

AFKA Cymru Legal Newsletter

Winter / early spring 2025

Welcome to the winter / early spring edition of the AFKA Cymru legal newsletter where we aim to provide Welsh specific legal advice and information on all matters relating to permanence planning for children.

Fostering

Foster carer trade unions

The East London Employment Tribunal heard three cases in June 2023, brought by the National Union of Professional Foster Carers on behalf of foster carers from three London boroughs.

The NUPFC has hailed the judgment as a major breakthrough for foster carers and they have had some limited success.

A brief history:

- In *W v Essex County Council* [1999] Fam 90 the Court of Appeal held that the relationship between FSP's and foster carers is not founded in any contract (of employment) but is the product of a statutory regime (i.e. the fostering regulations).
- The case *NUPFC v Certification Officer* [2021] ICR 1397 held that, for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992 the definition of worker does extend to a foster carer. The right to form a trade union is enshrined in Article 11 ECHR – right to freedom of assembly and association. However, this case did not alter the decision that there is no contract of employment
- In the most recent case, *Oni and Others v LB Waltham Forest and Others* [2023] the NUPFC made 4 claims in respect of foster carers:

- 1) **Whistleblowing claim** – this was upheld by the tribunal as a right under article 10 (freedom of expression);
- 2) **Discrimination claim** - this was upheld by the tribunal as a right under article 8 (right to a private and family life);
- 3) **Right to a national minimum wage** – this was not upheld as the right requires a contract of employment
- 4) **Right under the worktime regulations** (paid annual leave) – this was not upheld as the right requires a contract of employment.

The NUPFC have been encouraged by some comments made in previous judgments and have stated that they intend to take the matter to the Supreme Court (they will have to do this to overturn the Essex Court of Appeal Judgment).

A summary of the present law:

As a consequence of the three cases cited above, foster carers have the right, but are restricted, to:

- Forming a trade union
- Making a claim to the Employment Tribunal in respect of whistleblowing
- Making a claim to the Employment Tribunal in respect of discrimination

Continuing with fostering

The Local Government and Social Care Ombudsman's report, 'Fostering better services: Helping to improve council services for foster carers and their children'

This is a very recent report and, though English based, provides relevant information on similar aspects of fostering in Wales.

The **Local Government Ombudsman** investigates complaints from members of the public about local authorities and other organizations providing public services in England. It seeks to resolve complaints, improve services, and provide guidance to councils (local authorities) on dealing with complaints fairly.

In Wales we have the **Public Services Ombudsman Wales**. They have the same powers as the English Ombudsman

The report looks into a number of themes arising from complaints made in England and provides some examples. The themes (which will not surprise practitioners) are:

- **Failure to use the statutory complaints procedure**
- **Information prior to placement** An example of this was where a newly approved foster carer had a child placed with them whose needs were far too complex for a first placement. The lack of information prevented the foster carer from making an informed decision as to the placement. Foster carers should be

given sufficient information to be able to make a decision (with, hopefully, a supportive supervising social worker).

- **Recognising a local authority's responsibility in foster care arrangements**
This is where a LA plays such a large part in arranging the placement that it is, effectively, making the placement, but then refuses to take responsibility for it and calls it a 'private family arrangement' (going against old and established case law). The Ombudsman found that, when having a major role in a placement decision, LA's must recognise the child protection duties and should regard the children as looked after.
- **Support and contact issues** This highlighted a particularly interesting area in terms of contact / keeping in touch arrangements between separated siblings. The example was of a foster carer with a sibling group of three who complained to the Ombudsman that the wishes and feelings of the children, who had asked for face to face contact with their adopted brothers and sisters and believed that that was the plan, were not considered when the plan changed to letter box contact only within the adoption proceedings. No explanation was given for the change of plan. The LA also delayed sharing the younger siblings' settling in letter with the older brothers and sisters, again without explanation. The Ombudsman found that the foster children's views should have been heard during the adoption proceedings, even though the court may not have made a different decision.

The Ombudsman recommended:

- The LA keep records of key meetings and correspondence about care planning
- Social workers write a handover summary of each case
- Foster carers must be kept informed of key decisions to prevent them from giving wrong information or raising foster children's expectations

As we know, older brothers and sisters' wishes and feelings are not necessarily viewed as important, or even relevant, by the court in adoption proceedings. However, from the perspective of the younger children and the plans for post adoption contact / keeping in touch, s1(4)(f) (the extended welfare checklist) is relevant: *the relationship which the child has with relatives and any other person in relation to whom the court or agency considers the relationship to be relevant, including – (i) the likelihood of any such relationship continuing and the value to the child of its doing so.*

It would be good practice to at least inform the court of the wishes and feelings of older siblings, in line with the welfare checklist.

- **Social work visits to children who are looked after.** Here there was a failure to ensure regular social work visits and deal with contact issues. There were numerous changes in social workers, irregular statutory visits and contact with

family was not supervised properly. The Ombudsman found that LA's should listen to foster carers' experiences and use feedback. Also that contact / family time should be planned and managed carefully

- **Fostering payments** The Ombudsman found that LA's must have a clear policy setting out what foster carers should be paid, the difference in allowances and fees (basic and enhanced allowances) and annual agreements with foster carers
- **Allegations against foster carers and the ending of placements** The example here was of foster carers who wished to adopt the children placed with them. The children were moved suddenly as a result of allegations made against the foster carers but those allegations were not investigated properly and the foster carers were not informed of the details of the allegations. The Ombudsman found that when foster carers are willing to offer a long term home the LA must consider these offers seriously. If a child must be moved it must be planned and agreed at a statutory review (unless there is an emergency)

This is another situation that can become fraught with difficulty, particularly where the foster carers have expressed a wish to adopt the children at a late stage, when adoption linking and matching is underway. Foster carers' views should always be sought at an early stage in the care planning process in order to have the time to consider what is likely to be in the child's best interests and plan accordingly

- **Staying Put (English version of When I'm Ready) and leaving care** LA's must be clear how long these arrangements will last
- **Immigration status considerations for children who are looked after** Here the example was of an 18 year old young woman who was a care leaver. Her immigration status had not been resolved whilst she had been looked after and subsequently when reaching adulthood she had no recourse to public funds. She was eventually given leave to remain and was able to take up a university place but two years later than originally planned. The Ombudsman found that LA's must ensure any issues with immigration status are resolved before adulthood.

We have highlighted the importance of immigration status / nationality before in relation to adoption, but it is equally as important for children who are looked after.

- **Foster children with SEN** With a child who is looked after a LA has a duty to secure education and can direct certain schools to admit a child with an ECH plan (Individual development plan (IDP) in Wales)

Adoption

Adoption support

A v Adopt London North [2024] EWFC 373

This was a case involving adoption support services in respect of a non agency adoption. The circumstances of the case were appalling so far as the children and prospective adopter were concerned. For our purposes it is the extent to which the services were needed rather than the facts of the case that matter. This was an English case but our regulations are the same.

The case helps us to understand the powers and duties an adoption agency has in relation to adoption support for those groups of people where there is not a 'duty' set out in the regulations to provide those services. In this case it was a non agency adoption case but the principles may also apply (in very particular circumstances) to the provision of adoption support services to adults who have been adopted. In these two situations the regulations have the same 'duty' to provide only 'counselling, advice and information' under reg 4 of the Adoption Support Services (Local Authorities) (Wales) Regulations 2005.

In this case the adoption agency refused to provide adoption support services to the children and adoptive parent:

'The Local Authority prepared an Annex A report in August 2023 which supported adoption orders being made. In relation to adoption support the report failed to include any assessment of the family's need for adoption support services and contained the legally incorrect assertion that 'the placement is not eligible for adoption support' as it was a 'non-agency adoption.'

Theis J goes back to the primary legislation

'The people who are entitled on request to an assessment of their need for adoption support services are set out in section 4(1) of the Act and ASR 13ASR 4 (our reg 4) limits the local authority's duty in this respect to an assessment of need for support services of the kind to which each category of person is entitled. Local authorities have discretion under section 4(2) of the Act to undertake an assessment for other persons or in other circumstances if they think it appropriate.'

She then goes on to cite s3(3) ACA 2002 which states that as part of the service, the arrangements made for the purposes of subsection (2)(b) (provision of adoption support services) –

- (a) Must extend to the provision of adoption support services to persons who are within a description prescribed by the regulations (ie those set out in reg 4*
- (b) May extend to the provision of those services to other persons.*

So there is a discretion (may) to:

- a) carry out an assessment for services outside the scope of reg 4 (s4(2)) and
- b) provide services to people outside the scope of reg 4 (s3(3)(b))

The aunt's argument went as follows:

(1) The local authority is in breach of its statutory duty to undertake an assessment of A's need for adoption services.

(2) A is not ineligible for adoption support. She is eligible for the full range of adoption support services if the local authority chose to assess her for them. Insofar as the local authority does not assess her for financial or therapeutic support, this is a decision on its part not to exercise its discretion to do so.

(3) Such a decision is amenable to challenge on the usual public law grounds (ie in this case there was such a wealth of evidence to demonstrate that the family needed adoption support services that not exercising the discretion to power to undertake an assessment under s3(2)b), amounted to an unlawful action, on public law grounds, on the part of the AA).

How this may extend to providing adoption support to adopted adults:

- 1) There is no 'duty' to assess or provide adoption support services other than the provision of counselling, advice and information (s3(3)(a) and reg 4);
- 2) There is the discretion to extend the provision of services other than counselling, advice and information (such as therapeutic help) under s3(3)(b);
- 3) The circumstances in which the AA exercises that discretion is important. If there are compelling reasons / evidence (as there was in this case) then it could be seen as being the act of an 'unreasonable' AA to not provide them and the AA could become the subject of a judicial review.

In the end this case was agreed as the AA provided adoption support services (after the aunt's pro bono solicitors had written to the AA threatening JR proceedings). However, Theis J seems to accept the arguments set out by the aunt.

So what do we now know as a result of this case?

- There IS a discretion to both assess and provide support services outside the scope of reg 4 and,
- if the need is very great for those services, that discretion may become a duty in terms of acting as a 'reasonable' public body in exercising that discretion.

This case does not mean that every case of a request for a post adoption support service for an adult who has been adopted will become a 'duty' in terms of acting as a reasonable adoption agency. There may be a small number where the circumstances are so clearly indicating a need that the adoption agency's discretion becomes a duty. At least adoption support teams now know that they are able to provide support if the circumstances dictate.

The new CAR/B form

The new CoramBAAF CAR/B form (Child's Adoption Report / Annex B) is to start its pilot with a number of local authorities within the next couple of months. We will report back in a later issue.

The Children's Wellbeing and Schools Bill

People will be aware of the Bill which is at the report stage in the House of Commons. A great deal of the Bill covers education which is, of course a devolved matter. However, Part 1 of the Bill covers safeguarding provisions and these are areas which are right on the line between what is and what isn't devolved to Wales.

We know that Part 111 Children Act 1989 does not apply in Wales and that anything to do with services to children in need of care and support is devolved and found in Parts 3, 4 and 6 Social Services and Well-being Act 2014. We also know that any secondary legislation (regulations and guidance / codes of practice) in all areas of law, including safeguarding / child protection, is devolved - for example the Wales Safeguarding Procedures.

So what are the main provisions that Welsh Government will be looking at to consider whether they must apply to Wales as well as England or should, as a matter of good practice, apply to Wales?

• Mandating family group decision-making offers before care proceedings

This is definitely a devolved issue. It is hoped that Welsh Government will consider creating a similar provision for Welsh local authorities (with the associated financial support), as we know from research that, when properly conducted and used in a timely way, they can help provide support to the family, prevent care proceedings, identify possible kinship carers and identify who is important to the child for keeping in touch purposes in the event of adoption being the final care plan. The family group decision making model is not quite the same as the family group conference model, which always advocates private family time as part of the conference.

This is a subject which we will discuss at our forthcoming kinship conference on 10 June in Cardiff, where we are lucky to have Y Bont coming to talk about their long experience in providing family group conferences in Wales. Details of the conference can be found on the AFKA website.

• Introducing a Single Unique Identifier for better information sharing

The intention of this clause is to bring together data on children's interactions with different services (social services, police, education, health). This is one of the areas of law which amends the Children Act 2004 which in fact is an England and Wales provision. It would seem nonsensical to have such a provision in England and not in

Wales, particularly in those local authorities where cross border moves occur quite frequently.

- **Strengthening multi-agency child protection teams**

This again is an amendment to the Children Act 2004 but involves arrangements under secondary legislation which is definitely devolved. It mandates English local authorities to ensure that safeguarding partners automatically include all relevant agency education and childcare agencies in their safeguarding arrangements. These arrangements enable education and childcare agencies to have representation at both the operational and strategic decision making levels of these safeguarding arrangements

- **Regulating home education for children with safeguarding concerns**

This is an amendment to English education legislation and so is also devolved. It arises from the Sara Sharif case where Sara was being 'home educated' at the time of her death. If a child is subject to a s47 enquiry or is on a child protection plan their parent will need the LA's consent to home educate that child. If the child is already being home educated (when the Act comes into force) then the LA can require the child to attend school. Again this will surely be an area where Wales will want to adopt such a provision.

- **An amendment to s25 Children Act 1989 (secure accommodation orders)**

This is a devolved area as s25 was in Part 111 Children Act and is now in s119 Social Services and Well-being (Wales) Act 2014.

The aim of the amendment is to reduce the number of applications currently being made for deprivation of liberty orders (DOL's) under the Inherent Jurisdiction of the High Court. It provides a statutory framework for LA's seeking to place children in a new type of accommodation, where they may be 'deprived' of their liberty, rather than 'restricted' and where the accommodation is not specifically 'secure accommodation'. This will provide more flexibility in meeting the individual child's needs, with mandatory review points. Children will also be eligible for their own legal aid which they are not eligible for in DOL's applications.

The provision, theoretically, applies to England only. However, Welsh local authorities are often in the position of having to make an application to place a child in an English secure provision, where an application has to be made under s25 CA. The Part 6 Code of Practice states:

728. Where the intention is to place a child in a children's home providing secure accommodation in England or in Scotland, the application will need to be made to the court under section 25 of the Children Act 1989. Courts in Wales can hear applications under section 119 of the Act or section 25 of the Children Act 1989

It must follow, therefore, that Wales will need this amendment in order to be able to apply for the alternative order and so avoid a DOL's application, under either the amended s119 or s25, depending on the geography of the accommodation / community home.

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