



EMPLOYMENT TRIBUNALS

Claimant: Mr M Everall
Respondent: Worcestershire County Council
Heard at: Birmingham
On: 8 February 2019
Before: Employment Judge V. Jones (sitting alone)

Representation

Claimant: In person
Respondent: Mr P Keith (Counsel)

RESERVED JUDGMENT

1. The claimant is not a worker as defined by regulation 2 of the Working Time Regulations 1998 (WTR) because he is not working for the respondent under a contract.
2. The claimant's claim for holiday pay under regulation 24 WTR is not well founded and is dismissed.

REASONS

Background and Issues

1. Mr Everall claimed holiday pay from the County Council under the Working Time Regulations 1998 (WTR). He claimed he was a worker as defined by regulation 2 WTR. The County Council defended the claim, arguing that the claimant was not a worker but an independent contractor in respect of whom it was his customer or client. Alternatively, it argued that the work he did for the respondent was not work done pursuant to a contract as it was governed by a heavily regulated statutory scheme.
2. The claimant appeared in person. The respondent was represented by Mr Keith of counsel. There was an agreed bundle of documents (pp1-273) in addition to which the claimant provided a supplementary bundle (pp274-245). By agreement I added two further documents: an exchange of emails between Shared Lives staff headed "Provider to provider replacement care" and HMRC's response to a Freedom of Information request from the claimant. For the claimant, I read a witness statement and heard oral evidence from the claimant. For the respondent

I read a witness statement and heard oral evidence from Ms J Parker, Registered Shared Lives Manager. The witnesses adopted their witness statements as their evidence in chief and were cross-examined. On conclusion of the evidence I heard oral submissions from both sides and Mr Keith provided a written skeleton argument. At the end of the hearing I reserved my decision.

3. The issues, identified with the parties at the outset, were as follows:
 - a) Was the claimant a worker under the Working Time Regulations 1998, or was he an independent contractor in respect of whom the respondent was a customer or client?
 - b) If the claimant was a worker, was he entitled to holiday pay from the respondent and if so for what periods and in what amount? The claimant claimed holiday pay from the date he became a Shared Lives Provider for the respondent.

Findings of Fact

4. The respondent is a local authority with a statutory duty to provide services to disabled people in its area. It does so under a number of schemes, one of which is known as the Shared Lives Scheme. Under this scheme the respondent funds individuals (“Providers”) to provide support to vulnerable people, usually in the provider’s home.
5. The claimant and his partner are Shared Lives providers and the claimant has been supporting individuals under the Shared Lives Scheme (formerly known as Adult Placement) since 2004.
6. Since 2013 the claimant has had a written contract with the respondent. Prior to this, from 2005 to 2013 there was no written contract but he says he worked to guidelines issued by the Shared Lives Scheme. The current version of the contract is at pp51-66 of the appellant’s bundle.
7. The Shared Lives Scheme is defined under the contract (at p53) as “a scheme regulated under the National Minimum Standards for Adult Placement Schemes 2004, responsible for recruiting assessing, training and supporting Shared Lives providers for taking referrals, matching and placing people with providers and for supporting and monitoring the placement”. A “provider” is defined as a person who, under the terms of the contract is a member of the shared lives scheme and who provides or intends to provide the care and/or support outlined under clause 5.2 of the contract.
8. A paragraph headed “Summary” (at page 54) states :

“This contract outlines arrangements under which the Council shall operate a Shared Lives Scheme and make placements and resulting payments to the provider under the scheme”. The provider is required to be a member of the Scheme and provide some or all of the following services: short or long term accommodation with care and support in the family home of the provider; support to service users in the community by the provider acting as extended family or outreach support in the community. The paragraph states that services can be provided to a maximum of three service users at any one time.
9. Section 2 of the contract provides that the agreement will remain in force until terminated by either party. Section 19 sets out the notice provisions. Either side

can terminate the contract with a period of written notice. In addition, there are a number of circumstances in which respondent may terminate the contact with or without notice, including if the provider fails to perform a substantial part of the service or has committed an irremediable breach of contract which presents a serious risk to the wellbeing of any service user or materially disadvantages the council or any service user and if the Approval Panel withdraw the provider's approved status.

10. Section 6 of the contract sets out the responsibilities of the respondent. Section 6.10 (headed "finance") states the Council will make payments for each long-stay service user on a four weekly basis. The Council sends the provider, on the same four-weekly basis, a Schedule detailing the care purchased by the Council during that period and the payment to be made. The provider must certify the schedule, giving details of any variations and return it to the Council by the due date. Subject to approval by the Council, any amended payment resulting from a notified variation will be incorporated into and paid under the next four-weekly schedule.
11. Section 6.10(d) provides that the fee levels will be reviewed annually by the Council during the last quarter of the financial year in consultation with providers through the "Provider Forum". The Council contribution for the following year is fixed by the Council having regard to various indicators. The Council notifies the provider of the proposed new fee level not less than 6 weeks before the start of the new financial year and as soon as possible thereafter notifies them of the actual revised Council contribution "*which shall be deemed to vary the placement agreement and consequently the weekly fee accordingly*".
12. Section 7 of the contract sets out the responsibilities of the provider. They must: be approved by Shared Lives; work in accordance with the aims and objectives of the scheme as detailed in the contract, provider's handbook, placement agreement and individual service user plan; not accept any placement that is not made under Shared Lives, nor any placement for which the Council has not supplied a needs assessment; participate positively in placement monitoring and reviews by Shared Lives and/or the care manager, allowing reasonable access for this to be done; participate positively in training and related activities arranged by Shared Lives and attend all essential training as designated in the Shared Lives Handbook and provider's training plan; keep all records relating to service users up to date in good order in a secure manner and return them to Shared Lives when a placement is terminated; provide the Council with any monitoring information reasonably requested. There are also requirements to report to Shared Lives within 24 hours events such as the death, serious accident or serious illness of the service user, unexplained absence, theft or burglary, or any incident which is reported to or investigated by the police. They must report any changes in the composition of their household or any change in their personal circumstances which may affect their ability to support a service user. There are obligations requiring them to have household and car insurance and to comply with any statutory regulations and enactments relating to the provision of the service.
13. Section 14 is headed "Exclusion of Agency or Partnership" and provides that the provider will not hold themselves out as being the agent of the Council and nothing in the contract creates a legal partnership between them.
14. Section 15 is headed "Subcontracting or assignment" and provides that the provider will not assign or transfer the whole or any part of the contract or sub-

contract or any part of the service under the contract without the prior written consent of the Council, which consent will not be unreasonably withheld.

15. There are further terms relating to the protection of vulnerable adults, indemnity, insurance, equal opportunities, and resolution of disputes.
16. At pp327-345 of the bundle were the Placement Agreements entered into by the parties in respect of each of the service users the claimant currently looks after. At pp76-118 is a "Handbook for Shared Lives providers" which includes summary policies, procedures and contractual obligations and gives information about the roles and responsibilities of the provider and other staff, the conduct expected of them, record keeping requirements and training and development requirements.
17. There was a document in the supplementary bundle from the Care Quality Commission (CQC) (pp296-314) entitled "Supporting Information – Shared Lives Schemes". The respondent is required to register the personal care aspects of the Shared Lives Scheme with CQC, under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2012. CQC has powers to carry out inspections of providers as part of its statutory duty to monitor the regulated activity of "personal care". However I found this document was not relevant to the claimant because he does not provide personal care as defined in the 2008 Regulations. He provides only support and accommodation. He is not therefore subject to any inspections by the CQC, nor obliged to maintain the additional records required for those administering personal care.
18. The claimant's evidence was that the fee he was paid was fixed by the respondent and he had no power to negotiate it. The document at pp317-320 (entitled "General counseling and support for xxx") was completed by the respondent in discussion with the claimant and the service user. It sets out the amount of time the respondent assessed that the claimant would spend each week on the various tasks he was required to undertake for each service user. The tasks included meal planning and preparation, shopping, laundry, repairs, housework, facilitating contact with family and friends, peer counseling, safety and security of the home. An hourly rate was then applied to the total hours, which the claimant says is the same hourly rate paid to domiciliary care workers employed by the respondent.
19. The claimant said that at the beginning he was happy with the fee the respondent paid him, but it was subsequently reduced without consultation and has never been increased. Ms Parker said that providers could negotiate the fee levels and that some providers had done so. However I found section 6.10 of the provider contract made clear that it was the respondent which fixed the fee. Though it did so after consultation with a providers' forum, there was no provision allowing a provider to negotiate the hourly rate payable under the contract.
20. The contract provides that the Council should ensure that a provider providing long term accommodation should be able to take regular breaks. It was common ground that such breaks are not paid. The contract says that where necessary the Council should take responsibility for finding alternative care for the service user during the agreed break periods. It was common ground that it was not appropriate for the long term residents the claimant looked after to move out of their accommodation and so the "relief provider" would need to provide care in the claimant's home. Ms Parker confirmed the claimant's evidence that if he took a holiday he could either pay for cover himself or forfeit his fee for the period of his leave and the respondent would arrange for and pay the relief carer direct. It was also clear that there had been some difficulties finding relief carers for the claimant, though Ms Parker said that the respondent was working to improve that situation.

21. The respondent submitted that a provider has an unfettered right of substitution. However the contract provides that consent to be given by the respondent and for the substitute to be required to have undergone a DBS check. In evidence Ms Palmer said that usually holidays were covered by other shared lives providers and if the substitute was not already a Shared Lives provider the respondent would require them to have similar experience and have undergone similar training, as they were caring for vulnerable people. I find there was not an unfettered right of substitution.
22. The claimant has worked as an adult placement provider for over 24 years. However, between 1994 and 2005 he was the “registered provider” of the service. In order to work in the scheme his home had to be registered as a small residential home with the (then) County Inspectorate. The Council’s role was simply to match clients to providers and offer support to both. In his words, he “discharged WCC’s duty of care”. He was able to source his own placements both in and out of county from other social services authorities and could set his own commercial rates for self-funders.
23. In 2004 the County Inspectorate was abolished and the former adult placement scheme was replaced by “Shared Lives”. From that date the respondent became the registered provider. The respondent advised the claimant he would have to deregister his small residential home or lose his placements. From that time onward, WCC’s in-house shared lives scheme became the sole agency and discharger of the respondent’s statutory duty of care and the claimant became a “shared lives provider”. At the same time the claimant, on the respondent’s advice, entered into tenancy agreements with the residents he looked after. They are still his tenants, though Ms Parker said this was a historic arrangement and nowadays the majority of service users under the scheme are licensees, which is the Council’s preference.
24. The claimant says he was not required to sign a written contract with the respondent between 2004 and 2013. However in 2013, after an incident at his home involving a resident who became ill, the respondent said he was required to enter in a written provider contract. He says he did so under pressure and felt he had no choice. The contract at pp 51- 66 is a subsequent contract which was signed when the claimant and his partner became joint shared lives providers in November 2016.
25. Because holidays were unpaid the claimant did not take any leave between 2004 and September 2018. The claimant said that he had consistently informed shared lives staff, when they carried out quarterly monitoring and annual reviews, that he was stressed from not having a break. But he says nothing was done about this. However in October 2018 he took seven days holiday and paid a carer to look after his residents during this period. The arrangement was approved by the respondent. The claimant said that when he had looked into the cost of paying for holiday cover it was considerably more than he received himself. But he accepted Ms Parker’s evidence that he could instead forfeit his weekly fee and the respondent would pay for the relief cover, even if this exceeded his weekly allowance.
26. The claimant said he had for some time felt that he should be entitled to paid breaks from his shared lives work. He has become aware of Shared Lives schemes in other areas which pay their providers for holidays and some have generous annual leave entitlements. He presented his claim to the tribunal arguing that he should have the same employment rights as domiciliary care workers employed in care homes. He clarified at the hearing that he sought a declaration that he was a “worker” and primarily sought entitlement to holiday pay

and compensation for lost holidays.

The Law

Working Time Regulations 1998

27. Regulation 13 of the Working Time Regulations 1998 (WTR) provides that a worker is entitled to four weeks annual leave in any leave year. Regulation 13A provides that a worker is entitled to additional annual leave of 1.6 weeks in any leave year beginning on or after 1 April 2009.
28. Regulation 16 provides that a worker is entitled to receive payment in respect of any period of annual leave to which he is entitled under regulations 13 and 13A at the rate of a week's pay in respect of each week of leave. Regulation 30 provides that a worker may present a complaint to an employment tribunal that his employer has failed to permit him to exercise his right to take annual leave or has failed to pay him the whole or any part of any amount due to him under regulation 16.
29. Regulation 2 defines a worker as: "*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"*

Shared Lives: The Legal Framework

30. Since 2004 all adult placement schemes (of which Shared Lives is one) must conform to the Adult Placement Schemes (England) Regulations 2004. Those regulations were made under section 22 of the Care Standards Act 2000 which permits the making of Regulations governing the carrying on of establishments and agencies. The Regulations were accompanied by revised National Minimum Standards issued under the powers of the Secretary of State in section 23 of the Act.
31. The Explanatory Memorandum which was laid before Parliament with the regulations explained that their purpose was to move the focus of regulation from individual adult placement carers (APCs) who were previously regulated as care homes under the Care Standards Act 2000, to adult placement schemes (AP Schemes) which had not been regulated previously.
32. The memorandum explains the objectives of the new regulatory approach as: to lift the burden of regulation from individual APCs, allowing them to focus on their role in providing family-based placements; to place legal accountability on AP Schemes to meet regulatory requirements; to ensure that all adult placement activity is covered by regulation, to provide protection for all service users and equity within the sector and across regions.
33. The memorandum states that "*Adult placement offers short or long-term accommodation and/or care or support provided to a maximum at any one time of three adults, by an Adult Placement Carer who is approved and supported by an Adult Placement Scheme. Adult Placement services include accommodation with care or support in or outside the Adult Placement Carer's home, day services or respite care, and kinship' or 'outreach' support in the community.*

Case No: 1303773/2018

Provided by ordinary individuals and families in the community, adult placements have proved to be a highly valuable service option, giving the people who use them access to family and community life. There are approximately 130 Adult Placement Schemes in England with a workforce of more than 600 people supporting about 5000 AP Carers in 3644 carer households who provide services to more than 6500 vulnerable adults. The Government wishes Adult Placement to continue to expand as an option available to those who may benefit from this type of service, and believes that the best way to achieve this aim is through rigorous and appropriate regulation of Adult Placement Schemes rather than of the carers themselves. The standard to which Adult Placement Schemes worked was not previously consistent across England....”

34. The final paragraph of the memorandum says:

“The proposed regulation of Adult Placement Schemes brings the regulatory framework for adult placements in line with the regulation of fostering and domiciliary care agencies. It will ensure that the Regulatory burden is appropriately placed with the scheme rather than with the carer.”

35. An “adult placement carer” (APC) under the regulations means a person who, under the terms of a carer agreement entered into with a person who carries on an adult placement scheme, provides, or intends to provide, care or support (which may include accommodation in the carer’s home) for service users.

36. Regulation 13(1) of the regulations requires the registered provider to enter into a written placement agreement with the APC (referred to as “a placement agreement”) before a placement is made. This must comply with the conditions specified in paragraph (2) which include:

(a) the service user and placing authority must be parties to the placement agreement;

(b) the placement agreement must specify the number of service users, which shall not exceed 3, that the adult placement carer may have placed with him at any one time

(c) the placement agreement must specify which elements of the service user’s plan are to be met by the adult placement carer under the scheme;

(g) the placement agreement must reflect the obligations of the registered person under regulation 21;

(h) the placement agreement must specify the records to be kept by the adult placement carer in relation to the service user’s plan and require the adult placement carer to keep those records up to date, in good order and in a secure manner, and to return them to the registered provider if the placement is terminated

(i) the placement agreement must specify details of the service user’s plan, the room to be occupied by the service user in the adult placement carer’s home, the fees payable in respect of the placement and who is responsible for paying them, the method of payment, the qualifications and experience of the adult placement carer, the terms and conditions in respect of the accommodation care or other services to be provided and the procedure to be followed where an adult placement carer acts as agent for, or receives money from, the service user.

37. Regulation 17 requires the registered provider to enter into a written agreement with an adult placement carer (referred to in the regulations as “the carer agreement”) which complies with a number of conditions specified in paragraph (2). The agreement must:
- (a) define the respective roles and responsibilities of the registered provider and the adult placement carer;
 - (b) set out the requirements of the adult placement carer’s working practice;
 - (c) specify the insurance cover to be maintained by the adult placement carer which shall include household, public liability and, where appropriate, motor vehicle insurance;
 - (d) specify the procedure to be followed after an allegation of abuse, neglect or other harm has been made;
 - (e) specify that a service user is not to be subject to physical restraint unless restraint of the kind employed is the only practicable means of securing the welfare of that, or another, service user;
 - (f) specify that any allegation of a type mentioned in paragraph (d) of this paragraph or the use of any physical restraint upon a service user is to be reported to the registered person;
 - (g) specify the circumstances in which an adult placement carer may administer or assist in the administration of a service user’s medication; and
 - (h) require the adult placement carer to notify the registered person within 24 hours of the occurrence of an incident described in paragraph (3), and any such notification which is given orally shall be confirmed in writing.

The incidents described in subsection (3) are:

- (a) the death of any service user, including the circumstances of his death;
 - (b) the outbreak of any infectious disease which in the opinion of a registered medical practitioner attending a service user is sufficiently serious to be so notified;
 - (c) any serious injury to a service user;
 - (d) any serious illness of a service user;
 - (e) any event within the placement which adversely affects the well-being or safety of any service user;
 - (f) any theft or burglary within the placement;
 - (g) any incident which—
 - (i) occurs in connection within the placement; and
 - (ii) is reported to, or investigated by, the police;
 - (h) any allegation of misconduct by a service user or their representative in relation to the adult placement carer or a member of his family;
 - (i) any unexplained absence of more than 12 hours of a service user from the adult placement carer’s home.
38. Regulation 19 provides that the registered person shall prepare an adult placement carer handbook and provide a copy of it to every adult placement carer providing, or intending to provide, a placement for the purposes of the scheme. The handbook must include a statement as to:
- (a) the aims and objectives of the scheme as set out in the statement of purpose;
 - (b) the role and responsibilities of adult placement carers;
 - (c) the role and responsibilities of any care manager and any social worker responsible for a service user;
 - (d) the complaints procedure;
 - (e) the procedure for terminating the agreement;
 - (f) the fees payable to the adult placement carer and details of when and by whom such fees will be paid, and the method of payment;

- (g) any other information that the registered person considers necessary to enable the adult placement carer to meet his obligations under the carer agreement.
39. Regulation 19(3) provides that the handbook must also specify:
- (a) the procedure to be followed where an adult placement carer acts as agent for, or receives money from, the service user;
 - (b) the procedure to be followed after an allegation of abuse, neglect or other harm has been made;
 - (c) that a service user is not to be subject to physical restraint unless restraint of the kind employed is the only practicable means of securing the welfare of that, or another, service user;
 - (d) that any allegation of a type mentioned in paragraph (b) of this sub-paragraph or the use of any physical restraint upon a service user is to be reported to the registered person;
 - (e) the circumstances in which an adult placement carer may administer or assist in the administration of a service user's medication;
 - (f) the records to be kept by the adult placement carer in relation to the service user's plan.
40. Regulation 15 sets out the situations in which the provider carrying on a scheme must terminate a placement.
41. The National Minimum Standards for Adult placement Schemes form the basis on which the Commission for Social Care Inspection (CSCI) determines whether adult placements meet the needs of the people who use them and safeguard and promote their welfare and quality of life. They apply from 31 August 2004. Standard 1 sets out the underlying principles which underpin and define all Adult Placements. The remaining standards cover: criteria for accepting a referral (Standard 2); the process for matching a service user to a provider (Standard 3); ensuring carers understand and fulfil their responsibilities in accordance with the principles in standard 1 (Standard 4); the development of a written placement agreement to include a service user's plan setting out how the person's needs will be met (Standard 5); placement monitoring and review (Standard 6); carer support and review (Standard 7); selection procedure and training programmes for AP carers (standard 8); the overall management of the scheme (Standard 9); ensuring key policies and procedures are maintained to protect the person in the placement.
42. Annexes 2-7 of the Standards represent good practice but are not prescriptive. They include guidance on provision of adult placement support carers, the adult placement carer review, the AP carer's skills and knowledge, the Adult Placement Approval Panel and a list of 40 policies to be maintained by AP schemes (including equal opportunities, harassment, safe working practices, food hygiene, fire safety first aid, managing money, working with challenging people, concerns and complaints, key holding and record keeping).

Submissions

43. Mr Keith submitted the claimant could not be an employee because of the absence of day to day control by the respondent and the lack of mutuality of obligation. He could choose when and how to do his work. Nor could he be a worker because his contract did not require him to provide personal service as he had an unfettered right of substitution. There was no obligation on either side to provide work or to be available for it. The provision that after a period of refusing placements (the contract says 9 months) the respondent could apply for him to be de-registered did not equate to a provision that he must be available for work

at all times and accept any reasonable placement offered. He submitted that, contrary to the claimant's belief, he was free to advertise for and take other work alongside his Shared Lives role. Indeed, Ms Parker's evidence was that other Shared Lives carers did so.

44. But, relying on the judgment of the EAT in Bullock v Norfolk County Council, Mr Keith submitted that there was, in any event, no contract between the parties. The Shared Lives Scheme, in the same way as the fostering scheme which was considered in Bullock, was heavily regulated by statute and the agreement between the parties was not negotiated freely.
45. The claimant submitted he was an employee or worker of the respondent because he was subject to considerable control over the way in which he carried out his work, was trained alongside other Council domiciliary workers who were employees of the Council, was subject to regular reviews and inspections, was subject to numerous rules about how he did his job and was not free to negotiate the terms of payment. He was initially happy with the pay he received in 2004 but the respondent reduced this after a period, without consultation, and there has been no increase since. He says he now earns £300 per week less than he earned in 2005. The vulnerable adults he looks after have tenancies of their rooms in his home. He is, in effect, looking after them in their own homes in the same way as domiciliary care workers look after their clients. The respondent works out his fee by ascertaining how many hours he is providing support for and paying those hours at the same rate of pay that it pays its domiciliary care workers. He is subject to strict rules prescribing how he should perform his job, including a term which limits his use of alcohol in the home, in the same way as he would be if employed by the council. He did not believe he was free to take on additional clients otherwise than through the shared lives scheme. He had worked continuously for the Council under the scheme since 2004 and was still caring for one service user who has been with him since 1995. He cannot arrange a person of his choosing to cover his holidays: they must be approved by the Council.
46. The claimant disputed that the Shared Lives scheme was heavily regulated. He said as he did not provide personal care the service he provided did not fall within the area of provision regulated by CQC. He sought to distinguish his case from that of a foster carer because he is not looking after children as a substitute parent. His clients are adults with capacity. He submitted that other authorities who operate shared lives schemes pay their carers when they take annual leave, in some cases up to 42 days per year.
47. The claimant said once he became aware of the case of Pimlico Plumbers and another v Smith [2018] UKSC 29, he felt his situation was analogous to that of Mr Smith and that he should be classed as a "worker" of the Council.

Conclusions

48. Regulation 2 WTR defines a worker as an individual who had entered into or works under a) *a contract of employment or b) any other contract whereby the individual undertakes to do or perform personally any work or services for another party.....*
49. I have first considered whether there was a contract between the claimant and respondent. Mr Keith submits the claimant's position is analogous to that of a foster carer. In Bullock v Norfolk County Council (2011) UKEAT/0230/10/RN the EAT found, following W v Essex County Council [1998] 3 WLR 534 and Rowlands v City of Bradford Metropolitan District Council [1999] EWCA Civ 1116 that that the relationship between a registered foster carer and a local

authority was not one of contract. The EAT cited para 50 of Rowlands where Stuart-Smith LJ said:

“There are in my judgment a number of reasons why the plaintiffs’ claim in contract must fail. First, although the specialist foster care agreement had a number of features which one would expect to find in a contract, such as the payment of an allowance and expense, provisions as to national Insurance, termination and restriction on receiving a legacy or engaging in other gainful employment and other matters to which the judge referred...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 an rate in their most important respects, there is no contract; see Norweb Plc v Dixon [1995] 1 WLR 636, 643F” .

50. Ms Bullock had claimed she was entitled to legal representation under section 10 of the Employment Relations Act 1999 when appearing before a fostering panel which was considering the termination of her approval as a foster carer. That right depended on her being a “worker” as defined by s230(3) of the Employment Rights Act 1996 (the definition is identical to that contained in regulation 2 WTR). The EAT held that the relationship between a foster carer and local authority is heavily regulated and few aspects of the agreement between the respondent and the claimant existed outside the statutory framework. The EAT included in its decision the following key findings of fact from the ET:

“The first agreement that is entered into is the Foster Care Agreement (‘FCA’) That is a generic document. Only one FCA is signed for a period of fostering although FCAs can be updated from time to time...

“The terms, but not necessarily the detailed content, of every clause in the FCA is dictated by the 2002 Regulations and the parties are not free to draw up an agreement which does not include all those terms....

“As well as the FCA the Council has to enter in a foster placement agreement (‘FPA’) every time it places a child with a foster carer. That is

required by section 34(3)of the 2002 Regulations and the terms of the FPA are governed by schedule 6 of the Regulations.”

51. The EAT rejected Ms Bullock’s submission that Rowlands and W were no longer good law, and/or that to apply them in that case would have catastrophic effects for the protection of workers in this country, observing (at para 41) that “W and Rowlands did not change the law”.
52. In the case of Shared Lives providers, the generic document is the provider contract at pp51-65 (referred to as the “Carer Agreement” in the 2004 regulations). As with the FCA, only one is signed though it can be updated, as it was in Mr Everall’s case when his partner became a co-provider. As with the FCA, the terms, but not necessarily the detailed content, of every clause is dictated by regulations, in this case regulation 17 of the 2004 Regulations.
53. In addition to the provider Contract, the respondent enters into a placement agreement every time it places a service user with a provider (pp327-345). That is required by Regulation 13 which sets out the mandatory content of that agreement. The Adult Placement Standards set out further mandatory requirements.

54. The registered provider must also provide a handbook complying with the requirements in regulation 19.
55. Having considered the terms in the provider Contract and Placement Agreements entered into by the parties, I find they cover the mandatory matters set out in Regulations 13 and 17 of the 2004 Regulations and the Adult Placement Standards. The staff handbook contains the further mandatory information required by regulation 19. It is clear that the most important terms of the agreement between the parties are all contained in the statutory scheme.
56. The adult placement scheme thus mirrors the fostering scheme. This is unsurprising since, as the Explanatory Memorandum makes clear, this was the government's intention when the Regulations and Standards were laid before Parliament (see para 33 above).
57. Given these findings, I have concluded that the work the claimant does as a Shared Lives provider is not work done under a contract with the respondent. The contract is not freely entered into and freely negotiated. Neither party is free to negotiate terms of contract outside the scope of the statutory framework in the 2004 Regulations and the National Minimum Standards. The most important terms of the arrangement are contained in that statutory framework which makes it mandatory for there to be a "Carer Agreement" and a Placement Agreement. Those agreements, together with the handbook, incorporate the key requirements of the statutory scheme.
58. Applying the reasoning of the Court of Appeal in W and Rowlands, and the EAT in Bullock, 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.
59. As the claimant is not an individual "working under a contract" he cannot satisfy the first limb of the definition in regulation 2 WTR and so is not a "worker" under those regulations. It is therefore unnecessary for me to determine whether he was "performing personally any work or services" for the respondent, or whether the respondent was the "client or customer of any profession or business undertaking" carried on by him.
60. As he is not a worker, the claimant is not entitled to the minimum periods of annual leave set out in regulations 13 and 13A WTR, nor to any payment under regulation 16 WTR for annual leave he has taken. The claimant's claim is not well-founded and must therefore be dismissed.

Employment Judge V. Jones

28/02/2019