doctrine of vicarious liability.

Contact

Helen Rideout

Partner

helen.rideout@brownejacobson.com

+44 (0)115 976 6291

Related expertise

Services

Abuse and social care claims

Children's services

Employment

Employment and pensions for public sector

Employment services for healthcare

Health and social care disputes

Social care services