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Unlawful Deductions to Fees or Allowances: Fostering Remuneration and Unlawful Deductions to Wages

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Abstract

There is a duality in the role of the foster carer: They are expected to be both parents to the children in their care and workers for the fostering service provider, on whose behalf they care for the children; yet in England, they are legally recognised as neither. In recent litigation, respondents have presented those two dual roles as mutually exclusive and irreconcilable—therein lies tension. The duality of the role is reflected in the two types of remuneration English foster carers receive—a fee and an allowance—and the distinctive purposes those types of remuneration fulfil. This article considers how a litigious foster carer might seek to recover an underpayment to their fee and/or allowance through the employment tribunal. It takes as its starting point the distinctive purposes of the types of remuneration and recent developments in status-related case law. Application of the law of unlawful deductions to wages—and the importance of the purpose of remuneration—provides a useful paradigm for reconciling the tension of the dual role of the foster carer, understanding them as workers undertaking the work of parenting.

Keywords

allowances; deductions; fees; fostering; purposive approach; remuneration; wages

1. Introduction

In England, foster carers are individuals who are registered with a fostering service provider (often, but not necessarily, a local authority) to provide care for children whose parents or family are unable to do so, from their (that is, the foster carer's) own home. In that role, they look after the children as if they were their own, without taking on parental rights and responsibilities (Davis, 2010, as cited in Mitchell, 2020, p. 10). They do so under the direction of, and are supervised by, the fostering service provider with whom they are registered.

There is a duality in this: Foster carers are expected to be parents to children, carrying the responsibility of parenting, but do so under the control and supervision of the fostering service provider. They enjoy neither the freedom to parent (Government UK, 1989, section 31) nor the protections enjoyed by workers (*W v Essex County Council*, 1999). The perceived dichotomy between these dual roles is reflected in the two types of remuneration paid to foster carers—a fee and an allowance—and their respective distinctive purposes.

In recent years, foster carers have been mobilising (Kirk, 2020), taking collective action and litigating, arguing for recognition of themselves as "workers" (*Glasgow City Council v Johnstone*, 2019; *Oni & ors v London Borough of Waltham Forest & ors*, 2025; *National Union of Professional Foster Carers* [NUPFC] *v The Certification Officer*, 2021). While many fostering service providers argue that that status would be impractical (Booth, 2020) and detrimental to the welfare of the children who foster carers care for (*NUPFC v Certification Officer*, 2021; *Oni & ors v London Borough of Waltham Forest & ors*, 2025). This article considers how a litigious foster carer might sue for their remuneration. In so doing, it proposes that human rights law might provide a means of overcoming the hurdle of precedents arising from *W v Essex County Council* (1999), which prevents foster carers from accessing the suite of workers' rights, and considers how far that approach and the reasoning of the employment tribunal might assist in reconciling the tension of the foster carer's dual role.

This article takes, as its starting point, an assessment of the dual purposes of foster care and considers how this is reflected in the two types of remuneration they receive. When viewed through the lens of a (theoretical) unlawful deduction to wages claim, usually only available to workers and employees, the article considers how a litigious foster carer might sue for their remuneration, and how the employment tribunal might treat their remuneration. In so doing, the reasoning of the tribunal provides a potentially useful paradigm for reconciling the perceived dichotomy between their dual role of workers and parents, distinguishing between the working relationship and the work of foster carers and treating foster carers as workers undertaking the work of parenting.

2. Dual Role: Parent and Worker

Foster carers simultaneously fulfil two roles: They are workers and parents on behalf of the fostering service providers (usually local authorities), which typically retain many parental rights and responsibilities for the children in their care (Government UK, 1989, section 31). Foster carers are legally recognised as neither parents nor workers and therefore enjoy neither the freedom nor protections either status might provide (Government UK, 1989, section 31; *W v Essex County Council*, 1999).

The parental role is emphasised in the requirement under Schedule 5 of the Fostering Services (England) 2011 Regulations to "care for any child placed with them as if the child was a child of the foster parent's family" (Government UK, 2011). Many of the tasks carried out by foster carers in pursuit of this are tasks ordinarily carried out by parents (Mitchell, 2020)—providing food, personal hygiene, school runs, and emotional support for the children in their care. It has been suggested that "effective foster care means good parenting" (Sellick, 2006, in Mitchell, 2020, p. 10).

However, foster carers do not carry out their role with the same freedom as parents: They do so under the supervision and control of the fostering service providers (Mitchell, 2020; *Oni & ors v London Borough of Waltham Forest & ors*, 2025, para. 73–80). They must follow the placement plan for the child (Government

UK, 2011, schedule 5, section 5), are appointed a supervising social worker who regularly holds "supervision meetings" (Department for Education, 2011; Mitchell, 2020), and are subject to annual reviews and panels to determine their suitability to foster under section 28 of the *Fostering Services (England) Regulations, 2011* (Government UK, 2011). This control has been used to support arguments for workers status (*Glasgow City Council v Johnstone*, 2019; *Oni & ors v London Borough of Waltham Forest & ors* 2025; *NUPFC v The Certification Officer*, 2021). Similarly, many of the tasks carried out by foster carers are not those associated with the ordinary parenting role (Mitchell, 2020), such as keeping detailed logs of children's activities, health and safety inspections of homes, attending training, and seeking permission for routine activities such as haircuts.

Despite being presented as mutually exclusive and irreconcilable, there is clearly some intersection between the parental and worker roles of the foster carer. That intersection appears to lie in the work they carry out, which resembles both the parental role and includes tasks unique to foster care which are carried out under strict supervision and control. Foster carers may therefore be more accurately described as workers undertaking the work of parenting.

3. Fostering Remuneration: Regulation and Purposes

The relationship between the fostering provider and foster carer is primarily formalised and maintained through the *Fostering Services (England) Regulations 2011* (Government UK, 2011) and *The Fostering Services: National Minimum Standards* (Department for Education, 2011), published under the Care Standards Act (Government UK, 2000, section 23). The procedural requirements for becoming "registered" as a foster carer are set out in sections 28 and 27 of the *Fostering Services (England) Regulations 2011*. That process requires an extensive assessment and a panel for determining "suitability to foster," culminating in the foster carer and the fostering service provider entering into a foster care agreement (Government UK, 2011, schedule 5). That agreement sets some minimum terms, but much of the detail of the relationship is found in the *Fostering Services: National Minimum Standards* document (Department for Education, 2011).

The minimum terms of the foster care agreement are set out in the "Matters and Obligations in Foster Care Agreements" of the *Fostering Services (England) Regulations 2011* (Government UK, 2011, schedule 5)—although parties are also free to include additional terms. It includes, for example, the foster carer's terms of approval, the support and training to be provided, and the procedure to review their approval. It also sets out the foster carer's obligations, including, for example, to notify the fostering provider of any expected changes to the fostering household, and to comply with the placement plan for any child placed with them. Notably, it contains no remuneration obligations.

The obligation to pay an allowance is found in section 22C (10)(b) of the Children Act of 1989, which states that a local authority may determine the terms on which they place a child with a foster carer, including regarding payment. The *Fostering Services: National Minimum Standards* requires fostering service providers to pay foster carers a "national minimum fostering allowance" during the time a child is placed with them (Department for Education, 2011, standard 28.1, p. 55). The amount is set annually by the Government and varies largely according to the age of the child, but parties are free to agree on any amount that meets or exceeds the national minimum allowance.

The Fostering Network describes the allowances as "designed to cover the cost of caring for a child in foster care. This includes food, clothes, toiletries, travel and all other expenses incurred and varies depending on the age of the child" (Foster Carer Finances, n.d.). The *Foster Care in England Report* describes the allowance as paid "to cover the cost of caring for a child" (Narey & Owers, 2018, p. 44). Policies of fostering providers also often reflect this. For example, the policy of the London Borough of Waltham Forest described allowances as "expected to cover all food, clothing, pocket money, personal and household expenditure" (*Oni & Ors v London Borough of Waltham Forest & Ors*, 2025, para. 85). Other fostering providers, such as the Staffordshire County Council, prescribe how certain percentages of the fostering allowance should be spent on the children (Foster with Staffordshire County Council, n.d.). Thus, the payment of an allowance to foster carers is intended to cover the costs associated with caring for a child. It is intended to be spent quite specifically on the care of the child and the ordinary expenses that might be incurred.

Standard 28 of the *Fostering Services: National Minimum Standards* document also refers to fees, but is silent as to the amount. It requires that:

> There is a clear and transparent written policy on payments to foster carers that sets out the criteria for calculating payments and distinguishes between the allowance paid and any fee paid. The policy includes policy on payment of allowances and any fee during a break in placement or should the fostering household be subject to an allegation. (Department for Education, 2011, p. 55)

The payment of fees to foster carers, which appears to be aligned with the gradual "professionalisation" (Kirton, 2013) of foster care, is generally understood as intended to recognise a foster carer's time, skills, and experience (Foster Carer Finances, n.d.; Narey & Owers, 2018). Many local authorities have developed a fee system linked with training and experience—often foster carers may progress through "skill-levels" upon demonstrating certain competencies and thereby receive an increased fee. Leeds and Hampshire are highlighted as examples of such a model (Narey & Owers, 2018). Fees, then, should be understood as intended to remunerate foster carers for their time, skills, and experience in carrying out the work of caring for a child and appear to arise from the working relationship with the fostering provider. The fee, therefore, has much in common with wages.

The two types of remuneration, and their distinctive purposes, reflect the dual roles fulfilled by foster carers. Allowances compensate for the costs of caring for a child (the work), whereas the fee—akin to the work–wage bargain—arises from the foster carer's working relationship with the provider.

4. Fostering and Litigation

There is a long history of foster carers seeking to challenge authorities in court to recover monies owed to them. In a recent study, Rhodes (2024) followed the stories of 50 petitions by women carrying out "non-kin childcare" (akin to modern-day foster care) who had cause to challenge the authorities in court. Foster carers continue to have cause to challenge the authorities in court today; however, the manner in which such complaints are litigated has significantly changed, particularly given that the ruling in *W v Essex County Council* (1999) precludes foster carers from raising wages complaints in the employment tribunal.

In Rhodes' study, she reviewed the court papers of women who petitioned the courts for payments, which were not received, in exchange for looking after children in the Parish. Rhodes identified that these women were more successful in persuading the courts to force Parish authorities to pay, particularly when compared with biological parents (Rhodes, 2024, pp. 6, 13). In part, Rhodes attributes this success to the carers' ability to present their arguments as wage complaints, based more on broken promises (even contracts) than pleas for help (Rhodes, 2024, pp.13–14). Rhodes cites one petitioner, who described themselves as having "contracted" with Parish authorities, describing their language as "formalised and legalistic" (Rhodes, 2024, p. 7). Whilst acknowledging the possibility that those were not the petitioner's words, it is interesting to note the legal, rather than emotional, arguments.

Today, foster carers are unable to make these legal arguments in the employment tribunal. Since *W v Essex County Council* (1999) is the "authority" for the position that a foster care agreement is not contractual, foster carers are legally self-employed and without access to the suite of rights afforded to employees or workers (Government UK, 1996, section 230). The reasoning in *W v Essex County Council* (1999) has since been followed in a number of decisions (see *Armes v Nottinghamshire County Council*, 2017; *Bullock v Norfolk County Council*, 2011; *Rowlands v City of Bradford Metropolitan District Council*, 1999). Meaning modern-day foster carers are precluded from the more persuasive legal arguments.

Foster carers have recently sought to challenge this position. Either seeking to overturn *W v Essex County Council* (1999) as no longer representing good law, or through human rights law to access certain claims. The argument that *W v Essex County Council* (1999) is no longer good law was (unsuccessfully) presented in *Oni & ors v London Borough of Waltham Forest & ors* (2025) on the basis that it is not consistent with the UK Supreme Court's purposive approach in *Uber BV and ors v Aslam and ors* (2021). That purposive approach indicates that, in questions of worker status, the starting point should be the purpose of protecting vulnerable workers—subordination or dependency and control being the touchstone of that vulnerability (*Uber BV and ors v Aslam and ors*, 2021). The alternative, more successful, argument presented in both *NUPFC v The Certification Officer* (2021) and *Oni & ors v London Borough of Waltham Forest & ors* (2025) is that, to comply with human rights law, foster carers must have access to *some* workers' rights.

In *NUPFC v The Certification Officer* (2021), the claimants successfully argued that the exclusion of the NUPFC from being listed as an official trade union under Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act of 1992 amounted to an unlawful interference with the human rights of the members of that organisation to form and join a trade union (Council of Europe, 1950, art. 11). As a result, *only* for the purposes of determining whether an organisation "consists wholly or mainly of workers" (Government UK, 1992, section 1), and can therefore be listed as a trade union, foster carers can be interpreted as workers (*NUPFC v The Certification Officer*, 2021, para. 147).

Similarly, in *Oni & ors v London Borough of Waltham Forest & ors* (2025), the claimants argued, among others, that their exclusion from claims under the Equality Act of 2010 (relating to discrimination), and Part IVA of the Employment Rights Act of 1996 (relating to whistleblowing) amounted to an unlawful interference with their human right to a private life (Council of Europe, 1950, art. 8.) and freedom of expression (art 10). Judge Crosfill found that the claimants' enjoyment of their convention rights was not "secured without discrimination" on the ground of the "other status"—that being the status of foster carer, courtesy of the ruling in *W v Essex County Council* (1999; see also *Oni & ors v London Borough of Waltham Forest & ors*, 2025, para. 330). Their exclusion

from those claims was not found to be a proportionate measure pursuant to a legitimate aim, which therefore amounted to an interference with Art. 14 of the European Convention on Human Rights (*Wandsworth London Borough Council v Michalak*, 2002).

Foster carers in Rhodes' study made contractual arguments to challenge the non-payment of wages (Rhodes, 2024). Following *W v Essex County Council* (1999), that claim is not available in the employment tribunal to foster carers. Instead, foster carers seek to dilute the pervasive effect of *W v Essex County Council* (1999) by using human rights law to access at least some of the rights and protections afforded to workers.

5. Unlawful Deductions to Fees and Allowances

This article seeks to apply the law of unlawful deductions to wages to foster carers' fees and allowances to consider how a modern-day foster carer might bring such a claim. But how might the employment tribunal treat the two types of remuneration, and does that reasoning assist in navigating the tension in the dual role of foster carers?

We should briefly acknowledge alternatives to the employment tribunal, such as civil claims, judicial review, or indeed extra-judicial avenues such as the formal complaints mechanism. These avenues are largely outside the scope of this article—however, their deficiencies as alternatives to the employment tribunal were explored in *Oni & ors v London Borough of Waltham Forest & ors* (2025), with the judge noting the benefits and expertise of the tribunal in dealing with matters arising from work (para. 370–374).

Sections 13 and 14 of the Employment Rights Act of 1996 confer upon workers the right not to suffer unlawful or unauthorised deductions to their wages, and the right to bring a claim before an employment tribunal for such deductions. To do so, there must have been a deduction (*Delaney v Staples*, 1991) and that deduction must have been made to wages, defined in section 27 of the Employment Rights Act 1996 as "any sums payable to a worker in connection with his employment, including whether under his contract or otherwise" (Government UK, 1996). The deduction would also have to have been authorised by a contract term or other agreement (*Discount Tobacco and Confectionary Ltd v Williamson*, 1993).

Given that claims under section 13 of the Employment Rights Act of 1996 are reserved for workers or employees (as defined in section 230 of the Employment Rights Act of 1996) and the precedent set in *W v Essex County Council* (1999), litigious foster carers could attempt to bring claims within the ambit of a human right (*Oni & ors v London Borough of Waltham Forest & ors*, 2025). They would then have to bring the fees and/or allowances within the statutory definition of wages.

The claimants in *Oni & ors v London Borough of Waltham Forest & ors* (2025) successfully argued that their exclusion from certain claims, based on their foster carer status, amounted to an interference with their human rights, in breach of Article 14 of the European Convention on Human Rights—which prohibits discrimination in the enjoyment of the rights and freedoms set out in the Convention (Council of Europe, 1950, art. 14). Whilst unlawful deductions to wages was not averred, they did argue that their exclusion from claims under the National Minimum Wage Act of 1998, the Working Time Regulations of 1998, and the Working Time Directive of 2003, interfered with Article 1 Protocol 1 (hereafter A1P1) of the European Convention on Human Rights: The right to one's peaceful enjoyment of possessions (Council of Europe, 1952). These arguments were

rejected as circular and arising from something to which they were not entitled (*Oni & ors v London Borough of Waltham Forest & ors*, 2025, para. 289). A1P1 cannot be used to create a right or possession (Meade, 2022). An unlawful deduction in a wages claim would not suffer these deficiencies, as it is already established law that salary earned is a possession within A1P1 (*Baka v Hungary*, 2014, as cited in Meade, 2022).

A deduction is likely to be fact-specific, but if less is paid than was expected—even nothing—that might amount to a deduction (*Delaney v Staples*, 1991). The litigious foster carer would need to be mindful that the deduction is not, in fact, a recovery of an overpayment, which is excluded from claims under section 13 (Government UK, 1996, see also section 14). Unfortunately, this is reasonably foreseeable given that foster carers are often paid in advance and placements can end abruptly (for example, when an allegation results in the removal of a child under section 47 of the Children Act of 1989). Assuming that there has been a deduction, the foster carer would carry the burden of proving that the deduction was made to "wages" as defined by statute. Case law suggests that the employment tribunal would consider the purpose of any remuneration in determining whether it constitutes "wages."

In *Lucy and Ors v British Airways plc* (2009), the appeal tribunal considered whether several allowances amounted to wages (and were therefore within the jurisdiction of the employment tribunal). This case concerned employees of British Airways, working as cabin crew, who were eligible to earn allowances when flying. In 2006, the Manchester depot was closed and, although cabin crew were not made redundant, they ceased to fly (and, therefore, to earn the allowances). In finding that the allowances were not "wages," or therefore justiciable in the employment tribunal, Judge Burke drew a distinction between:

> Wages or salary payable periodically to an employee who works or is ready and willing to work if no work is provided…[and] remuneration which is only earned if specific tasks are carried out, such as commission for sales, allowances for flying or allowances for overnight stays. (*Lucy and Ors v British Airways plc*, 2009, para. 39)

This distinction lies in the purpose of the remuneration—wages are paid because of the employment relationship, whereas, in this case, an allowance is contingent upon specific tasks.

The purported purpose of the foster carer's fees—remuneration for their time, skills, and experience—may point to the fee element being akin to wages. Foster carers receive the fee when there is a child in placement, and some, such as the National Fostering Group, are paid on a retained basis (National Fostering Group, n.d.). They also remain available to take on a placement, and often the fostering provider's control and supervision continues when a child is not in placement; for example, by completing training and reflecting on recent placements. Irrespective of whether there is an ongoing placement, foster carers should have a supervising social worker assigned to them (Department for Education, 2011, p. 55, standard 28), and supervision meetings often continue irrespective of whether there is a child in placement. Similarly, the fee's purpose in remunerating for time spent has more in common with the work–wage bargain.

In contrast, allowances are intended only to cover the costs of caring for a child in care and are (usually) contingent upon a child being in placement. In reaching his conclusion in *Lucy and Ors v British Airways plc* (2009), Judge Burke drew an analogy with a lorry driver who receives a meal allowance, irrespective of whether he incurs the cost of the meal. Similarly, foster carers receive an allowance to cover costs of caring for the child,

e.g., providing food, regardless of whether they incur precisely that cost in providing the food. Allowances paid to foster carers—such as those in Staffordshire, whose spending of the allowance is quite tightly prescribed by the fostering provider—may be more likely to be found to have been made to cover costs, and therefore constitutes an allowance rather than "wages" as defined by section 27 of the Employment Rights Act 1996.

The lawfulness of any deduction is likely to be fact-specific but would have to be consensual. The foster care agreement is not required to include financial information. It is, therefore, more likely that the lawfulness of any deductions would arise either from policies that should set out what should happen to a foster carers' remuneration in the event of a child being removed from their care (as required under the *Fostering Services: National Minimum Standards* document; see Department for Education, 2011), or from individual agreement with the carer in advance. In the absence of a statutory requirement, practice varies between providers, but some continue to pay foster carers during an investigation when a child is removed, either until its conclusion or for a pre-determined number of weeks (Swindon Borough Council, n.d.). Failure to make payments in accordance with that policy might then amount to an unlawful deduction. It is more likely that fostering providers would seek individual agreements to cease payments during this period. This itself has problematic implications of a power imbalance—the very power imbalance that worker status ought to protect against (*Uber BV and ors v Aslam and ors*, 2021).

An unlawful deduction in wages claim appears to be available to the modern-day litigious foster carer, despite the hurdle of *W v Essex County Council* (1999): By relying on A1P1 and Article 14 of the European Convention on Human Rights (Council of Europe, 1952) and demonstrating that, at a minimum, the fee element—based on its purpose—likely constitutes wages (assuming a non-consensual deduction rather than an overpayment). The application of the law of unlawful deductions to wages reveals a useful paradigm of distinguishing between the *working relationship* and the *work*: the fee arising from the working relationship and the allowance from the work itself. That paradigm, then, might usefully be applied to common objections to worker status to reconcile the tension in the two roles.

6. Application of the Paradigm

When facing worker status claims by foster carers, respondents argue that it would fundamentally damage foster care. For example, the then executive director of social care for Glasgow City Council described it as meaning "literally overnight—the end of foster care" (Booth, 2020). Objections to foster carers' worker status may be broadly separated into two categories: one theoretical and the other practical. Theoretical objections focus on worker status as inconsistent with the purpose of foster care being to prioritise the best interests and needs of the children (described as a "mandate analysis"; see Bogg, 2018). Practical objections suggest that access to worker status will also grant access to rights that are not practical for foster carers to exercise. Does applying the paradigm of viewing foster carers as *workers doing the work of parenting* to both theoretical and practical objections assist in navigating the tension of the dual roles that are often presented as mutually exclusive and irreconcilable?

The "mandate analysis" suggests that, because foster carers are mandated to care for vulnerable children and prioritise their needs, the purposes of foster care are inconsistent with worker status (Bogg, 2018). That familial purpose of foster care is emphasised by the "matters and obligations" referred to in the *Fostering Services (England) Regulations 2011* which obliges foster carers to:

> Care for any child placed with them as if the child was a child of the foster parent's family and to promote that child's welfare having regard to the long and short-term plans for the child. (Government UK, 2011, schedule 5, section 2(a))

However, when foster carers are understood as workers carrying out the work of parenting, it becomes easier to overcome this objection. "Mandate analysis" could be applied to any care work (Bogg, 2018) and, in *Oni & ors v London Borough of Waltham Forest & ors* (2025), when considering the availability of whistleblowing claims, Judge Crosfill drew a comparison between health workers and foster carers, pointing to the extent to which they both work with vulnerable people. The argument's focus on the nature of their work can be extended to suggest that the "mandate" should be better understood as *how* the work (of parenting) is carried out (perhaps even as a standard of care) rather than relevant to determining the nature of the working relationship. Such a position is more consistent with the purposive approach taken in *Uber BV and ors v Aslam and ors* (2021).

It has further been suggested that the conferral of workers' rights would risk the commodification of care (which is argued to be inconsistent with the familial purpose of foster care). As Judge Crosfill pointed out in *Oni & ors v London Borough of Waltham Forest & ors* (2025), and as was discussed earlier in relation to unlawful deductions to wages, at the point of litigation in the employment tribunal the commodification has already happened: The litigious foster carer would be seeking to enforce a pre-existing agreement to payment rather than creating an expectation of payment.

Respondents making a familial argument also make a jurisdictional one (*Oni & ors v London Borough of Waltham Forest & ors*, 2021, para. 331), arguing that the conferral of worker status will lead to decisions about children being made in the inappropriate forum of the employment tribunal. Again, viewing foster carers as workers undertaking the work of parenting goes some way to resolving this. Matters relating to the working relationship would be resolved in the employment tribunal, which is experienced in distinguishing employment from domestic matters (see *Tiplady v City of Bradford Metropolitan District Council*, 2017, in *Oni & ors v London Borough of Waltham Forest & ors*, 2021, para. 354). The substance of the work, for example, the child's placement plan, would be determined through, presumably, the family courts.

Practical arguments against worker status for foster carers suggest that foster care is a 24/7/365 role (*Oni & ors v London Borough of Waltham Forest & ors*, 2021) and that worker status carries rights which are not practical, e.g., to a minimum hourly rate (Government UK, 1998b, section 1), rest (Government UK, 1998, sections 4, 10, 11, 12) or leave policy (Government UK, 1998a, section 13). Following the trend discussed earlier—that is, of using human rights as a means of accessing some workers' rights— the litigious foster carer would be required to bring their claim within the ambit of a human right (*Wandsworth London Borough Council v Michalak*, 2002). It would also potentially invite questions as to how to define the time spent undertaking the work of parenting. Arguably, this does not appear to entirely reconcile the tension between the legal expectation that workers only work for limited periods of time (Government UK, 1998a) and the 24/7/365 nature of parenting—leaving foster carers in the unsatisfactory position of lacking in the protections afforded to workers.

6.1. Human Rights as a Means of Accessing Some Workers' Rights

Whilst the earlier analysis of *Oni & ors v London Borough of Waltham Forest & ors* (2025) presents human rights as a means for the litigious foster carer to access workers' rights, the potential of that strategy is limited. It only

allows access to those rights that litigants can bring within the ambit of a human right (*Wandsworth London Borough Council v Michalak*, 2002).

Oni & ors v London Borough of Waltham Forest & ors (2025) indicates that minimum wage and working time rights would not fall within the ambit of A1P1. There is some case law to indicate that challenges might be brought within the ambit of other human rights; for example, under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to a private life; see Council of Europe, 1950), where compulsory overtime impinges upon private life, or the observance of holy days under Article 9 (the right to religious freedom; see also McCann, 2010). There may therefore only be limited circumstances when foster carers could bring their working time and minimum wage complaints within the ambit of a human right.

To a certain extent, this strategy of gradually bringing claims which can be brought within the ambit of a human right might be viewed positively as giving more agency to foster carers themselves to choose which rights best reflect the reality of their work, and to therefore litigate over. However, thus far it has only enabled access to limited rights—for an organisation representing them to be listed as a trade union, and to bring claims for discrimination and whistleblowing (*NUPFC v The Certification Officer*, 2021; *Oni & ors v London Borough of Waltham Forest & ors*, 2021). A presumably unintended consequence of this strategy, then, may be that there are some rights and claims that remain inaccessible to foster carers. In turn, this leaves foster carers vulnerable to underpay and overwork—the purpose of the worker status being to protect workers from both these things (*Uber BV and ors v Aslam and ors*, 2021, para. 71).

6.2. Defining the Work of Parenting

Even if foster carers could bring claims within the ambit of a human right, this will inevitably invite consideration as to when foster carers are "working." One answer to such considerations may be to reject the "always on" depiction of foster care (*NUPFC v The Certification Officer*, 2021, para. 39) and clearly delineate when precisely foster carers are working (or rather when they are undertaking tasks that would be considered working time). Such an approach might be consistent with the tribunal's approach of assessing the purpose of remuneration when determining whether it constitutes wages (*Lucy and Ors v British Airways plc*, 2009). If the purpose of the fee is rewarding time, skills, and experience (Narey & Owers, 2018), and employment status is contingent upon subordination and control (*Uber BV and ors v Aslam and ors*, 2021), time spent on activities such as supervision meetings or training, which are undertaken under the control and supervision of the fostering provider, might reasonably be considered working time, for which foster carers are being remunerated by way of their fee (wage). Provided the foster carer did not spend too much time on these activities, this may also go some way to resolving objections relating to the working time and national minimum wage. This also has similarities with the reasoning adopted in *Royal Mencap Society v Tomlinson-Blake* (2021) relating to whether sleep-in shifts constituted working time. In that case, the court drew a distinction between time spent working and time spent available for work—finding that time spent working would be relevant for the purposes of calculating compliance with the national minimum wage, whereas time spent available for work would not.

The argument that foster carers are workers doing the work of parenting, in working time and national minimum wage claims (which essentially ask claimants to tell the tribunal *when* they are working), naturally invites a delineation between activities which are work and those which are not. As was discussed in *Oni &*

ors v London Borough of Waltham Forest & ors (2025, para. 70–72), this is a difficult, if not impossible, task. The example given by Judge Crosfill was the claimant who spent an entire night checking on the welfare of a child who had a history of self-harm. The foster carer was "required to be available to care for the child 24 hours a day" (*Oni & ors v London Borough of Waltham Forest & ors*, 2021, para. 71). Or as Lord Justice Underhill put it in *NUPFC v The Certification Officer* (2021, para. 39), they are "always on."

Further, even if time or tasks could be delineated in this way, such an analysis assumes that the tasks undertaken by foster carers can be neatly categorised as tasks which develop their skills and experience and/or time spent at the direction of the fostering provider. Many of the tasks undertaken by foster carers do not necessarily fit either of these categories. Consider cooking dinner—this is clearly the work of parenting, but it does not clearly develop skills or experience and is unlikely to be undertaken at the direction of the fostering provider—other than expectations that foster carers assist children in maintaining a healthy diet, which ranges from quite prescriptive requirements relating to portions of fruit and vegetables to less prescriptive requirements (Fostering with Wiltshire Council, 2024). More concerningly, even if those tasks could be delineated, it may result in downward pressure on fees—if fostering providers felt that they need only remunerate foster carers, at a national minimum wage rate, for the (potentially limited) time spent on certain tasks.

By distinguishing the *worker* from the *work* (of parenting), it is possible to overcome the theoretical objections to the worker status for foster carers—indeed, it goes some way to reconciling them. By placing the familial purpose of foster care and the best interests of the children at the centre of the work (rather than the working relationship), we can think of it as a standard of care rather than determinative of a working relationship. However, when that paradigm is confronted with the legal expectation that workers do not work 24/7/365 and work for at least an hourly minimum wage, it becomes more challenging. How this is resolved may depend on the determination of litigious foster carers: If *W v Essex County Council* (1999) cannot be set aside, they may be forced to accept the limitation that they can only pursue *some* workers' rights (leaving them vulnerable to underpay and overwork). In so doing, they may still be forced to try to artificially define the work of parenting in a way that likely does not reflect the reality of the work. Neither represents an entirely satisfactory outcome.

6.3. Pragmatism Over Legalism?

Although largely out of the scope of this article, extra-judicial solutions should be acknowledged. It is possible that fostering providers may turn to practical means of avoiding the risk of litigation, or legislation might overtake litigation. Either of which could change the practical functioning of foster care outside the employment tribunal.

For example, fostering providers might rely more on kinship care rather than foster care, although there have been recent cases that emphasised that kinship carers ought to receive the same training and benefits as foster carers (*London Borough of Tower Hamlets v R X*, 2013). This means that fostering providers would be well-advised to exercise caution in such an approach. Alternatively, they might start to change the way fostering is organised.

There has been an increased use of "Mockingbird" constellations in the UK in recent years (The Fostering Network, n.d.). Although its merits are outside the scope of this article, the basic idea is that foster carers

operate in a constellation caring for each other's placements on both a planned and ad-hoc basis to replicate the extended family model. This might allow foster carers to have rest breaks—mitigating against the possibility of working time or national minimum wage claims—without causing the potential damage to placements discussed in *Oni & ors v London Borough of Waltham Forest & ors* (2025, para. 237–238). Of course, this would not resolve the lack of status, but might afford foster carers the rest time and remuneration they may otherwise want to enforce.

Alternatively, legislatures might follow the advice of Lord Justice Underhill to "introduce bespoke legislative provision for the position of foster carers, which would either preserve the present exclusion or provide for rights appropriate to their very unusual role" (*NUPFC v The Certification Officer*, 2021, para. 152). In *Oni & ors v London Borough of Waltham Forest & ors* (2025), the judge pointed to the position of health workers as having been specifically included by legislation to enjoy whistleblowing protections. A similar approach might see legislation introduced to afford foster carers specific rights. Although again, this may still not afford foster carers the full suite of workers' rights and continue to leave them vulnerable to underpay and overwork.

It has been suggested that the two roles of the foster carer—parent and worker—are mutually exclusive and irreconcilable. Application of the paradigm that foster carers are workers undertaking the work of parenting goes some way to reconciling them by overcoming the theoretical objections relating to consistency with the familial purposes of foster care. It separates the working relationship from the work, placing those familial purposes at the centre of the work. However, this is not true of all claims. National minimum wage and working time claims, which revolve around time spent on specific tasks, resting time, and remuneration per hour, may be more difficult to bring within the human rights arguments presented in *Oni & ors v London Borough of Waltham Forest & ors* (2025) and *NUPFC v Certification Officer* (2021), and require an artificial delineation of which tasks constitute the work. In the absence of any pragmatic solution, there appears to be no satisfying resolution to the practical concerns surrounding the unsatisfactory employment status of English foster carers.

7. Conclusions

There is a tension in the dual roles of foster carers: They are expected to be both skilled workers, working under the control and supervision of a fostering provider and undertaking training and development to gain expertise in caring for often traumatised children, and parents, bringing those children up in a familial environment, with their best interests at heart (Government UK, 2011, schedule 5), yet enjoy neither the protections nor freedom of either role.

This article has considered how a modern-day litigious foster carer might litigate to recover unpaid wages. In so doing, it took as its starting point the distinctive purposes of the two types of remuneration English foster carers receive—a fee (to remunerate time, skills, and experience) and an allowance (to compensate for the costs of caring for a child). The assessment of the foster carer's remuneration through the lens of the law of unlawful deductions to wages considers (a) how a litigious foster carer might litigate *despite* hurdles presented by the precedent status set by *W v Essex County Council* (1999) and (b) how this might help in reconciling the dual roles which are often presented as mutually exclusive and irreconcilable.

By following the approach successfully adopted in *Oni & ors v London Borough of Waltham Forest & ors* (2025), it is suggested that a modern-day litigious foster carer might pursue their fostering provider for unpaid

wages in an unlawful deduction to wages claim under section 13 of the Employment Rights Act of 1996. It also suggests that the tribunal would assess the two types of remuneration by reference to their distinctive purposes—likely finding that the fee amounts to wages, whilst the allowance may not be justiciable as entitlement arises from specific tasks as opposed to the working relationship. This analysis of the fee arising from the working relationship, while the allowance compensates for the costs of tasks arising from the work, reveals a useful paradigm—distinguishing the working relationship from the work to understand foster carers as workers undertaking the work of parenting (with the familial purpose as the standard for that work).

That paradigm might also assist in reconciling the tension in the two dual roles by overcoming objections to worker status. The strength of theoretical arguments—i.e., that the purpose of foster care is inconsistent with worker status—is "diluted if not extinguished" (*Oni & ors v London Borough of Waltham Forest & ors*, 2021, para. 363) in respect of certain claims, and might be further extinguished in respect of all claims when familial purposes are positioned as central to the work rather than the working relationship. The same is not necessarily true of the practical arguments, particularly when applied to claims that demand the assessment of time. The human rights approach taken in *Oni & ors v London Borough of Waltham Forest & ors* (2025) and applied in a theoretical unlawful deduction to wages claim only assists foster carers in accessing *some* workers' rights. This leaves litigious foster carers in an unenviable position. They may be able to pursue only some rights (potentially leaving working time and minimum wages questions unresolved and foster carers vulnerable to overwork and underpay), or even if they can access these claims, they may be forced to try to artificially delineate the work of parenting. While *W v Essex County Council* (1999) continues to be authoritative, neither is a particularly satisfying solution to the question of foster carers' employment status, which continues to leave them legally neither workers nor parents and vulnerable without the protections of worker status.

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Conflict of Interests

The author is employed by the Independent Workers' Union of Great Britain (IWGB) and works closely with the Foster Care Workers' Union (which is a branch of the IWGB).

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