IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 217
EMPC 471/2019

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	PETER HUMPHREYS Plaintiff
AND	SIAN JIMENEZ HUMPHREYS First Defendant by her litigation guardian, L Meys
AND	CHIEF EXECUTIVE OF THE MINISTRY OF HEALTH Second Defendant

Hearing:	21-22 June and 13 August 2021 and further submissions filed on 9, 15 and 20 September 2021
Appearances:	P Cranney, counsel for plaintiff L Meys as litigation guardian for first defendant S McKechnie and T Bremner, counsel for second defendant
Judgment:	8 December 2021

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Sian Humphreys is a 33-year-old woman. She was diagnosed with Angelman syndrome when she was three years old. She has been assessed as having very high disability needs. Those very high disability needs have been with her since birth and will continue throughout her life. Sian does not have capacity to understand these proceedings or to participate in them, other than through a litigation guardian.

[2] Sian's lifelong disability needs mean that she cannot be left unsupervised. She lives with her parents. Her adult siblings, who I infer do not have disability needs, do not live with their parents. Sian's father is the plaintiff, Mr Humphreys. He is Sian's primary carer. Her mother, Ms Jimenez, works full-time out of the house in paid employment but otherwise provides care for Sian.

[3] From August 2014 Sian was in receipt of funding under what is known as the Funded Family Care Model. The Funded Family Care Model was designed and implemented by the second defendant, the Chief Executive of the Ministry of Health ("the Ministry"). In order to access funding under this Model the Ministry required an application to be made, supported by a support needs assessment ("needs assessment") completed by an agent of the Ministry of Health in accordance with guidelines issued by the Ministry. Sian's needs assessment was completed by Disability Support Link. The needs assessment confirmed that Sian had very high disability needs, recorded the nature and extent of her disabilities, and that she was being cared for by Mr Humphreys in the home.

[4] The Ministry's application form, which had to be signed by the disabled person (in this case Sian) and the family caregiver (in this case Mr Humphreys), made it clear that Sian would be the employer and her father would be her employee. The documentation recorded the obligations that each were said to owe the other as employer and employee. A copy of the completed documentation relating to Sian is not before the Court.

[5] Funded Family Care was disbanded late last year. Sian moved to a different model, which was also designed and implemented by the Ministry of Health. That model is called Individualised Funding. Mr Humphreys remained Sian's putative employee; she remained his putative employer. Sian's circumstances remained the same; as did the care provided to her by Mr Humphreys.

[6] The essence of Mr Humphreys' case is that the way in which the relationship between himself and his daughter has been described by the Ministry of Health is at odds with the real nature of it. He says that his daughter could not employ him, as she

lacks capacity. He says that having regard to the real nature of the relationship he is an employee of the Ministry of Health. He seeks a declaration to that effect.

[7] The Ministry denies the claim. In summary, it says that it was and is simply the funder, and that the mechanisms by which funding has been made available under Funded Family Care and Individualised Funding do not create "richer, deeper…employment relationships." Rather, the mechanisms have been designed to keep the level of control exerted by the Ministry to a minimum and to create distance between it and the provision of care to the disabled person.[1]

[8] I dealt with what I regard as the legal framework in *Fleming v Attorney-General*.[2] Leave to appeal and to cross-appeal against that judgment has been granted by the Court of Appeal.[3] In considering the issues in this proceeding I do not regard myself bound by the approach adopted in the *Fleming* judgment[4] and have considered matters afresh. In doing so I have been assisted by comprehensive submissions made on behalf of the parties.

[9] I accept that Mr Humphreys has been engaged by the Ministry of Health as a homeworker to provide care for Sian. That means that he is an employee of the Ministry for the purposes of the Employment Relations Act 2000 and is entitled to be appropriately remunerated for the work he has provided as an employee. It also follows that, as employer, the Ministry owes broader obligations to him, including as to health and safety. At this stage the nature and extent of any such obligations is not before the Court and I do not need to say any more about them. The same point can be made in respect of the impact or otherwise of various statutory provisions which were in place during the relevant period in terms of the calculation of any lost remuneration. These questions do not arise in this case, which is solely focussed on declaratory relief relating to employment status.

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1 It is apparent that one of the key drivers for describing the relationship between the disabled person and the family caregiver under the Funded Family Care Model was to avoid the perceived burdens of an employment relationship being placed on the Ministry of Health: see *Fleming v Attorney-General* [2021] NZEmpC 77, [2021] ERNZ 279 at [5]-[22]; Judy Paulin, Sue Carswell and Nicolette Edgar Evaluation of Family Funded Care (Ministry of Health Disability Support Services, April 2015) [The Artemis Report] at 37-38.

2 *Fleming*, above n 1.

3 *Attorney-General v Fleming* [2021] NZCA 510.

4 Michael Hardie Boys *Laws of New Zealand* Courts (online ed) at [37].

[10] The reasons for my conclusions as to the employment status issue will be apparent from what follows. There is a degree of repetition of the legal analysis adopted in *Fleming,* but it is convenient to replicate some of it in this judgment for ease of reference.

The facts

[11] Sian cannot be left unsupervised. If her parents declined to care for her in their home, and if no one else was prepared to take on the role, Sian would need to be cared for by the State, most likely in a fulltime residential facility. Based on Sian's assessed needs, such a facility would likely be staffed 24 hours a day, seven days a week, 365 days a year. It can reasonably be inferred that staff employed within any such facility would be remunerated for their work, including being available to provide intermittent care for Sian and any other residents as and when they required it. To put it another way, they would be available to attend to Sian's needs as and when they arose, reflecting the established reality that she requires 24 hour a day supervision to ensure her safety and wellbeing.

[12] While Mr Humphreys' claim relates to the period from April 2014 to the present, there is a relevant background to it.

[13] By April 2014 Mr Humphreys had been providing care to Sian for many years, and had been advocating for other family caregivers. The Court of Appeal delivered its judgment in *Atkinson* in 2012.[5] The Court confirmed that a group of nine parents, who provided care for their severely disabled adult children, had been discriminated against by the Ministry of Health on the basis of family status. That was because, while the Ministry made funding available to pay for care provided by non-family caregivers, family caregivers such as Mrs Atkinson were excluded. The Ministry's approach appears to have rested on an assumption that family caregivers could be expected to provide (free) care for their disabled children in line with what were regarded as their familial obligations. That assumption was rejected.[6]

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5 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
6 At [168].

[14] Mr Humphreys wrote to the Ministry's agent, Disability Support Link, on 8 August 2012 requesting clarification as to why he was being contracted to provide care services rather than being employed. Disability Support Link wrote back advising that:[7]

> As you will be aware, *in the direct payment agreement* between yourself and [Disability Support Link], it clearly states in section 2:
>
> > The Relationship Between Peter Humphreys (for Sian Humphreys) and Disability Support Link
> >
> > This is an Agreement for the provision of Services between you and us, it is not a partnership Agreement or a joint venture Agreement. Under this contract you are a subcontractor, not our agent or employee.
>
> This has been signed by both yourself and a representative of the District Health Board, every year since commencement in 2001. From DSL's point of view, there is no dispute or lack of clarity. *You are an independent contractor, and have been since the commencement of this agreement***.**
>
> *Disability Support Link provides a Needs Assessment Service Coordination*, (NASC), *on behalf of the Ministry of Health*. The NASC Service Specification between the Ministry of Health and DSL, states the following:
>
> > Clause 3: The NASC will not directly provide flexible support services to people, but will engage other parties to do so.
> > Clause 5.1: The NASC may have subcontractors provide goods and services through its discretionary funding budget.
>
> I hope this provides the clarification you were seeking.

[15] Mr Humphreys responded on 15 August 2012 advising that the reason he had signed the agreement was because the Human Rights Review Tribunal directed that there should be no change in the arrangement until all legal proceedings had taken place. As he pointed out, a favourable outcome had been achieved in one of the proceedings (*Atkinson*) and:

> … Hence my request that I no longer receive a wage that is under the minimum wage. Hence my request to be informed of what status I am, employee/contractor?

[16] Five months later the Ministry entered into an arrangement with Mr Humphreys and the *Atkinson* plaintiffs. The arrangement was referred to in a letter to

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7 Emphasis added.

Mr Humphreys from the Ministry of Health dated 14 January 2013. It described the arrangement as being one of "employment". The letter stated:[8]

> This letter confirms your back payment details as part of an *interim employment arrangement* agreed between the Ministry of Health (the Ministry) and your legal counsel as your representative.
>
> This agreed arrangement applies solely to you and other plaintiffs in the Atkinson vs Attorney General litigation. *It is recognition that you may be paid as an employed caregiver for your daughter Sian from 14 May 2012, which is the date of the Appeal Court decision, until the date that the Ministry implements a new paid family caregivers policy later this year.*
>
> The Ministry has been advised that as part of the arrangement you will commence employment with Healthcare New Zealand on 28 January 2013 to provide 11.5 hours per week of personal support care to Sian at a rate of $15.36 per hour…

[17] As foreshadowed in the Ministry's 14 January 2013 letter, a new family caregiver policy was subsequently implemented, on 1 October 2013.[9] The policy sat alongside a number of legislative provisions and a Gazette Notice. This was known as the Funded Family Care Model.

[18] In order to secure payment under the new policy, a needs assessment was required. In this case the needs assessment was undertaken by Disability Support Link. The relationship between the Ministry of Health and NASC providers, such as Disability Support Link, was variously described in the evidence and submissions. I return to what I understand the nature of the relationship to be, based on the evidence before the Court, below.

[19] The needs assessment conducted by Disability Support Link was based on an interview with Mr Humphreys and Ms Jimenez (Sian's mother), during which Sian was present. The assessment is detailed and includes the following observations:

(a) Sian's situation had remained unchanged in terms of her needs;

(b) Sian required 24 hours a day/seven day a week supervision;

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8 Emphasis added.

9 Ministry of Health *Funded Family Care Operational Policy* (2nd ed, Ministry of Health, Wellington, 2016).

(c) Sian enjoyed programmes like Mr Bean but could not watch something straight through, and was up and down during the advertisements;

(d) Sian's seizures continued to be uncontrolled;

(e) toileting was an issue, with an inability to control bowel motions, regular accidents and nappy leakage at night (the family had leather couches as they were easier to wipe if Sian had an accident);

(f) Sian was very sociable but had no friends;

(g) some steps were difficult for Sian and she was liable to fall down high steps;

(h) Sian did not need much sleep (some nights may be six hours - others 3-4 hours);

(i) Sian was mostly spoon fed;

(j) Sian could not go into the backyard without someone with her and had "zero" idea about road safety;

(k) Sian needed full assistance with everything, including washing in the shower and brushing her teeth (although she would cooperate with dressing to the extent of pushing her arms and legs through); and

(l) Sian was 97 kilos in weight (at the time of the hearing she was 110kg and difficult to move, particularly when she dropped to the floor and Mr Humphreys had to try to get her up).

[20] Once a needs assessment has been completed, a host provider becomes involved (under both Funded Family Care and Individualised Funding, which Sian subsequently moved to and which I discuss later). The host is responsible for providing information to the disabled person, including advice about setting up the arrangement, which includes preparation of an individual service plan. The plan sets

out each of the tasks associated with the person's disability in relation to needs. The plan, once approved, triggers payment by the Ministry of Health to the disabled person.

[21] Hosts are agents of, and receive funding from, the Ministry of Health.[10] They, like NASC assessors, are required to apply Ministry of Health guidelines and policies in undertaking their work on behalf of the Ministry. It is via these means that the Ministry exerts control, including over who is paid and for what. It is also via these means that the Ministry retains some assurance that a severely disabled person is receiving a base quality of care, consistent with the State's broader obligations to citizens such as Sian.[11]

[22] Mr Humphreys was dissatisfied with the number of hours of support that the NASC assessment had led to. On 13 February 2013 the Ministry of Health wrote to Mr Humphreys advising him how to apply for a review, which he subsequently did. The process involved application to the NASC National Reviewer. A Panel meeting occurred on 12 March 2014 and noted, amongst other things, that:[12]

> Sian is a 15 year old lass[13] presenting with Angleman's syndrome and associated ID and uncontrolled seizures.
>
> *She requires 24/7 supervision at all times.*
>
> Sian is doubly incontinent, requires full support for all personal hygiene, feeding, community outings and during disturbed nights.
>
> She can have prolonged very noisy and banging episodes.

[23] The number of hours increased, from 31 March 2014, to 21 hours of support a week; 39 hours from 25 January 2017; and to 44 hours from 5 February 2019 (after consideration of an exceptions review by an Independent Review Panel as to whether the "soft cap" of 40 hours should be exceeded). The Review Panel, which appears to have been disestablished in 2019, sat within the Ministry of Health.

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10 See "The Funded Family Care Notice 2013" (26 September 2013) 131 *New Zealand Gazette* 3670 at [11].

11 See *Fleming*, above n 1, at [32]-[38].

12 Emphasis added.

13 This appears to be in error; Sian's date of birth was 8 October 1988.

[24] Mr Humphreys was paid at the minimum wage for each of the hours allocated for Sian's care. Payment was made by the Ministry of Health by way of lump sum payment into Sian's bank account operated on her behalf by Mr Humphreys, who then arranged periodic transfer of wages to his account and arranged for compliance with PAYE, ACC and Kiwisaver.

[25] Funded Family Care was disestablished in 2020.[14] Sian transferred from Funded Family Care to what is known as the Individualised Funding model on 3 August 2020.

[26] Individualised Funding has been in place for some time and has been subject to ongoing reforms. The Individualised Funding model that was in place as at August 2020 (and remains in place) provides a range of options, including that a disabled person assessed as having high or very high needs may employ a resident family member as a caregiver. I infer from the evidence that 40 hours per week is regarded as a high allocation, although there is room to allocate more hours in certain circumstances. Such circumstances were assessed as applying in Sian's case as 44 hours of funded care were ultimately allocated.

[27] Hosts are contracted by the Ministry of Health to support people in using Individualised Funding; the disabled person or their agent is responsible for all aspects of employment, including Accident Compensation levies, employment contracts, leave and tax requirements and Kiwisaver; budget management and the quality of the services provided. Payment is made by the Ministry of Health to the Host which then on-pays to the family caregiver (employee) on the provision of time sheets, as Mr Humphreys described in evidence.

[28] It is convenient to record at this point that I accept Mr Humphreys' evidence, which I did not understand to be challenged, that there has been no change in what he was doing in respect of the care provided to Sian in terms of its nature and extent, despite the changes to the overarching model.

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[14] New Zealand Public Health and Disability Amendment Act 2020, s 4.

[29] While it would have been possible to employ a third-party carer under Individualised Funding, or for Mr Humphreys to be employed by a Home and Community Support Service (HCSS) provider, Mr Humphreys currently wears two hats. He is both Sian's agent (so employer under the Ministry's model) and her employee (under the Ministry's model), as he explained in evidence. At the hearing Ms Bleckmann, Group Manager Operational Performance, Disability Directorate within the Ministry of Health, doubted that this could be so but subsequently filed an affidavit clarifying her earlier evidence, confirming that it was indeed possible for Mr Humphreys to be both employer (as agent) and employee under the Ministry's Individualised Funding Model. I understood Ms Bleckmann to say that it was not encouraged, although there is no evidence before the Court as to what (if anything) had been communicated to Mr Humphreys on behalf of the Ministry in this case.

[30] Mr Humphreys gave evidence, which I accept, that the decision to provide care for his daughter under the employer/employee model was based on a number of concerns about the workability/suitability of the alternatives. Effectively, he felt he had no choice.

[31] A copy of what is called the Individualised Funding job description, to be filled in by the caregiver (as employee), was before the Court in the common bundle of documents for hearing (although the completed documentation in this case was not). Relevantly, the job description records that the homecare worker is responsible for providing care to the disabled person in their home; that they are to adhere to health and safety policies and practices, including by maintaining a healthy and safe working environment, reporting accidents etc; and that they are required to "work independently with little supervision"; be honest and reliable and have good time keeping. The employee is required to sign the job description certifying that they have read and understood the responsibilities assigned to the position.

[32] A copy of the associated individual employment agreement was also before the Court in the common bundle of documents. Again, the completed documentation for Sian/Mr Humphreys was not. However I did not understand anyone to be suggesting that some other form of documentation had been filled in, and it is notable that the

documentation was a required step in the funding process. I infer that the same forms were filled in to support the Humphreys' application prior to it being approved.

[33] The individual employment agreement included the following provisions:

> **3. Nature and Term of Agreement**
>
> **3.1 Individual Agreement of On-going and Indefinite Duration**
>
> This employment agreement is an individual employment agreement entered into under the Employment Relations Act 2000.…
>
> …
>
> **4. Obligations of the Relationship**
>
> **4.1 Obligations of the Employer**
>
> The Employer shall:
>
> (i) Act as a good Employer in all dealings with the Employee
> (ii) Deal with the Employee and any representative of the Employee in good faith in all aspects of the employment relationship, and
> (iii) Take all practicable steps to provide the Employee with a safe and healthy work environment.
>
> **4.2 Obligations of the Employee**
>
> The employee shall:
>
> (i) Comply with all reasonable and lawful instructions provided to them by the Employer
> (ii) Perform their duties with all reasonable skill and diligence
> (iii) Conduct their duties in the best interests of the Employer and the employment relationship
> (iv) Deal with the Employer in good faith in all aspects of the employment relationship
> (v) Comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer from time to time, and
> (vi) Take all practicable steps to perform the job in a way that is safe and healthy for themselves and their fellow employees.

[34] The employment agreement also provided for the place of work, at cl 5:

> **5.1 Fixed Place of Work**
>
> The parties agree that the Employee shall perform their duties at:
> … *(address)* and other places as agreed.

[35] Hours of work were provided for, with the employer being obliged to set out the employee's hours of work in accordance with a roster; rest and meal breaks were provided for; salary/wage review every 12 months; annual holiday, public holiday and

sick leave, bereavement and parental leave entitlements; and various health and safety obligations.

[36] Mr Humphreys gave emotional evidence, which was not challenged and which I accept, of the frustrations he had encountered over the years trying to raise employment-related issues in respect of his situation. In this regard he said that:

> I have over the years complained about employment issues, ranging from pay parity to number of hours allocated. I have never been able to complain to my Ministry of Health appointed employer my daughter Sian. I have always complained to the Ministry of Health or the local needs assessment assessors Disability Support Link. The Ministry of Health have always dictated my working conditions and I have never witnessed them communicating with Sian about my working conditions.
>
> … The never-ending battles that us parents of adult disabled children who want to be supported to care for our children at home just wears you down. The bottomless money coffer that is there to fight us through the courts is something we cannot compete with.

[37] On 4 February 2021 a letter arrived at the Humphreys' home. It was addressed to Sian. The letter advised Sian that her tax returns were overdue and that prosecution action might follow. As Mr Humphreys pointed out, Sian is not able to open a letter. Nor is she able to understand what is written, much less take steps to comply with any tax obligations. I refer to this because it reflects on the practical reality of the situation, and Sian's capacity (if it were otherwise in doubt), to discharge the onerous obligations resting on all employers in New Zealand.

Jurisdictional hurdle?

[38] I deal with a central pillar of the Crown's case at the outset, namely that this Court lacks jurisdiction to decide the claim. That contention centres on the way in which funding assistance is provided for people in the Humphreys' position. In a nutshell it is said that funding, and the basis on which it is granted, are quintessentially matters for the Crown and, if appropriate, the High Court on judicial review proceedings.

[39] Parliament has conferred on this Court the exclusive jurisdiction to decide whether a person is or is not in an employment relationship and if so with whom. That requires the Court to assess the real nature of the relationship. I do not regard the steps

that have been taken by Parliament (enactment of Part 4A); the Minister (issuing a Gazette Notice) and the Ministry (devising and implementing policies) as carving out an area of jurisdiction that this Court would otherwise have in relation to what is essentially a group of vulnerable workers.

[40] Nor do I accept the submission that the nature and scope of the Court's powers[15] point away from jurisdiction to deal with the matters at issue in this case. Section 187 (which sets out the Court's exclusive jurisdiction) expressly refers to the Court's jurisdiction to hear and determine "any question whether any person is to be declared to be an employee" within the meaning of the Employment Relations Act.[16] As the declarations sought by the plaintiff in the statement of claim make clear, this case is about clarifying Mr Humphreys' employment status - whether he can be employed by his severely disabled daughter who lacks capacity; whether the Ministry of Health is his employer; and, if so, what obligations flow from any such employment relationship. If the Crown is correct on its jurisdictional objection, the Court's exclusive jurisdiction conferred by s 6(5) of the Employment Relations Act to determine whether a person is an employee having regard to the real (as opposed to described) nature of the relationship would be rendered nugatory.[17] I do not see the statutory framework relating to funding mechanisms for care provided by family caregivers as altering the core jurisdictional point, for the reasons set out in *Fleming v Attorney-General.*

[41] It might also be noted that Mr Humphreys' quest for clarification as to his employment status arises directly out of the arrangements which the Ministry of Health has put in place/implemented over time (which labels him as employee of his severely disabled daughter), and the way in which earlier arrangements had been characterised as an independent contractor working for the Ministry's agent, Disability Support Link, and then as an employee under an interim arrangement, although he has been doing the same caring work throughout.

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15 Described by counsel for the Crown as "problem-solving". It is unclear what the basis for the adopted descriptor is, although it may be a mis-reference to the powers of the Employment Relations Authority, described in s 157(1) as being: "an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits if the case, without regard to technicalities."

16 Employment Relations Act 2000, s 187(1)(f).

17 See *Fleming*, above n 1, at [54]-[57].

[42] The status question is one that routinely comes before the Court and is answered by an application of s 6 of the Employment Relations Act and the guidance which emerges from the caselaw.

The Ministry of Health was in the driver's seat

[43] The Ministry of Health describes the arrangements it had put in place, involving itself, NASC, the Host, the disabled person and the family caregiver as a "five-way partnership." Mr Cranney, counsel for the plaintiff, did not accept that this was an apt description. There was, he said, no partnership involved. Sian is a disabled adult citizen being cared for by her family. To the extent that there is a "partnership", it is between the Ministry (and its agents) on one side and Sian and her family, on the other.

[44] As I have said, various descriptors were used during the course of the hearing in respect of the nature of the relationship between the Ministry of Health and NASCs, such as Disability Support Link, and Hosts. In evidence Mr Wysocki, Manager of the Office of the Deputy Director-General within the Disability Directorate (a business unit of the Ministry of Health), described:

- NASC organisations (such as Disability Support Link) as: "independent entities contracted by the Ministry of Health."
- the Ministry of Health as operating broadly as a "detached funder having set the overarching policies."

[45] In other evidence called on behalf of the Ministry, NASCs were described as acting as the Ministry's "agent in providing NASC services and as such have routine contact with the Ministry in relation to questions of disability policy, support service provision and funding allocation;" and the Ministry involving itself in eligibility decisions made by NASCs and questioning/overturning decisions on a referral when the eligibility criteria had been incorrectly applied.

[46] It is clear that the Ministry retained funding and review oversight of NASCs, and provided a very detailed operational manual for NASC managers. It is relevant

too that it was the Ministry which drafted the NASC documents and the template for decision-making. While Mr Wysocki did not accept (when the point was put to him in cross-examination) that these documents were anything other than general guidance tools, I do not accept that their role was as anaemic as suggested. While they did not impose a decision-making straitjacket, NASC providers and Hosts were expected to comply with them, including to promote consistency of approach. This is reflected in, for example, the fact that the Ministry reserved to itself an auditing and review function.[18] It is also reflected in the way in which the forms were crafted by the Ministry. And in other evidence Mr Wysocki described the Ministry as setting the parameters for the calculations of support to be provided by producing tools and guidance; the "support allocation template" as being developed by the Ministry "to assist" NASC organisations in "calculating the number of hours required"; and the Support Package Allocation Tool, which bands needs from "very low" to "very high", being designed to "support consistency and equity in service allocation."

[47] In summary, I understood the Ministry of Health to essentially be saying that it was the funder and distanced from the organisations (NASCs and Hosts) which were focused on the delivery of services. I am not satisfied that the evidence supports that sort of "hands-off" characterisation. In any event, even if the Ministry had, through the structures it put in place, distanced itself in practice, I do not consider that the reality of the relationship between it and Mr Humphreys was materially altered.

[48] I am satisfied, based on the evidence before the Court, that the Ministry of Health was not a distant participant in the delivery-of-care process or that it is aptly described as simply a funder. Rather, I infer from the evidence that the Ministry of Health sat firmly in the driver's seat.

The "artificial" employment relationship: Sian and her father

[49] In closing submissions counsel for the Ministry described the employer model which it says was imposed via Part 4A, the Gazette Notice and policies, as "artificial"

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[18] Mr Wysocki accepted that the Ministry of Health became involved if issues arose and also conducted routine audits from time to time.

and that the Crown made no apologies for that. I understood the submission to be that the employer model had been imposed under a statutory framework, which deemed the relationship to exist – artificiality being the purpose of a deeming provision.

[50] I agree that describing Sian and her father as being in an employment relationship is "artificial", in the sense that there cannot be an employment relationship where one party lacks the capacity to understand the most basic obligations and liabilities attaching to the role (for reasons which I come to). I disagree that the artificial relationship was deemed by Parliament to exist, for the reasons set out in *Fleming*.[19]

[51] I have no doubt that if Parliament had wished to deem certain categories of carers as employees of categories of people cared for (particularly those who lack capacity) it would have made that very clear. It is probable that it would have done so within the statute which specifically deals with employment relationships (namely the Employment Relations Act) and which sets out the relationships which can be characterised as ones of employment and those which are not, as it had done in relation to volunteers[20] as well as dairy workers and real estate agents.[21]

[52] The omission of any amendment to the Employment Relations Act to exclude, or otherwise deal with, family caregivers is notable (if that is what Parliament intended); as is the fact that Part 4A did not make express provision for their employment status either. All of this reinforces the conclusion that, properly interpreted, Part 4A was directed at funding; it did not reflect a Parliamentary intention to create an employment relationship which could otherwise not exist.[22]

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19 At [56].

20 Employment Relations Act 2000, s 6(1)(c).

21 Section 6(4).

22 The funding model appears, from contemporaneous Cabinet papers which were before the Court, to reflect deliberate decisions about where employment liabilities should lie. In this regard, conferring employer status on the disabled person was seen as the most fiscally conservative option put to it and also that if that burden was shouldered by the Ministry it would be obliged to take on 1600 new employees. As noted in *Fleming*, a budget of $23,000,000 was allocated for Funded Family Care. By April 2015 the Ministry of Health reported a significant underspend - only 12 per cent of the 1600 eligible for funding had applied. It is apparent that many saw the imposition of an employment relationship as off-putting: see The Artemis Report, above n 1, at 37-38.

Sian does not have capacity to employ her father (or anyone else)

[53] Having concluded that Sian is not deemed by statute to be in an employment relationship with her father, I turn to consider whether it would otherwise have been possible for Sian to take on that role. In this regard Ms Bleckmann responded in questions in cross-examination in the following way:[23]

> Q. The question was, *isn't it blindingly obvious* or very, very clear *that someone that doesn't know how to read, write or speak or what an employer is or an employee is cannot be said to be the employer*?
>
> A. And that is the –
>
> Q. No, no, what's the answer. Im not asking for commentary.
>
> A. In this specific situation with Ms Humphreys, *yes*.

[54] I do not accept that Sian could have entered into, or had imposed on her absent express statutory provision, a binding employment relationship with her father and I do not consider that Parliament has taken this step, although it remains open to it to do so if it wishes. In this regard I consider that the analysis in *Fleming* remains apposite, including the following:

> [27] Severe disability is not the disqualifying factor to taking on employer status - mental capacity is. Counsel were unable to identify any authority for the proposition that a person who lacks mental capacity can enter into an enforceable employment relationship agreement. That is hardly surprising.
>
> [28] Employment rights and obligations Parliament has put in place under a suite of minimum standards legislation are aimed at supporting effective employment relationships and protecting employees from both witting and unwitting abuse. A breach exposes an individual employer (Justin, on the Crown's case) to the imposition of penalties of up to $50,000 and recovery and compliance action, including by a Labour Inspector,[24] and unlimited financial claims for breach of contract and personal grievances.[25] Defaulting employers may be imprisoned, fined and their property sequestered.[26] The short point is that with employer status comes weighty responsibilities which, if they are breached, can give rise to significant legal consequence. Such statutory obligations are supplemented by numerous common law requirements.
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> …

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23 Emphasis added.
24 Employment Relations Act 2000, s 142G.
25 Employment Relations Act 2000, ss 123 and 162(a).
26 Employment Relations Act 2000, ss 140(6) and 142R.

[30] The difficulty with [the agent acting on behalf of a person who lacks capacity] is that the employment relationship is personal in nature.[27] An employer can, and often does, obtain assistance in discharging some of its tasks, for example, payroll. Employers cannot, however, devolve their ultimate responsibility for discharging their obligations; nor can employees. If it were otherwise it would be a simple matter for both parties to pass the buck, and seek to take the benefits of the relationship while minimising exposure to legal risk. An employer could, for example, engage a company to discharge the payroll function and deny liability for a subsequent failure to pay; an employee could unilaterally substitute labour. Neither is permissible within the framework of an employment relationship. All of this is relevant to the Crown's submission that Justin could take on the role of employer via supported decision-making. The point is that the buck stops with the employer, Justin. It is Justin, not those providing support, who would be liable for penalties, damages, compensation, sequestration of property and imprisonment in the event that his obligations as an employer were not appropriately discharged. In any event, it appears that what would be required in Justin's case is not, as the Crown suggested, supported decision-making, but rather substituted decision-making. The latter was considered out of bounds by the United Nations Committee on the Rights of Persons with Disabilities.[28]

[31] In discussing the imposition of an employment relationship in the context of family care, little focus was placed by the Crown on the impact of such a relationship on the employee (family caregiver). In this regard it remained unclear how Ms Fleming's rights as an employee, including to have regular rest and meal breaks, annual and statutory holiday leave, and safe hours of work (40 hours per week having been identified as "safe" by Crown witnesses), were expected to be protected or how she might realistically pursue a personal grievance, breach of contract or minimum rights claim against her severely disabled son.

[32] I accept that the international obligations that have been entered into are relevant, but I do not accept that they lead to the end point that the Crown contends for in terms of imposing an employment relationship on someone in Justin's position in order to secure funding for his care.

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[37] I agree with counsel for the Human Rights Commission that the delivery of services through an agency structure and imposed relationships should not be taken to obviate the State's responsibilities to disabled persons, particularly those (like Justin) who lack mental capacity.

[38] I agree too with the submission advanced by the Human Rights Commission that the imposition of a one-size fits all approach via a compulsory employment relationship between the disabled person and their

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27 *Rasch v Wellington City Council* [1994] 1 ERNZ 367 (EmpC) at 383, where it was held "Such contracts are not assignable; an employee without his or her fully informed consent cannot be put by one employer into the service of another. I have already explained that employment contracts are personal to the parties."

28 Committee on the Rights of Persons with Disabilities *General Comment No.1 – Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

> family carer will not always be compatible with the principles of the Convention [on the rights of Persons with Disabilities]. For some disabled persons, particularly those with high and complex needs, it may not align with their circumstances.
>
> [39] Employment relationships are important. They are not to be viewed as a convenient device to shift liabilities away from the key players or to paint a distorted picture of reality. That is why Parliament has conferred on this Court the exclusive jurisdiction to determine, on a case by case basis, whether a particular individual is an employee and (if so) of whom, and made it clear that the answer to that question emerges from a fact specific inquiry, rather than (for example) the way in which the relationship may have been characterised.
>
> [40] There are many severely disabled people who are perfectly capable of undertaking the role of employer. Justin is plainly not one of them. He does not have capacity to understand or discharge the most basic obligations he would be required to shoulder as an employer, and as set out in the Gazette Notice.[29] The reality of Justin's level of capacity is reflected in the fact that a litigation guardian was appointed to act in his interests in these proceedings.[30] The end point that the Crown wishes to arrive at requires a leap of legal logic and common sense that I find myself unable to make.

The Gazette Notice

[55] Mr Cranney submitted that the evident purpose of the Gazette Notice was to ensure that the Crown had knowledge and oversight in relation to persons with high and very high disability needs. The fact that the Notice drew no distinction between those who have and do not have capacity is, it was said, simply reflective of a recognition that some disabled people are perfectly capable of entering into an employment relationship; some are not - there is a spectrum. For those with no capacity, the relationship is a fiction and the true employer is the one who has true control over the relationship and engages the carer - namely the Ministry.

[56] Sian is severely disabled. She requires care. Mr Humphreys provides care to Sian. Sian has no capacity to engage Mr Humphreys as an employee. That leaves

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[29] See *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771, at [48], noting the Crown's agreement that "many persons with disabilities are so impaired that they do not have the necessary capacity in law to employ another person."

[30] Litigation guardians may be appointed for litigants who are incapacitated. An incapacitated person is defined as meaning a person who, by reason of mental (or other) impairment, is not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings or unable to give sufficient instructions to issue, or defend, or compromise proceedings: See High Court Rules 2016, r 4.29.

three options in terms of the Gazette Notice. First, the Notice (properly interpreted) has no application because Sian is so severely disabled she cannot employ anyone to care for her (including Mr Humphreys). Second, the Notice (properly interpreted) provides an implied default position of the Ministry of Health as employer of those who provide care for those who lack capacity to employ a carer themselves. Third, some other person or entity is Mr Humphreys' employer, although no alternative person or entity was identified during the course of hearing.

[57] I see some force in Mr Cranney's purposive interpretation, having particular regard to the context. The context is that it is the State which has obligations to Sian to ensure that she is adequately cared for. To the extent that Mr Humphreys owed any such obligations to Sian, he ceased to do so once she became an adult. The State (through the Ministry of Health) has sought to meet its obligations through the Notice and associated policies. The Notice requires that care be provided and paid for via an employment relationship with the carer. Mr Humphreys is the carer. Sian cannot employ him. People have a range of disability needs - it can reasonably be inferred that the full range was intended to be covered, including those who lack capacity (such as Sian). If it were otherwise a group of the most severely disabled people with care requirements would fall outside the reach of the Notice. That would subvert its evident purpose. To return full circle, the State has the obligation; it has the control; and it can be inferred that it stands as employer under the Notice in respect of particularly vulnerable citizens such as Sian.

[58] While I accept that the Notice may be read consistently with the Ministry of Health being the employer in a case such as this, it is (as the Supreme Court's judgment in *Bryson v Three Foot Six Ltd* makes clear) for the Employment Court to assess whether an employment relationship exists and if so between whom, and the way in which the relationship has been described (including as to the identity of the parties to it) is but one piece of a larger fact-dependent puzzle.[31] That means that a broader inquiry is necessary, which I turn to next.

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[31] *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372.

Is Mr Humphreys an employee and if so who is his employer?

[59] If, as I have concluded, Sian did not and could not employ her father or anyone else, and did not have an employment relationship imposed on her by statute (which would otherwise be required), the question remains whether Mr Humphreys was and is an employee and if so of whom.

[60] Section 6(2) provides that, in determining whether a person is employed by another person under a contract of service, the Court must determine the real nature of the relationship. In assessing the real nature of the relationship, the Court is directed to consider all relevant matters, including any matters that indicate the intention of the parties, and is not to treat as determinative any statement made by the persons describing the nature of their relationship.

[61] In this case it is notable that the Ministry of Health drafted all of the relevant documentation - neither Mr Humphreys nor Sian had anything to do with it. The fact that it was the Ministry which characterised the relationship in a certain way means that it is less relevant to an analysis of the real nature of the relationship than, for example, where there is a written agreement that two parties have prepared which describes their relationship as being of a particular character.[32]

[62] Section 6 makes it clear that the definition of employee includes a homeworker or person intending to work but excludes a volunteer who does not expect to be rewarded for work to be performed as a volunteer and receives no reward for work performed as a volunteer.[33]

[63] An employer is defined as meaning a person employing any employee, and includes a person engaging or employing a homeworker.[34] A homeworker is defined in s 5 as:

> (a) means a person who is engaged, employed, or contracted by any other

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32 See Moshood Abdussalam "On the Construction of One-Sided Contracts (Particularly in the Information Society)" [2021] NZ L Rev 209; *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209. Contrast *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, [2020] ERNZ 530.

33 Employment Relations Act 2000, s 6(1)(b)-(c).

34 Employment Relations Act 2000, s 5.

person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse …; and

(b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.

[64] As ss 6 and 5 make plain, all homeworkers are employees; not all employees are homeworkers. Mr Cranney and Mr Meys submitted that Mr Humphreys fell within the narrower definition of employee and broader homeworker definition; and that his employer in either case was the Ministry of Health. As counsel for the Ministry pointed out, it was not expressly pleaded that Mr Humphreys was a homeworker, but the point was well traversed in submissions and I deal with it on that basis.

[65] I am satisfied, on the evidence before the Court, that Mr Humphreys is a homeworker for the purposes of s 5. I am not satisfied, on the evidence before the Court, that he is otherwise an employee. My analysis of the legal framework essentially follows that set out in *Fleming*. I repeat much of it for ease of reference.

[66] Homeworkers are largely invisible. They do work (as the name suggests) in the home. That means that the work they do, and how they do it, is also largely invisible to the outside world. Their work has historically been undervalued and private. Caring work is often conducted in the home of those who need care. Caring work is often provided by women. There has previously been a perception (though not universally held) that such work ought to be delivered for free or at a reduced rate. The Court of Appeal's judgment in *Atkinson* may be said to reflect the point. There the Court of Appeal rejected the Crown's argument that care provided by Mrs Atkinson to her severely disabled adult son was provided (for free in the home) under a social contract. In this regard the Court observed:[35]

> [168] As to the finding relating to the social contract, we agree with the reasoning of the High Court. The Court accepted that there was a community perception of a parental duty to look after their children up to a certain age "in the sense of providing them, within their means, food, shelter and clothing." That concept included ensuring children were educated and, as far as possible within the home, caring for them when ill or seeing they receive proper care. However, the Court saw it as a different matter altogether to extrapolate from that to a duty owed by parents to care for disabled children "for the duration of the life of those children, … no matter how severe that disability". We

35 *Atkinson*, above n 5 (footnotes omitted) (emphasis added).

> agree. *There is no support for the suggestion of a social contract to care for adult children who are disabled for the remainder of their lives on a full-time basis, subject to respite care.* In any event, the existence of such a contract is inconsistent with the Ministry's policy which effectively enables a parent to decline to care for his or her disabled adult child.

[67] A Cabinet paper setting out the proposed response to *Atkinson* noted that:[36]

> The Ministry currently has a blanket policy of not allowing the payment of certain family carers (parents, spouses and resident family members) who provide disability support services … The Ministry is now required to change this blanket policy as a result of the [decision that the policy involved unlawful discrimination against family carers under the New Zealand Bill of Rights Act 1990]. Changing that policy means that families are likely to be paid to provide support that they currently provide unpaid.
>
> …A policy of paying family carers of disabled people represents a change to one of the fundamental assumptions on which the disability support system is based in New Zealand and internationally. That is, that family carers are 'natural supports' and are supported to carry out this role, rather than being paid to do so…

[68] Society's perception of the value of work, and the valuable role of those who perform it, has evolved. What has also evolved is an appreciation of the vulnerability of certain categories of workers, and the need to protect them from witting and unwitting exploitation.[37] The enactment of the s 5 definition of homeworker in 2004 occurred within this context. An interpretation of the homeworker provision consistent with its underlying protective purpose and the surrounding context is appropriate.[38]

[69] Also relevant in terms of the interpretative exercise are various articles of the Convention on the Rights of Persons with Disabilities ("the Convention"), including the right to live independently and be included in the community.[39] In this regard art

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[36] Cabinet Social Policy Committee "Paid Family Carers Case: Proposed Response" (11 December 2012) at [9] - [13].

[37] Gulnara Shahinian *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences* UN Doc A/HRC/15/20 (18 June 2010) at [18], observing that: "Domestic workers are often "physically invisible" to the general public. More importantly, much as in other gendered relationships, domestic work is deliberately made invisible to public scrutiny: A "private sphere" is socially constructed, where labour relationships are supposedly beyond State or social control."

[38] *Lowe v Director-General of Health* [2017] NZSC 115, [2017] 1 NZLR 691, [2017] ERNZ 560 at [34]; Legislation Act 2019, s 10(1).

[39] Convention on the Rights of Persons with Disabilities 2525 UNTS 3 (signed 30 March 2007, entered into force 3 May 2008); Optional Protocol to the Convention on the Rights of Persons with Disabilities 2518 UNTS 283 (signed 30 March 2007, entered into force 3 May 2008).

19 places an obligation on States to ensure that persons with disabilities have access to a range of in-home residential and other community support services. Those obligations and the way in which they are to be met find statutory expression in the New Zealand Public Health and Disability Act 2000 ("the Health and Disability Act") and the policies sitting under it.[40]

Is Mr Humphreys a homeworker for the Ministry of Health (and therefore an employee of the Ministry of Health)?

[70] To arrive at an answer, a number of questions need to be asked:

(a) First, is Mr Humphreys engaged, employed or contracted by the Minister of Health?

(b) Second, is he engaged in the course of the Ministry's trade or business?

(c) Third, is the engagement to do work for the Ministry?

(d) Fourth, does the work take place in a dwelling house?

(e) Fifth, if he is not engaged, employed or contracted by the Ministry of Health is he in substance engaged, employed or contracted by the Ministry of Health even though the contractual relationship is a vendor/purchaser relationship?

[71] The Supreme Court dealt with each of these issues in *Lowe.* The majority's judgment is binding on the Court.

Question 1: Was/is Mr Humphreys "engaged"?

[72] The majority of the Supreme Court in *Lowe* found "engaged" to be a flexible and ambiguous word.[41] They made it clear that active oversight or control was not a

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40 See Committee on the Rights of Persons with Disabilities "Combined second and third periodic reports submitted by New Zealand under article 35 of the Convention pursuant to the optional reporting procedure, due in 2019" CRPD/C/NZL/2-3 (8 March 2019).

41 At [36]. See also Gordon Anderson *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at [4.4.1].

prerequisite, otherwise any homeworker would also very likely be an employee under the narrower ordinary s 6 definition.[42] This is an important point in the context of this claim and underscores the need to avoid a strict control-type analysis, such that might apply in cases involving the distinction between an independent contractor (not an employee for the purposes of s 6) from a s 6 employee.

[73] The majority held that the normal meaning of engage contemplates the hirer making the selection of the person engaged. Counsel for the Ministry drew particular attention to the observation that it was not possible to extend the ambit of engagement to circumstances where there was no knowledge of the engagement.[43]

[74] In this case the evidence established that the Ministry *knew* that Mr Humphreys was applying to be paid to take care of his daughter in the family home. It *knew* that Sian needed care and could not be left unsupervised, and it *knew* that, if that care was not being provided by her family, it would be responsible for providing it.[44] The Ministry, because of its obligations to disabled persons, had an interest in knowing what Sian needed and how her needs were being met; and it informed itself of these things via various mechanisms it had put in place. What Mr Humphreys was doing allowed Sian to remain in the community. That was and is of benefit to the Ministry, and was and is consistent with meeting its obligations under both the Health and Disability Act and the Convention.

[75] The Ministry was apparently satisfied that Mr Humphreys was doing an adequate job in terms of meeting Sian's needs. In this sense it had no need, and no demonstrable desire, to dictate the way Mr Humphreys should undertake his daily tasks.

[76] I accept that what the Ministry *did not know* was that Mr Humphreys might fall within the expanded definition of employee (as a homeworker) and have an employment relationship with it, an outcome it had plainly wished to avoid.

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42 At [40]-[43].
43 At [63].
44 *Fleming*, above n 1, at [67], citing *Atkinson*, above n 5, at [168].

[77] The focus for the Court is determining whether the particular threshold requirements in s 5 are made out. It is well established that subjective intention to establish an employment relationship is not determinative, as illustrated by numerous s 6 cases where an employment relationship was found to exist when none was subjectively intended.[45]

[78] In this regard it is not uncommon for this Court to see cases where one or other or both parties genuinely fail to appreciate that an employment relationship exists, or where one party takes active steps to characterise and structure the relationship in a way they hope will avoid a finding of employment status. It is not unusual for this to be done by inserting intermediaries between the two key players. It is now well accepted that distancing the key player organisation from the core relationship through, for example, agency agreements, may not serve to divorce the key player from obligations it would otherwise have as an employer.[46] There will, of course, be situations where such steps do have the desired (lawful) effect. The point is that the central issue for the Court remains the same. It is:[47]

> … to separate the wood from the trees, have regard to all of the circumstances and determine the real (rather than described) nature of the relationship.

[79] For completeness, I note the Ministry's submission that the circumstances of this case differ from *Fleming*, in the sense that Ms Fleming was the only real possibility as carer. In the present case it could be Mr Humphreys or Ms Jiminez, in varying combinations. I do not see the facts as materially different. It cannot logically matter whether Mr Humphreys was employed as the sole carer or shared caregiving with Ms Jiminez. The core questions remain the same. And it is, of course, possible for two or more people to be employed to provide care.

[80] In my view, the fact that Ms Jiminez was also providing care only complicates things from the perspective of assessing substantive relief, namely the appropriate calculation of lost wages. That is a matter I return to below but does not, in my view,

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45 See for example *Bryson*, above n 32.
46 See *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835.
47 Fleming, above n 1, at [75]. See, for example, the discussion in *Prasad*, above n 46, including at [34].

mean that Mr Humphreys was not engaged by the Ministry for the purposes of s 5 to provide care for Sian. Nor can practical difficulties in calculating employment entitlements, which might otherwise arise from uncertainties, misunderstandings or mischaracterisations (deliberate or otherwise) of worker status, be allowed to dictate the answer to the ultimate - fact based - question, namely what is the real nature of the relationship.

[81] The reality is that the Ministry was very aware that Sian required care and that Mr Humphreys was providing care for her - as made clear in the NASC assessments, in addition to the correspondence in evidence. Indeed, while I have referred to the Ministry's knowledge in respect of Mr Humphreys being traceable from at least April 2014 (the date identified in the statement of claim), it emerges much earlier. There is correspondence before the Court dated 8 June 2006, between the then Minister of Health and Mr Humphreys, which clearly reflects that the Minister knew of Sian's situation and that Mr Humphreys was providing care for her.

[82] I make one final point. Mr Wysocki gave evidence that one of the underlying purposes of Individualised Funding was to give the disabled person the opportunity to engage support workers independently; as such the Ministry will not necessarily have visibility of any employment or contractor relationships. It was submitted that the Ministry had deliberately designed the Individualised Funding model to ensure that the Ministry was "hands-off" and there was flexibility as to who provided the services. The point is somewhat circular. The reduced hands-on involvement of the Ministry flowed from the way in which it constructed the model, namely through a number of intermediaries (in this case agents). The reduced involvement was then said to support an inference that no employment relationship existed between itself and Mr Humphreys. The same sort of analysis was advanced, and rejected, in *Prasad* by Sky Chefs.[48]

[83] I am satisfied that, in the particular factual context of this case and having regard to the nature and extent of the Ministry's involvement in and knowledge of

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[48] *Prasad*, above n 46, at [31]; *LSG Sky Chefs New Zealand Ltd v Prasad* [2018] NZCA 256.

arrangements for Sian's care, it "selected" Mr Humphreys,[49] and he was "engaged" by it for the purposes of s 5.[50]

Questions 2 and 3: Was/Is Mr Humphreys engaged "in the course of the Ministry's trade or business" to "do work for the Ministry"?

[84] Issues as to whether Mr Humphreys was engaged in the course of the Ministry's trade or business to do work for the Ministry are answered by *Lowe*. There the majority considered that both issues were settled by earlier authority in *Cashman v Central Regional Health Authority*.[51] The parties had conceded that, if Ms Lowe was engaged, it would have been in the course of the Ministry's trade or business, the monitoring and purchase of health and disability services, and the engagement would be to do work for the Ministry. The present case involves the same trade or business, and I approach it applying the same analysis. That means that if Mr Humphreys was engaged (which I have found he was), he was engaged in the course of the Ministry's trade or business to do work for the Ministry.

Question 4: Was/Is the work undertaken in a "dwellinghouse"?

[85] The majority in *Lowe* made it clear that a strict approach to this leg of the inquiry was required, essentially finding that the employer must require the work to be undertaken in a dwellinghouse.[52] The minority would have adopted a broader approach - that it would be sufficient if the work did in fact take place in a dwelling house although it might not have been a requirement that it be undertaken there.[53]

[86] Relevantly, the majority did not conclusively state that there must be an express requirement that the work take place in a dwelling house. Such a requirement may be implied. That is unsurprising. If an explicit requirement were the test it would mean that liability could readily be side-stepped. That would, in turn, defeat the purpose of

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49 The majority in *Lowe* made it clear that the act of engagement for the purposes of the s 5 was necessarily fact specific and that awareness is required (at [63]).

50 No one argued that the nature of Mr Humphreys' relationship with the Ministry was that of vendor/purchaser. Accordingly it is not necessary to deal with the relevance or otherwise of the "in substance so engaged" qualifier to engagement provided for in paragraph (b) of the definition, touched on in *Lowe*, above n 38 at [38]-[39].

51 *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA); *Lowe*, above n 38, at [16].

52 At [72]-[74].

53 At [169].

the homeworker definition, which is to protect a group of particularly vulnerable workers, recognised as lacking opportunity to organise with other workers and as having sufficient bargaining power to effectively negotiate contractual terms. In this sense the legislation is designed to do the heavy lifting for them.

[87] In the present case no issue in relation to the dwellinghouse limb of the test arises, and the individual employment agreement, which I have already referred to, specifically requires the employee to work there. Sian requires 24/7 supervision. She lives in the family home, where she sleeps and spends most of her time. Mr Humphreys is also based at the family home, where he sleeps and spends most of his time looking after Sian. There is no realistic possibility of Mr Humphreys undertaking the work he does anywhere else. The Ministry was well aware of the arrangements and the reality of the situation, both through its agents and directly. I have no difficulty concluding that the Humphreys' family home is a dwelling house for the purposes of s 5 and that the work was, by necessity, conducted there.

Homeworker summary

[88] An application of s 5 of the Act to the facts as they emerged in this case leads to the conclusion that Mr Humphreys was and is a homeworker and, accordingly, an employee of the Ministry of Health.

[89] Sian has been assessed as requiring 24 hours, seven day a week, supervision. If each of those hours was regarded as work done by an employee which the employer was required to remunerate, the total would be 168 hours per week. It goes without saying that requiring, or allowing, an employee to work 24 hour days, seven days a week, even if all of the hours worked are paid for either at or over the minimum wage, would present significant issues, including from a health and safety perspective.

[90] I have already found that the Ministry of Health was aware that Sian had been assessed as requiring round the clock supervision, through its agents and via the exceptions panel process.[54] That knowledge dated back to at least August 2014, and included that Sian was receiving care from Mr Humphreys in the home (although not

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[54] See *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138 (CA) at 143.

exclusively). The number of paid hours of care were reached applying criteria set by the Ministry, focussing on amounts of time for particular tasks associated with personal care and household management. What the template (required by the Ministry to be applied) does not do is capture the nature and degree of supervision required for Sian.[55]

Ordinary s 6 test

[91] As I have said, both the plaintiff and first defendant submitted that Mr Humphreys fell within the ordinary s 6 test for employee, and that his employer was the Ministry of Health. This requires a fact-intensive inquiry, which is conducted having regard to the range of indicia referred to by the Supreme Court in *Bryson*.[56]

[92] I am satisfied on the evidence that the Ministry exercises control over the caregiving process, including in terms of what its contracted agents are expected to do and how they are to do it. It can and does involve itself in cases, as it sees fit (for example, in relation to assessments it considers have been wrongly arrived at). And, as Ms Bleckmann accepted, the Ministry provided the template that NASC assessors were expected to apply and her staff within the Ministry worked "closely with the NASCs." However, while the Ministry exercises control, it is not detailed day-to-day supervisory control of Mr Humphreys' work. He decides what he is going to do to provide care for Sian, when and how he does it (and it is plain that he has, and continues to be, committed to doing it to a very high standard).

[93] The lack of day-to-day control points away from an employment relationship (in the narrower sense) but must be seen in context. The reality is that some employees operate independently with very little direction and/or control exercised by the employer. Much depends on the nature of the role. And the point is likely to become increasingly commonplace with work-from-home arrangements in the COVID-19 environment.

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55 The template document post-dated concerns identified by the Court of Appeal's judgment in *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771. As noted in *Fleming*, above n 1, at [11] and [101].

56 *Bryson*, above n 32.

[94] In the present case the degree of day-to-day control exerted by the Ministry may be said to reflect the realities of the situation: the location in which Mr Humphreys was performing his work and the person who he was providing care for. Those realities do not mean that he could not be the Ministry's employee for the purposes of undertaking the caring role. And it is notable that when Mr Humphreys was an employee of Healthcare New Zealand he was left to his own devices to look after Sian - Healthcare New Zealand simply paid him for the work he did for it. The same sort of hands-off approach continued under Funded Family Care and Individualised Funding.

[95] I accept that many of the usual trappings of a conventional employment relationship are missing, as Mr Humphreys readily accepted in cross-examination. There was no evidence that Mr Humphreys took annual leave, sick leave or holidays - he did not have time away and if and when he got sick he just carried on.

[96] There was no written agreement that described Mr Humphreys as having any sort of relationship with the Ministry; rather there was a written agreement describing him as having an employment relationship with his daughter. However, that agreement was drafted by the Ministry, under a model apparently designed to distance itself from an employment relationship with him (for reasons set out by Mr Wysocki). In these circumstances the absence of a written agreement between Mr Humphreys and the Ministry does not materially assist.

[97] It is evident that Mr Humphreys did not know who he was employed by in 2014 - his earlier requests for clarification reflect this. It is equally evident that the Ministry did not consider itself to be Mr Humphreys' employer. As I have already observed, whether one or both parties subjectively believe that they are or are not in an employment relationship is not determinative. And, as the Supreme Court has previously made clear, intention is to be objectively determined.[57]

[98] Overall, the factors to be applied on a conventional *Bryson* analysis point away from an employment relationship.

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[57] *Bryson*, above n 32, at [20].

Time for a refresh?

[99] Finally, I observe that it may be timely to reconsider the traditional indicia of employment relationships in light of the way in which work is conceived, and how it is done, in Aotearoa New Zealand in 2021. The issue was last considered by the Supreme Court over 15 years ago in *Bryson*, and much has changed in the intervening period.

Declaration of employment status

[100] It will be apparent from the foregoing that I consider it appropriate to make a declaration under s 6 of the Act that Mr Humphreys is an employee (as a homeworker), and has been for the relevant period; and that his employer is the Ministry of Health, and has been for the relevant period. A declaration in these terms is made accordingly.

What is "the work for which he is entitled to be paid"?

[101] The Crown asks that if a declaration of employment status is made some clarity be given as to what work Mr Humphreys is entitled to be remunerated for and how that is to be assessed. That request was supported by Mr Cranney and Mr Meys on behalf of Sian. The following observations are general ones - any assessment of the work for which Mr Humphreys is to be remunerated is not formally before the Court in light of the pleadings, and would need to be decided by way of fresh proceedings if they cannot otherwise be agreed.

[102] In *Fleming* I observed, in the context of a proposed direction to mediation to resolve remedies, that the correct calculation of wages will appropriately reflect the hours of work performed by Ms Fleming, applying the well-established test for what constitutes work. That test was confirmed by the Court of Appeal in *Idea Services v Dickson*, remains good law and is binding on this Court.[58] I do not accept, for the reasons that follow, that a different test applies when assessing the work for which a family care-giver of a disabled adult child should be remunerated.

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[58] *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522, [2011] ERNZ 192.

[103] In summary, the *Idea Services* test requires the Court, in assessing whether an employee is working at any particular time, to balance three factors:[59]

(a) constraints on the employee;

(b) nature and extent of the employee's responsibilities; and

(c) benefit to the employer.

[104] Since *Idea Services*, a number of cases arising in a range of different factual contexts have dealt with issues as to what constitutes work which is to be remunerated. Examples include:

(a) doctors at home and on call - time spent on call found to be work;[60]

(b) freezing workers getting into and out of their safety gear before and after joining the chain - time spent "donning and doffing" found to be work;[61]

(c) store workers attending pre-work 'voluntary' meetings - time spent found to be work;[62]

(d) boarding school matron sleeping at boarding school and on-call to attend to students - held to be at working while asleep;[63] and

(e) a community service worker sleeping at a community home so that he could be "on-hand" to deal with any issues that arose during the night - held to be working while asleep.[64]

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59 At [7]-[10].

60 *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127, [2017] ERNZ 749.

61 *Ovation New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2018] NZEmpC 151, [2018] ERNZ 455; *Ovation New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2019] NZCA 146.

62 *Labour Inspector (Ministry of Business, Innovation and Employment) v Smiths City Group Ltd* [2018] NZEmpC 43, [2018] ERNZ 124.

63 *Law v Board of Trustees v Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.

64 *Dickson*, above n 58.

[105] These judgments reflect two important things. First, a developing understanding of what constitutes work and the time during which employees are entitled to be remunerated. In this regard there has been a discernible move away from a perception that a worker is working only when they are doing something regarded by the employer as active and productive. Such a narrow conception of work was roundly rejected by the Court of Appeal in *Idea Services Ltd v Dickson*, as was an associated submission that a wider, "nebulous", approach to work to be remunerated would have "profound implications for the labour market."[65] The Court of Appeal observed that if Parliament was concerned about the implications of its approach it could legislate to make its intentions clear.[66]

[106] Second, the case law reflects the fact that work and how work is done are rapidly evolving. Employment relationships and the circumstances in which work is undertaken have become progressively varied, as the Court of Appeal has observed by reference to the annual survey of employed people conducted by Statistics New Zealand.[67]

[107] It is now well accepted that a worker's time has a value and, where an employer wishes to have the benefit of that time, it comes at a cost.[68] Relatively recent legislative amendments in relation to so-called zero hours contracts reflect the point.[69] The same policy objections might be said to apply in cases involving the provision of care.[70]

[108] Take the following example for illustrative purposes. A nanny is employed to care for a three-week-old baby. The baby generally wakes every three to four hours and requires feeding and a nappy change when it does. It is generally awake for 30

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65 Above n 58 at [11]-[12].

66 At [25]. Note that the Sleepover Wages (Settlement) Act 2011 was enacted shortly after the judgment was delivered, extinguishing past claims for sleepover back pay. It is now expired.

67 *Dickson*, above n 58, at [25].

68 See generally June Hardacre and Natalie Healy "What it means to 'work' – developments since Idea Services v Dickson" [2017] ELB 45; Richard Alfred and Jessica Schauer "Continuous Confusion: Defining the Workday in the Modern Economy" (2011) 26 ABA J Lab & Emp 363.

69 Employment Relations Act 2000, ss 4B, 130, 132 and 232.

70 See for examples Sara Charlesworth "Decent working conditions for care workers? The intersections of employment regulation, the funding market and gender norms" (2012) 25 AJLL 107; International Labour Organisation *Care Work and Care Jobs for the Future of Decent Work* (2018).

minutes and then goes back to sleep. From time to time the baby wakes unexpectedly and requires immediate attention. Is the nanny appropriately remunerated for each of the discrete time slots when they are actively providing care to the baby (feeding and changing nappies) or for the entire time they are onsite and available to attend to the baby's needs? If it is the former, is the nanny free to leave the site and go to the movies, so long as they return three to four hours later? The answer to each of those questions appears to me to be obvious.

[109] Ms Bleckmann gave evidence on behalf of the Ministry touching on the realities of Mr Humphreys' situation:[71]

> Q. … between tasks if [Sian] requires 24 hours a day supervision how is the time between tasks that are identified taken into account?
>
> A. Well it's not.
>
> Q. Right and why not?
>
> A. Because the allocation, the NASC is still allocating for the personal care and the household management and any other supports so if the family or the other things that Ms Humphreys or a disabled person is during – doing during the day means that they don't have alternative support then the NASC and the family would be needing to talk about other options such as residential care.
>
> Q. So you're saying that supervision, the fact that Sian has been identified as requiring 24-hour a day seven day a week supervision is not something that the Ministry considers needs to be fed into an assessment of allocated paid hours, is that it in a nutshell?
>
> A. Yes.

[110] It may also be noted, as Mr Meys pointed out, that despite the unchallenged evidence that Mr Humphreys has been doing precisely the same caring work for an extended period of time, the assessment of the time for which he should be remunerated has changed. It now sits at 44 hours per week, although it has previously sat at considerably less.

[111] I understood the Crown's key argument to be that the "usual approach" (namely the approach endorsed in *Idea Services v Dickson*) was a poor fit in the context of a family caregiver's situation. It would not adequately reflect the reality

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[71] Notes of evidence at 120. See also Mr Wysocki's evidence at 146.

that this is not a conventional employment relationship, primarily because the work is conducted in Mr Humphreys' place of residence and because of the special nature of the relationship with the person being cared for. In closing submissions counsel for the Crown gave the example of a not-for-profit carer coming into the home, submitting that although the benefit to the Ministry would be the same, it is not the sort of "benefit" that creates a basis for the Ministry to be an employer, or for it to be regarded as "work" in all the circumstances. The difficulty with the analysis is reflected in the following example:

- A school is fundraising for a new gym. It runs a school dance. A talented parent with a musical bent spends five hours acting as DJ at the event. The parent is not paid for the five hours.

- A school is fundraising for a new gym. It runs a school dance. A commercial DJ is hired for the event. The DJ is paid for the five hours.

The work is the same; the benefit to the school is the same. The difference is that one person is prepared to do the work for free. I note for completeness that while Parliament has made specific provision for volunteers (excluded from the definition of employee under the Act) there was no argument that Mr Humphreys fell into this limited category.[72]

[112] It was further argued that the Crown, as employer, would have a limited ability to properly estimate or take steps to reduce the amount of "work" Mr Humphreys actually does.[73] The difficulty with this submission is that it disregards the fact that Parliament has specifically legislated for homeworkers (who perform their work in their home and whose activities, by definition, lack visibility) to come within an expanded definition of employee and thus entitled to all of the rights that come with that status, including to be remunerated for work performed. Nor did Parliament see fit to couple the expanded definition with a statutory test for how remuneration might be assessed.

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72 Employment Relations Act 2000, s 6(1)(c).

73 The Crown also advanced a subsidiary argument about the correct payment being determined by reference to the applicable FFC and IF policies. I have found that Mr Humphreys was an employee of the Ministry and as such these policies are not relevant.

[113] In any event, the objection appears to me to boil down to the sort of concern raised by the employer in *Idea Services*, which failed to gain traction. Issues about the extent to which Mr Humphreys was and is constrained in terms of what he does will fall to be determined on the facts. That is hardly novel - the same approach was applied in each of the cases referred to above at [104]. And while an appropriate assessment of lost wages might not be a particularly straightforward exercise, the reality is that such an assessment is often an inexact science, as the caselaw[74] and various statutory provisions[75] reflect. It may well be necessary for the Court to make the best assessment it can, being satisfied on the balance of probabilities that the conclusion as to loss is correct. A pragmatic view is sometimes required.[76] Both the Employment Relations Authority and the Court are well used to this sort of task.

[114] The Crown submitted in closing that if *Idea Services* was to be adopted then it would be appropriate to use the NASC assessment as a proxy for hours worked. There is a logical difficulty with such an approach. The factors identified as relevant by the Court of Appeal in *Idea Services* differ from those applied by NASC in assessing the number of hours to be paid. In other words, the NASC assessment does not calculate how much work is being done but rather decides the number of hours which will be paid for based on a combination of factors determined by the Ministry.

[115] In summary, I do not see the fact that Mr Humphreys works in his home as justifying a departure from the test endorsed by the Court of Appeal. I perceive the test to have significant benefits in this specialist area of the law, particularly in terms of it being sufficiently flexible and fact-dependent to enable the Court to apply it in a range of cases and within the context of different employment relationships and as they evolve over time.

[116] A further issue identified by the Crown appeared to be centred on a concern that Mr Humphreys might be assessed as working 24 hours a day/seven days a week

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74 See, for example, *Cowan v Kidd* [2020] NZEmpC 110, [2010] ERNZ 319 at [40]-[46].

75 Employment Relations Act 2000, ss 4B, 130, 132 and 232.

76 See, for example, *Smiths City (Southern) Ltd (in receivership) v Claxton* [2021] NZEmpC 169 at [159]. See also Burrows, Finn and Todd (eds) *Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at ch 12; *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] NZLR 726.

based on an application of the Court of Appeal's *Idea Services* test. Mr Cranney made it plain that he was not advancing a submission that a family caregiver should be paid for working 24 hours a day. In any event I consider the objection to be beside the point. The Crown's concern cannot, as a matter of logic or principle, require the application of a different approach. *If* Mr Humphreys is working 24 hours a day/seven days a week/356 days a year as an employee he is *entitled* to be appropriately remunerated for that.[77] In any event, the Crown's objection puts the cart before the horse - the correct assessment of the work Mr Humphreys has done and which he is to be remunerated for can only be made after a full factual analysis has been undertaken.

[117] Finally, I see it as unhelpful to apply differing approaches to an assessment of work across categories of workers/workplaces. It could lead to particularly vulnerable groups of workers (including homeworkers) being disadvantaged simply because of the location they undertake their work in. While the way in which work is performed, for whom and how, is rapidly evolving, the underlying principle remains precisely the same - namely that a worker is entitled to be remunerated for the time they are constrained from the freedom they would otherwise have while undertaking responsibilities for the benefit of their employer. That is a factual assessment.

[118] It follows that I would apply the Court of Appeal's approach in *Idea Services* to a determination of the work for which Mr Humphreys should be remunerated at no less than the minimum wage. That step in the process has not been taken and cannot occur until Mr Humphreys pursues a claim for lost wages.

[119] For completeness, I note that the Supreme Court (UK) has recently dealt with the concept of work in *Royal Mencap Society v Tomlinson-Blake*.[78] That judgment deals with a particular statutory/regulatory regime which differs from New Zealand's, and the way in which the common-law test for work has been carefully developed by the Courts in this country, having regard to its own, unique, industrial relations landscape. For these reasons I do not consider that it assists the analysis required by ss 5 and 6.

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77 Minimum Wage Act 1983, s 6.
78 *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8.

Conclusion

[120] Mr Humphreys is declared to be an employee of the Ministry (as homeworker) for the relevant period.

[121] Mr Humphreys was not and could not have been an employee of Sian; and she could not have been his employer.

[122] As an employer the Ministry has a range of obligations and liabilities, including to remunerate Mr Humphreys appropriately for his work and in respect of health and safety. The nature and scope of these matters do not fall for determination at this stage.

[123] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 9.30 am on 8 December 2021