



IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CH/1793/2019

On appeal from the First-tier Tribunal (Social Security and Child Support)

Between:

London Borough of Hillingdon

Appellant

- v -

EB

Respondent

Before: Upper Tribunal Judge Mitchell

Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal taken on 2 April 2019 under number SC 301/17/01605 did not involve an error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal dismisses this appeal.

REASONS FOR DECISION

Summary

1. The issue in this case is whether payments made to a foster carer by an independent fostering agency for caring for a looked after child are to be counted, for housing benefit purposes, as a claimant's earnings. Independent fostering agencies are an important part of the system of state care for looked after children. According to the most recent statistics, at 31 March 2020, 34% of foster carers were approved by independent agencies (*Fostering in England 2019-20*, OFSTED 12 November 2020). I decide that fostering allowances paid to fosters carers approved by

independent agencies, in common with allowances paid to carers approved by local authorities, are not to be counted as part of a foster carer's earnings.

2. In these reasons, "foster carer" and "foster parent" are used interchangeably. While foster parent is the legislative term, I understand that the social work profession tends to prefer the term 'foster carer'.

Background

3. On 2 August 2017, Compass Fostering London informed Miss B, the Respondent, that they had approved her as a foster carer (p.46 of the First-tier Tribunal bundle). On 18 August 2017, Miss B informed her housing benefit authority, the London Borough of Hillingdon, the Appellant, that, as from that date, she had left employment and wished to apply for housing benefit (p.47). She added:

"I am now signed off as a foster carer and as I understand it you are not allowed to take the money I receive from this into consideration when assessing a housing benefit claim."

4. The Foster Care Agreement between Miss B and Compass included the following provision:

- (a) "I...understand that all Compass Fostering work complies fully with the legislation and guidance relevant to fostering services such as: Children Act 1989...";
- (b) "I...understand that we cannot be approved as Foster Carers by more than one Agency, although we can take placement from more than one Local Authority";
- (c) "I...understand that when a child is placed we will be required to enter into a specific written agreement detailing the requirements of that placement and to work to the Care Plan and within the terms of the written Placement Plan. I...accept that we will work within the terms of the Care/Placement Plan and co-operate with the child's Local Authority regarding any arrangements it makes for the child..."
- (d) "I...understand that the responsible placing Authority must review the child's case at intervals of 20 days, 3 months following the start of the placement and 6 months thereafter";
- (e) "Foster Carers to ensure that the child is given the opportunity to participate in the day to day and long term decisions which affect their care

(having due regard to age and understanding of the child and requirements of the Local Authority”);

- (f) “Foster Carers must allow any child placed to be removed from their home, as instructed by the Local Authority and under the requirements of the Fostering Regulations”;
- (g) “As Foster Carers we understand that we must work in partnership with the agency and Local Authority to ensure all placement ends are positive for the children placed with them”;
- (h) “Any allegations made against foster carers will be notified to the placing Local Authority and to the Area Local Authority who will determine jointly what action to take”.

5. In October 2017, a Hillingdon official asked Miss B to disclose the name/s of foster children in her care. Miss B rightly refused, and Hillingdon subsequently apologised to Miss B and agreed that the official should not have sought this information.

6. A Hillingdon internal memorandum of 7 November 2017 read as follows (p.122):

“I telephoned the Placement team on [internal extension] and spoke to [K] who was on duty. She confirmed that Compass Foster Agency is a private run company operated for profit.

She also confirmed they offer more services than just fostering.”

7. On 10 November 2017, Hillingdon informed Miss B that from 25 September 2017 her housing benefit award would be calculated on the basis that her payments from Compass Fostering were earnings. Hillingdon found that Compass Fostering London Ltd was a profit-making independent fostering agency and neither a charity nor a voluntary organisation. As such, concluded Hillingdon, payments made to Miss B by Compass could not be disregarded under the Housing Benefit Regulations 2006. The result was that Miss B’s housing benefit award was reduced to £7.29 per week.

8. On 20 November 2017, Miss B asked Hillingdon to reconsider their decision (p.29). She argued that she fostered looked after children (which is not disputed) so that her fostering payments should not be taken into account as earnings.

9. The note of an internal Hillingdon telephone conversation on 24 November 2017 (p.140) read as follows:

“I telephoned the placement team to gain a better understanding of foster care and particularly the use of outside agencies.

When a situation arises the local authority (placement team) will review the requirements of the child and try to locate the child within LBH services first. If these are not available a request will be issued to the West London Foster Alliance for a suitable placement.

The agencies (of which Compass is part of) will review their available carers and offer a placement.

The decision will be made by the placement team of LBH and confirmed with the LBH social worker for the child.

I have confirmed there are some voluntary organisations such as St Christophers and Barnardo's who offer foster caring.

[Hillingdon] and an in house social worker will remain in contact with the foster carer for the period the child remains in place with the placement.

She confirmed the two ofsted [registration] numbers for Compass..."

10. On 24 November 2017, Hillingdon informed Miss B of their refusal to revise their decision (p.31):

"Compass Fostering Agency is an independent fostering service which is a private company and not a voluntary organisation. Once the need for a placement is identified and the Local Authority are unable to place within its own resources it will pass the request on to the independent fostering agency and in doing so, discharges the functions to them. Therefore any payment received under these arrangements does not fall within regulation 26 [of the Housing Benefit Regulations 2006] to allow the payment to be disregarded."

Proceedings before the First-tier Tribunal

11. Miss B appealed to the First-tier Tribunal against Hillingdon's decision that payments received from Compass Fostering were earnings. Miss B was represented by a solicitor who submitted in writing that (p.144):

(a) Hillingdon had misunderstood the nature of Miss B's foster care. All her fostered children were looked after children and the arrangement between Miss B and Compass could not properly be described as one which effectively took over the local (social services) authority's duties towards a child, as was shown by the placing authority's continued responsibility to oversee and supervise a placement;

(b) arrangements made by a local authority which resulted in placement of a child with Miss B were authorised by paragraph 17 (the solicitor must have meant section 17) of the Children Act 1989 which permits a local authority to make arrangements

with external bodies for the provision of services for children in need and their families. It was “both legal and morally wrong” for Hillingdon to assert otherwise;

(c) the reason for the general disregard of fostering allowances within the Housing Benefit Regulations 2006 was to enable such allowances to be used solely for the benefit of a fostered child, which is underscored by the Regulations leaving fostered children out of account in quantifying a housing benefit award;

(d) the Fostering Network, in a 2011 document, confirmed that the Department for Education, when it set fostering allowances in 2007, did not include housing costs;

(e) central government’s Housing Benefit Manual, at W2.72, provided that local authorities should “treat any fostering allowance...paid to a claimant as income other than earnings, and totally disregard it”, and drew no distinction “between fostering with the Local Authority and fostering any other way”.

12. Miss B attended the hearing of her appeal before the First-tier Tribunal at which she was represented by counsel. A Presenting Office attended for the local authority.

13. The First-tier Tribunal allowed Miss B’s appeal and found that her fostering payments were to be disregarded as earnings in calculating her housing benefit award. The tribunal’s statement of reasons included the following findings (p.163):

(a) Regulation 37(2) of and Schedule 5 to the Housing Benefit Regulations 2006 excluded from earnings any payment ‘in respect of a person accommodated with the claimant under arrangements made by a local authority’;

(b) the evidence showed that local authorities tended to use independent fostering agencies such as Compass if a foster placement could not be found amongst a local authority’s own approved foster carers. Thereafter, the authority would retain responsibility for the placement; all the fostering agency did was offer a foster place to a local authority;

(c) since Compass Fostering was not responsible for the placement/s made with Miss B, arrangements whereby she fostered children amounted to the accommodation of a person under arrangements made by a local authority.

14. The First-tier Tribunal granted the local authority permission to appeal against its decision.

Legislative framework

Housing Benefit Regulations 2006 (“2006 Regulations”)

15. Regulation 21(3)(a) of the 2006 Regulations provides that a child or young person shall not be treated as a member of the claimant’s household, nor as

occupying the claimant's dwelling, "where he is placed with the claimant...by a local authority under section 22C(2) of the Children Act 1989...or by a voluntary organisation under section 59(1)(a) of that Act". The definition of "family", in section 137(1) of the Social Security Contributions and Benefits Act 1992, includes "a person who is not a member of a couple and a member of the same household for whom that person is responsible and who is a child" (this definition applies to the 2006 Regulations: see regulation 2(1)). Accordingly, a child placed with a claimant under section 22C(2) of the 1989 Act is not, for the purposes of the 2006 Regulations, part of the claimant's family.

16. Regulation 37(2) of the 2006 Regulations provides that a self-employed claimant's earnings shall not include any payment to which paragraph 26 of Schedule 5 to the Regulations refers. Insofar as relevant, paragraph 26 refers to:

"Any payment made to the claimant with whom a person is accommodated by virtue of arrangements made—

(a) by a local authority under—

... (i) section 22C of the Children Act 1989 (ways in which looked after children are to be accommodated and maintained),

... (b) by a voluntary organisation under section 59(1)(a) of the Children Act 1989 (provision of accommodation by voluntary organisations)."

17. While certain aspects of the entitlement of foster carers to income-related benefits have been considered by the Upper Tribunal and, previously, the Social Security Commissioners, I am not aware of any authority on the point that arises in the present appeal. *JS v Secretary of State for Work & Pensions* [2016] AACR 13 addressed whether a foster carer could be treated as having a child 'placed' with her when no child lived with her but she acted as an 'on call' mentor for other foster carers. *Wirral MBC v AH and the Secretary of State for Work and Pensions* [2011] AACR concerned whether, for housing benefit purposes, a foster child was included amongst the occupiers of a dwelling. *R(F) 1/96* addressed, for benefit purposes, the nature of foster care and 'boarding out' but, since then, the legislation governing fostering of children in England has been extensively reformed, in particular by amendments made to the Children Act 1989 by the Children and Young Persons Act 2008, and the concept of boarding out is no longer part of the legislative framework for state care of looked after children (the Boarding Out of Children (Foster

Placement) Regulations 1988 have been revoked without re-enactment in the current regulations governing fostering of, and care planning for, looked after children).

Children Act 1989 (“1989 Act”)

18. Under section 22(1) of the 1989 Act, a “looked after child” means a child who is either subject to a care order or whom a local authority provides with accommodation for at least 24 hours in the exercise of a function specified in section 22(1)(b). A reasonably common example of the latter type of looked after child, as I understand it, is one whom a local authority is required to accommodate under section 20(1) of the 1989 Act by virtue of “the person who has been caring for him being prevented...from providing him with suitable accommodation or care”.

19. The 1989 Act imposes a range of duties on local authorities in England in respect of children looked after by them. These duties include requirements to:

- (a) safeguard and promote a child’s welfare (section 22(3)(a));
- (b) provide accommodation for the child (section 22A, for children subject to a care order, and section 20 or other specified provisions, for other looked after children);
- (c) if arrangements cannot be made for the child to live with a parent or other person with parental responsibility for the child, “place [the child] in the placement which is, in their opinion, the most appropriate placement available” (section 22C(5)). The range of permitted placements includes “placement with a local authority foster parent” and, in such cases, the local authority “may determine...the terms on which they place [a child] with a local authority foster parent” (section 22C(6) and (10)(b));
- (d) ensure that a representative of the authority visits a looked after child, as provided for by section 23ZA.

20. “Local authority foster parent” is defined by section 105(1) of the 1989 Act as “a person authorised as such in accordance with regulations made by virtue of (a) paragraph 12F of Schedule 2...”. Regulations permit independent fostering agencies to authorise a person to act as a local authority foster parent: see Part 5 of the Fostering Services (England) Regulations 2011 (“2011 Regulations”).

21. Paragraph 12E of Schedule 2 to the 1989 Act authorises regulations to be made as to the placing of children with local authority foster parents. And paragraph 12G of Schedule 2 confers specific authority for regulations to “make provision as to the circumstances in which local authorities may make arrangements for duties imposed on them by the regulations to be discharged on their behalf”.

22. The 2011 Regulations do not set out the circumstances in which local authorities may arrange for their duties in relation to fostering to be discharged by another body on the authority's behalf. This is instead dealt with by regulation 26 of the Care Planning, Placement and Case Review (England) Regulations 2010 ("2010 Regulations"). Regulation 26(1) permits a local authority to "make arrangements in accordance with this regulation for the duties imposed on it as responsible authority by regulation 14(3) and regulation 22 to be discharged on their behalf by a registered person [in respect of an independent fostering agency]". Regulation 14(3) imposes an obligation to terminate a foster placement in certain circumstances but, of more importance for present purposes is regulation 22 which sets out the conditions that must be complied with before a local authority may place a child with a foster parent.

23. The conditions in regulation 22 of the 2010 Regulations include a requirement that a looked after child must not be placed with a foster parent unless that person is approved by the local authority or another fostering service provider, which includes an independent fostering agency (see the definitions in regulation 2(1)).

24. Schedule 5 to the 2011 Regulations sets out matters to be dealt with in agreements made between a local authority and an independent fostering agency. This includes a requirement to set out "the arrangements for the selection by the responsible authority of [a foster parent] from those approved by the [person registered as the provider of the independent fostering agency]" (Schedule 5.1(2)).

25. Section 59(1) of the 1989 Act imposes duties on a voluntary organisation "where a voluntary organisation provide accommodation for a child". Further duties are provided for by section 61. The duties are broadly reflective of those imposed on local authorities in relation to placements of looked after children. Section 59(2) authorises regulations "as to the placing of children with foster parents by voluntary organisations". And section 62 imposes duties on local authorities whose purpose is to ensure that, where children are accommodated by voluntary organisations, their welfare is satisfactorily safeguarded and promoted. A voluntary organisation is defined by section 105(1) as "a body (other than a public or local authority) whose activities are not carried on for profit". I understand it is accepted that Compass Fostering is not a voluntary organisation as defined by section 105(1).

Arguments

26. The First-tier Tribunal granted the local authority permission to appeal in order that the Upper Tribunal might consider whether it had applied the law correctly.

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27. Hillingdon argue that the First-tier Tribunal misdirected itself in law. Paragraph 26 of Schedule 5 to the 2006 Regulations deals separately with accommodation arrangements made by local authorities under section 22C of the Children Act 1989 and those made by voluntary organisations under section 59. This shows that, for non-local authority arrangements, fostering payments made to a claimant are only disregarded if made by a voluntary organisation which the parties agree Compass Fostering is not. Had the legislative intention been as Miss B argues, paragraph 26 would have referred simply to arrangements made by virtue of section 22C of the 1989 Act rather than arrangements made by a *local authority* under that section.

Miss B

28. Miss B's solicitor submits that the First-tier Tribunal's decision was correct. Hillingdon's argument that Miss B's foster placements could not have been made under section 22C of the Children Act 1989 misconstrues that Act. A local authority retains ultimate responsibility for a looked after child placed through an independent fostering agency. The final placement decision is reserved to the local authority and placing a looked after child with Miss B clearly constitutes an arrangement for accommodation of a looked after child. Regulation 26 of the 2011 Regulations permits a local authority to make arrangements with an independent fostering agency for it to exercise functions 'on their behalf', which shows that the agency's actions are effectively those of the local authority so that, for the purposes of paragraph 26 of Schedule 5 to the 2006 Regulations, the accommodation arrangements are in law made by the local authority.

Conclusion

29. I dismiss this appeal. I am satisfied that the First-tier Tribunal made the correct decision. Payments made to foster carers by independent fostering agencies in respect of placements of looked after children are payments made in respect of a person accommodated by virtue of arrangements made, in relation to England, by a local authority under section 22C of the Children Act 1989. As such, the payments are to be disregarded in calculating self-employed earnings for housing benefit purposes.

30. Section 22C of the 1989 Act confers on local authorities, and no one else, responsibility for making placement decisions for looked after children. This is hardly surprising given the range of duties owed by local authorities towards looked after

children. A local authority's ability to meet those duties would be imperilled if it did not have responsibility for making what must be the most important decision for a looked after child namely where and with whom the child is to live.

31. The legislative framework governing fostering of looked after children provides a role for independent fostering agencies in relation to the placement of such children. Under the 2011 Regulations, local authorities may agree with an agency that a limited range of duties may be exercised by the agency on the authority's behalf. Of particular relevance, for present purposes, is the duty under regulation 22 of the 2011 Regulations. This is a duty in the sense of a prohibition: the child may not be placed with a foster parent unless specified conditions are satisfied. Under the 2011 Regulations, therefore, the agency's role, on behalf of a local authority, is to determine whether the regulation 22 conditions would be met if a looked after child were to be placed with a particular approved foster parent. But that does not mean the agency displaces the local authority as the body responsible under section 22C of the Children Act 1989 for deciding on a looked after child's placement. For that to be so, specific legislative authority would have to authorise an independent fostering agency and local authority to make arrangements for section 22C placement decisions to be made by the agency on behalf of the authority.

32. The 2011 Regulations do not authorise a local authority and an agency to enter into an agreement for the agency to discharge on the authority's behalf its functions under section 22C of the 1989 Act. The local authority retains control over the choice of placement for a looked after child. This retention of control is reflected by the requirement in the 2011 Regulations for agreements between local authorities and independent fostering agencies to set out "the arrangements for the selection by the responsible authority of [a foster parent] from those approved by the [person registered as the provider of the independent fostering agency]". This division of responsibilities was reflected in the terms of the foster care agreement entered into by Miss B and Compass Fostering which made it clear that overall responsibility for the placement remained with the local authority. For instance, it was for the local authority, under the 2011 Regulations, to produce the care and placement plans referred to in the foster care agreement, which governed the operation of a particular placement, and Miss B was required to co-operate with the local authority in any arrangements it made for a particular child.

33. As Hillingdon submit, paragraph 26 of Schedule 5 to the 2006 Regulations does not prescribe a payment "made by a local authority". However, the conclusion drawn by Hillingdon from that omission is misconceived. In my judgment, it is clear that,

here, the 2006 Regulations are designed to be coherent with the legislative framework for fostering looked after children. That framework provides for a local authority to retain responsibility for making placement decisions for looked after children but does not reserve solely to local authorities the activity of paying fostering allowances due to approved foster parents. If a foster parent has been approved by an independent fostering agency, rather than a local authority, the agency will be expected to pay a fostering allowance. Regulation 17(1) of the 2011 Regulations requires a fostering services provider, including an independent agency, to “provide foster parents with such training, advice, information and support...as appears necessary in the interests of children placed with them” and, by virtue of Schedule 5(1) to the Regulations, foster care agreements between an agency and a foster parent must record the “support...to be given to the foster parent”. No doubt, separate financial agreements are entered into between independent fostering agencies and placing local authorities, but such agreements are not for present purposes relevant. The placement, and the accommodation it involves, retains its legal character as an arrangement made by a local authority under section 22C of the Children Act 1989 regardless of who pays the foster parent.

34. The above analysis explains why paragraph 26 of Schedule 5 to the 2006 Regulations does not require payments to be made by the local authority that arranges a placement (including accommodation) under section 22C of the Children Act 1989. Paragraph 26 simply reflects the fact that the Children Act 1989 provides a system under which fostering allowances may be paid either by the placing local authority or an independent fostering agency.

35. On Hillingdon’s construction of paragraph 26 of Schedule 5, it is not only payments made by independent agencies that would be counted as earnings. Payments made by voluntary organisations to individuals who foster looked after children would also count. Paragraph 26’s separate reference to payments by a voluntary organisation under section 59(1)(a) of the Children Act 1989 does not, as Hillingdon assume, catch a fostering allowance paid by a voluntary organisation to those who foster looked after children.

36. A voluntary organisation is not authorised by section 59(1)(a) of the 1989 Act to provide accommodation for a looked after child. The responsibility for providing accommodation for a looked after child falls on a local authority and no other body; this is made clear by section 22C of the 1989 Act. Section 59 regulates the independent provision of accommodation by voluntary organisations. This is shown not only by local authorities’ exclusive obligations in relation to looked after children

under Part III of the 1989 Act, which includes section 22C, but also by the way in which the Act seeks to replicate, where a child is accommodated by a voluntary organisation under section 59, the obligations that would be imposed on a local authority were the child in question a looked after child. There would be no need for section 62 of the Children Act 1989, for example, if section 59 accommodation extended to accommodation for a looked after child. Section 62 requires a local authority to ensure that the welfare of children accommodated by voluntary organisations is satisfactorily safeguarded and promoted. Such an obligation would be unnecessary were the children in question looked after children. The local authority would already be under a statutory duty to safeguard and promote welfare along with a host of connected duties designed to secure a looked after child's welfare.

37. For the above reasons, this appeal is dismissed. Local authorities may not include as a claimant's earnings payments made by independent fostering agencies to foster carers for looked after children. This avoids the clearly anomalous result that some categories of foster carer would benefit from an earnings disregard for fostering allowances, that is carers approved by local authorities, but others would not.

Mr E Mitchell,
Judge of the Upper Tribunal.
Authorised for issue on 7 July 2021.