IN THE SUPREME COURT OF NEW ZEALAND SC 97/2016

BETWEEN **JANET ELSIE LOWE**
Appellant

AND **DIRECTOR-GENERAL OF HEALTH, MINISTRY OF HEALTH**

CHIEF EXECUTIVE, CAPITAL AND COAST DISTRICT HEALTH BOARD
Respondents

Hearing:	10 February 2017
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	P Cranney and S N Meikle for the Appellant J C Holden and M J R Conway for the Respondents

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CIVIL APPEAL

MR CRANNEY:

If the Court pleases. My name is Cranney, and I appear with Mr Meikle for the appellant.

ELIAS CJ:

Thank you Mr Cranney, Mr Meikle.

MS HOLDEN:

If the Court pleases. Ms Holden and Ms Conway for both respondents.

ELIAS CJ:

Thank you Ms Holden, Ms Conway. Yes, Mr Cranney.

MR CRANNEY:

Your Honours, I do intend to cut quite quickly to the chase, which is really largely an issue of statutory interpretation, but I would, with the Court's leave, just make a few introductory comments about the case. The first one is simply to go through some of the terminology I'll be using. There's a number of phrases in this case, the first one is "home care", and that's, as Your Honours will see when I refer you to a case, is not carer support under the system. So it's not a, it's that it's simply somebody going to someone's home to do work for a disabled or elderly person. Whereas carer support is someone to go and do very similar work, but for the purpose of relieving the carer, the primary carer, and that's the next phrase. The next phrase is "primary carer" which is the person who is an unpaid person, usually a relation or a husband or a wife or a parent or a child, of the disabled person, and the relief carer is somebody like Ms Lowe, who provides the relief care. Now Your Honours will always hear the phrase "NASC" –

ELIAS CJ:

These aren't defined phrases. You're telling us how you're using them?

MR CRANNEY:

Yes, how we're using them Ma'am. The word NASC is used in all the Courts below. None of them, unfortunately, have got it quite right. It means needs assessment and service coordination service. It's a horrible acronym because it uses the word "service" twice. Needs assessment and service coordination service. You'll also hear the word "client" which refers to the, sometimes you

call it a service user or a patient, and then you've got the two defendants, the Ministry, who is the responsible party for people over 60, for clients over 60, and the DHB, who is the responsible client for the people under 60.

Now Your Honours, the matters have been before the Court before, some long time ago, and in those years, in the 1990s, the opposite happened to what happened here, so the Employment Court found against the caregivers in that case and were overturned by a full Court of the Court of Appeal. There's a case which I want to refer Your Honours to in the common bundle, which is the first *Cashman v Central Regional Health Authority* [1996] 1 ERNZ 1 (EmpC) decision, under tab 6, and simply to make the point about this case, that although His Honour Judge Palmer doesn't come to a legal point until page 33 of the case, the first 32 pages are worth reading, in this particular judgment because they set out in some detail the factual history of the sorts of arrangements which are before the Court now. If I could refer Your Honours to some of the parts of that case.

On page 9 of the case, in the last paragraph, the second line of the last paragraph of page 9, Your Honours will see a reference to carer relief and home support. So making that distinction to which I've just referred Your Honours.

GLAZEBROOK J:
So just making sure I've got where you are, bottom of page 9 did you say?

MR CRANNEY:
Bottom of page 9, last paragraph, second line from the top of the paragraph. You see the words "carer relief and home support". Then, Your Honour, over the page on page 10 you'll see in bold, just above half way down, "carer relief and home support" and page 11, the third paragraph, the carer relief and home support services, and then following that on page 11 in the paragraph beginning, "Appropriately at this juncture I refer to the range of services undertaken through the home support services and carer relief services," which describes very fully the sort of work that is done. Then over the page

on page 12, Your Honours will see the first couple of paragraphs there, distinguishing between the two different types of care again, but stating, for example, starting at the second sentence, “The range of such disability addressed during the evidence included age related disability of a physical character, extending to elderly clients suffering from Alzheimer’s disorder – or senile dementia – occasioning a greater and less pronounced degree of cognitive or management difficulty; psychiatric disorders of differing characters experienced by differing and often elderly clients; a female client suffering from advanced Parkinson’s disease in a carer relief setting when the woman’s husband was her primary caregiver requiring episodic ‘relief’ from demanding ongoing care burden posed by the afflicted client.”

Then in the next paragraph down, “Furthermore, during the present hearing the evidence established that the providers, who overwhelmingly, I accept, are women, have varying personal and occupational backgrounds,” and it gives some characteristics of the sort of person who is doing the work, and that is the same in this case. Then the case goes on to go through the history of the, perhaps on page 18, starting at line 15 onwards, or line 17 onwards, the history of the concept of carer relief, and the history of it was that all of these workers were engaged as independent contractors, initially from the Department of Social Welfare, and then New Zealand Income Support Service, up until the hearing of this case. So they were engaged by the Crown as independent contractors, including the carer support workers. So it is a useful judgment. Despite the fact that the Union lost the case, it sets out a very thorough factual background up until the *Cashman* judgment.

Then off to the Court of Appeal, five Judge judgment, *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA), and just to highlight one or two things in there Your Honours, the Court in that case, at the bottom of page 10, and this is under tab 8, at the bottom of page 10, “So in this case the respondents engage the homecare workers to provide services to those for whom they care. They do work for them but they also do work for the respondents,” and the phrase “do work for” is quite similar to what’s used in

section 5 of the Employment Relations Act 2000 and they were deemed by the Court to be homeworkers.

ELIAS CJ:
Sorry, what are you referring to when you say it's quite close to the words used in the section?

MR CRANNEY:
The section is set out at tab 1 Ma'am.

ELIAS CJ:
"Do work for that other person."

MR CRANNEY:
Do work for the other person, so I think in order to get home you must at least start off with person B doing work for person A. Leaving aside any question of the nature of the relationship between the two you must show that the work is being done for person A, if you are person B. The Court is there finding that they do work for the RHA, in that case, and Sunderland, and that conclusion is adopted by the Court of Appeal in this case, *Ministry of Health v Lowe* [2016] NZCA 369, which follows that same reasoning at, I think, paragraph 22 of the judgment.

Then after, we'll come on to the section again further in a moment Ma'am, after the Court of Appeal judgment the matter was then referred back to the Employment Court where certain conclusions were made in favour of the workers in the case, and they got certain remedies. And one of the submissions by the appellant here is that the arrangements are quite similar. The overall substance of what's happened here is quite similar to what was determined by the Court in *Cashman.*

ARNOLD J:
But in *Cashman*, as I understood it, originally the RHA contracted with the providers directly and then it effectively outsourced it to Sunderland, but there

would have been a contract between the RHA and Sunderland, but Sunderland was to employ people and provide the service. That's right isn't it?

MR CRANNEY:

Yes, that was a difference, I agree. The same workers providing the same services to the same source of people with a slightly different arrangement, and when it went back to the Employment Court in *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 706 (EmpC), and I've referred to this briefly in my submission, the Employment Court found that both Sunderland and the DHB, or as it was known then the RHA, were employers concurrently of the two, of the workers when it went back. Now I accept that there are different, I'm not saying the way it was characterised by the Court of Appeal judgment, which said – well Mr Cranney said – well it's more or less the same, we should just adopt it. I'm making a lesser submission which is the broad gist of this is that women workers are doing this caring work for the health sector in an almost identical way to the way it's always been done, and there's been some adjustments in the way that it's recorded and so on, and the question is do those things really matter when one compares this situations now with the *Cashman* situation.

ELIAS CJ:

The difference being, you would say which you say is not material, but the difference being what? What's the step?

MR CRANNEY:

Well in some ways, in the eventual conclusion of the Employment Court in*Cashman*, in some ways this is a better case. here we have the workers doing work for the DHB, and when I use the word DHB I mean both, there's no real difference, I'll just use one, and being paid for it by the DHB, and that is my submission on the section, which is that if person A is doing work for money, which has happened here, and the work is being done for B, in this case the RHA, the DHB or the Ministry, and money is paid by B to A for the

work, which is what happens here as well, then person A is engaged. It's as simple as that. That's my simple submission.

ELIAS CJ:

So what you have to convince us, though, is that they're doing work for the DHB in this situation.

WILLIAM YOUNG J:

But that was *Cashman*.

MR CRANNEY:

Yes, I'm relying on *Cashman*, and I'm relying on two Court of Appeal, *Cashman* and this one. They both came to the same conclusion.

ARNOLD J:

Just on that. When the DHB is funding this you say it's fulfilling its statutory obligations. There's not a specific statutory obligation, is there, it's just the general –

MR CRANNEY:

Yes.

ARNOLD J:

And so in funding the work clearly the DHB is acting within its statutory functions, but it's not compelled to offer a service of this sort, is that right? In terms of the New Zealand Public Health and Disability Act 2000 .

MR CRANNEY:

No, it's not compelled to offer any particular medical service anyway so it wouldn't have to offer brain surgery or even, there's no specific list of services that are imposed on the DHB or the Ministry. They have a general obligation to provide services, and this has always been one of the services that has been provided.

ARNOLD J:

So what's the difference then, I mean say I say to one of my grandchildren, you organise somebody to teach you to drive and I'll pay the bill, and they go off to a driving school and get them and I pay the invoice. Is that driving school working for me, doing something for me?

MR CRANNEY:

Yes, I think so, because I'm – well first of all you're asking me to go and make the arrangements for you, which I've done, and it's better than trying to teach them yourselves, I can tell you that.

WILLIAM YOUNG J:

It may depend on who the driving school invoices.

MR CRANNEY:

So I go to the driving school and say, look, there's a friend of mine, a Judge of the Supreme Court, and he wants you to teach his child to drive, and send the bill to him, and that's what happened here.

ARNOLD J:

So what's the difference then if I say to my granddaughter, look, you organise it, you pay for it, and I'll reimburse you.

MR CRANNEY:

If she goes herself to do it then I think the arrangement there is between her and the driving school. But see what happens here is the system is set up in such a way that the primary caregiver is authorised by the system, or by the Ministry, to make these arrangements. You go away and do it, give them the forms et cetera, and you're doing it without authority because it's in the paperwork, and make the arrangement, and that's exactly what happens. So, and it's perfectly sensible.

WILLIAM YOUNG J:

Well here, presumably, if the Ministry didn't pay, Ms Lowe could sue them?

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

There'd be a unilateral contract ie constituted by the forms that if workers provide, in accordance with the scheme, an invoice is rendered, it will be paid within X number of days.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

So that might be a sort of a triangulated contract between her and the, who should we call, and the respondents.

MR CRANNEY:

Yes, it's not an offer to the whole world like, and I've always wanted to mention *Carlill v Carbolic Smoke Ball Company* [1892] 2 QB 484; [1891] All ER Rep 127, but it's not one of those, but it's an offer, it's an arrangement where the Ministry and the DHB authorised the primary caregiver to make the arrangement. They send the paperwork out –

WILLIAM YOUNG J:

They are separately promising to the worker that if she does the work she'll get paid.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

And renders an invoice.

MR CRANNEY:

Yes, that's the substance of it. It is possible to put it into other, as my learned friend tries to do, you can try and push it into other analyses, but really what's

happening is that the Crown is paying the women to do the work which the Crown needs done.

ARNOLD J:

Well it's paying an amount, isn't it. I mean there's nothing to stop the primary caregiver saying to the relief worker, well actually I want you to do something in addition to these, the sort of thing that you pointed out in Judge Palmer's judgment, for example, a bit of physiotherapy, or something of that sort, and I'll pay you extra.

MR CRANNEY:

Yes, that could occur.

ARNOLD J:

That's right, so I mean in that sense the payment from the DHB or the Ministry would be a subsidy, wouldn't it?

WILLIAM YOUNG J:

Well if you look at it, if you look at 141, which is probably maybe the best document from your point of view . 141 of the case on appeal, volume 3, how to claim carer support.

MR CRANNEY:

Yes.

ELIAS CJ:

Sorry, I've just lost track of the question you were asked. I want to make sure that it's going to be answered.

WILLIAM YOUNG J:

It's effectively whether there are two deals. The primary support carer recruits the relief carer, one deal. Second deal, the respondents agree to subsidise the primary carer in relation to any costs. So there's no direct relationship between the respondents and the relief carer. The alternative theory is that

it's a tripartite arrangement where the respondents are in a contractual relationship with the carer and from your point of view there is actually a promise here.

MR CRANNEY:
Yes.

WILLIAM YOUNG J:
If you do the services and render the invoice you will be paid within 10 working days.

MR CRANNEY:
Yes, and I think there's a third analysis which I also press which is that it is simply a direct relationship between the DHB and the carer organised by the primary caregiver for the DHB which I think is the best analysis.

ELIAS CJ:
Say that again?

MR CRANNEY:
It's a relationship between the DHB and the relief carer, which is organised for the DHB by the primary carer under the system, and the Court of Appeal says that, and it's said in the submission from my friend, that it's common ground there was no contract, or I don't accept that that is common ground with no contract. The contract is one of sale and – well, whatever you want to put it, it could be a sale and purchase agreement, which is the way it's set up here it's an invoice, and there is a document here which records it as a, which records it as Lowe as a vendor, there's a vendor report, this is under tab G in volume 3 headed "Vendor Payment History Report". These things are not decisive but she, it could be a sale and purchase agreement. It could be a contract for services, which is very similar to a sale and purchase agreement, it probably is a sale and purchase agreement, and it – but certainly both of those fit within engagement. So engagement is a wider concept. Engagement would cover all the other aspects of the section 5 definition.

Now you see the word “employment” in section 5 as well, see we’ve now gone onto the statutory interpretation issue, which I thought we would get to.

GLAZEBROOK J:

Sorry, can I just find out where the vendor history payment report, what tab was that?

MR CRANNEY:

I beg your pardon Ma’am, it’s tab G on volume 3, and it’s the first four or five words, it’s in the heading. The section is quite interesting because, this is now at tab –

ELIAS CJ:

Sorry, when you say the first four or five words, what are you referring to?

MR CRANNEY:

In the middle of the page, at the top.

ELIAS CJ:

Tab G?

MR CRANNEY:

Yes, tab G, unless Your Honour has a different bundle.

O’REGAN J:

Vendor payment it says.

MR CRANNEY:

Are you looking, Your Honour, at volume 3, at tab G?

ELIAS CJ:

Yes, vendor payment. I see.

WILLIAM YOUNG J:

I mean it's a sort of a side issue in a way but are many relief carers registered for GST?

MR CRANNEY:

No, not many.

WILLIAM YOUNG J:

Are any?

MR CRANNEY:

I don't think so, not for the individuals. There'd be some corporate entities doing it.

WILLIAM YOUNG J:

So the full-time carer will not be registered for GST because that person is not conducting a business.

MR CRANNEY:

No.

WILLIAM YOUNG J:

So the GST is added to the bill and is that recovered by the respondents?

MR CRANNEY:

It must be, if it's paid to them, it must be accounted for in a normal invoice scenario.

WILLIAM YOUNG J:

So they do add GST to the…

MR CRANNEY:

They must if somebody claims the payment plus GST, they must then be able to recover it from…

WILLIAM YOUNG J:

Well, not necessarily. It may just be the, the respondents may just be in the nature of a consumer but –

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

Is that dealt with in the evidence?

MR CRANNEY:

I don't think so Your Honour.

WILLIAM YOUNG J:

If they were, it would imply that services were being provided by the relief carer to the respondents.

MR CRANNEY:

Yes.

GLAZEBROOK J:

They're asked to provide a tax invoice.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

Under this how to claim carer support.

WILLIAM YOUNG J:

Yes, so that does imply – and that's a tax invoice to the respondents.

GLAZEBROOK J:

To the respondents.

MR CRANNEY:

The second, the meaning of a homeworker, which is in section 5, a homeworker means, "A person who is engaged, employed or contracted by any other person (in the course of that other person's trade or business) to do work for that other person," so I have to get past "to do work for that other person". If I don't get past there, I'm out of the Court. But if I get past there I have to say who is the other person and there are only really two or three possibilities here. One of them is the, what I call the client, the sick person, the person who's being cared for. The other one is the primary caregiver, and the third one is the person who's paying the money for the work. So I take a rather simple view of the section, about what engaged means, which is that it means you're engaged if you're doing work for someone else who is paying you for it, and that then gets me home on engaged I say. in terms of the other aspects of it, you see the word "employed" there, which is rather odd because you wouldn't need to be a –

ELIAS CJ:

Sorry, what are you referring to now?

MR CRANNEY:

Section 5 Ma'am, tab 1 of the 1st of February bundle. A person engaged, employed or contracted. They all kind of overlap. Now if the word "employed" is in that definition, if it means employed in the normal sense, it wouldn't make much sense because you wouldn't need to have a homeworker definition for that person. So I say it means something like used, and the authority I've referred to later in the bundle is this Court's judgment in *Open Country Cheese Company Limited v New Zealand Dairy Workers' Union Incorporated* [2011] NZSC 59, where the same sort of phraseology is used in the anti-strike breaking provisions of the Act, and just to tell you the facts of that case, that although the strike breakers were employed by another company, they were still held to be employed or engaged for the purposes of strike breaking by the original company. So they took a broader view of the word "employed".

WILLIAM YOUNG J:

But Mr Cranney, in *Cashman* part of the period covered involved the arrangements in which Sunderland was a party, so presumably the relief carers were directly contracting with Sunderland for the provision of relief services. How did the Court of Appeal get to the conclusion that they were nonetheless engaged by the RHB? Sorry, I only read the judgment quickly. I didn't really get –

MR CRANNEY:

I think, Sir, that what happened was that the dispute erupted at the time of the so-called transfer. An interim injunction application was made and everybody agreed to put, to sheath their swords until the Court decided whether they were homeworkers. So it's a little bit unclear exactly precisely whether they ever even transferred.

WILLIAM YOUNG J:

Well it probably didn't matter much because Sunderland presumably would have been in a position where it would have had to accommodate employee, employer obligations and would not have worked for –

MR CRANNEY:

Although Sunderland did try to engage them on contracts for services.

WILLIAM YOUNG J:

Yes, sorry, but if the homeworker definition applied then Sunderland would be the employer.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

Presumably and, so it didn't really matter to anyone whether Sunderland was the employer or the RHA was the employer.

MR CRANNEY:

That's right.

WILLIAM YOUNG J:

Because Sunderland would, as it were, good for the money.

MR CRANNEY:

Yes, and it may well be, Your Honour, that if you look at this subparagraph (b) of the definition, which says, "Includes a person who is in substance so engaged, employed or contracted," it even widens it further. It's the substance of the thing you've got to look at. What is actually happening here. And the substance, we say, is that they're engaged by the DHB to do work for the DHB who pays for the work. Now the agency argument, we're not saying that the, if the agency argument is necessary at all, it's only necessary in the sense that the primary carer is doing certain things for the DHB. Not that they're entering into independent engagement, but that they're assisting the DHB by making the arrangements for the DHB, and that the so-called engagement between the primary caregiver and the relief carer, the so-called engagement in that circumstance is really just an engagement by the DHB facilitated by the primary carer and one of the objections that's made about this in my friend's submission, although I suppose I should wait until it's said, but I may as well address it. This fear that it's going to impose these obligations of employment on personal grievances and so on. But the sort of employment that we're talking about here is not Rolls Royce. If these people are deemed to be employees, deemed, then they're really in the situation of like of a casual McDonald's worker, whose shift ends every shift, but nonetheless are entitled because they're deemed to be employees, to be paid the minimum wage,

WILLIAM YOUNG J:

Is that, is minimum wage and perhaps holiday pay, is that what's in issue?

MR CRANNEY:

Primarily minimum wage and holiday pay. Although this – the Court here is not – there is one argument you could make, Sir, that some of them are kind of permanent, but it's not that strong because the whole arrangement is that they come in when called, and there's probably a justifiable basis for saying that if we don't want you back for good reason, you don't have to come back. The same as a home, someone who goes in to help people do showering and so on, the homecare workers, there's a very low threshold to reach, to say I don't want you back doing my showering.

WILLIAM YOUNG J:

So what's the significance of – I mean I understand that aspect of it, what's the significance of the minimum wage and holiday pay issue?

MR CRANNEY:

In this case?

WILLIAM YOUNG J:

Yes.

MR CRANNEY:

If you look back to that judgment of Judge Palmer, you'll see in there the figures in 1994, or when this came up, are the same as they are in 2016.

WILLIAM YOUNG J:

So they haven't been increased in 20 years?

MR CRANNEY:

No. $73, or something, for a half day.

WILLIAM YOUNG J:

How much sorry?

MR CRANNEY:

$73.

WILLIAM YOUNG J:

For a half day?

MR CRANNEY:

Yes, and you'll see they're pretty much the same and, of course, that's because it's not just a question of minimum wage in that sense, it's also a question of the right to organise, the right to unionise, the right to freely associate to advance your interests, and all of that stuff, that you don't get in New Zealand unless you're an employee under the Employment Relations Act 2000. So these people are outside of the system and the health system employs homecare workers, most of those are employees. Most of them are actually employed by third parties. They'd be on pretty much minimum wage and so on but they're actually employees. These people are below that. So these people are the lowest level of the whole health system, are these women workers doing this work. The very, very lowest level. There are thousands and thousands of people above them, and they're below New Zealand's minimum standards under this arrangement, which we thought had been fixed in *Cashman*. But it hasn't been. And the doomsday analysis of it, and there's been a bit of that in all the Courts that have looked at it, the same sorts of points are made in equal pay cases, the *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 case, the sleepover case, which although it was a male appellant, *Idea Services Ltd v Dickson* [2011] NZCA 14; [2011] 2 NZLR 522 about 75% of those workers are women, and these are people looking after intellectually disabled in residences, and the third one being what's known as the in-between travel cases, where workers are going from place to place doing homecare work and having to pay their own petrol and their own time, those things are being addressed and, to be quite fair to the State, positively, and there is a bit of a shift going on, it's not a, it's an equal treatment case in the sense that it's addressing a large group of, a very, very large group of women workers in New Zealand society, and these issues are beginning to be pushed up and addressed, and I think to be fair to the State, they are being addressed, it's not a question of being ignored, and this is just probably the last big group of them in this kind of position.

So in terms of what the Court of Appeal did with it, we say, well, they accepted the Crown submission that there had to be some, as they said, some attributes of employment like selection and control, but we say, well, there were some attributes of employment. Doing work and getting paid for it, and doing the work for the State, and those are very important attributes of employment, and for that reason we don't really think the Court of Appeal got to grips with the issue sufficiently, with respect, to address it.

WILLIAM YOUNG J:
I suppose if the respondent simply said to primary carers, we'll give you $150 per week, and you can use it to provide relief care if you want, and that had been the deal then you wouldn't have a very strong case.

MR CRANNEY:
No.

WILLIAM YOUNG J:
But you would have a case, presumably, against the carers, would you, the primary carers?

MR CRANNEY:
Yes, that's the effect of the Court of Appeal's judgment.

WILLIAM YOUNG J:
So the primary carers are liable to treat…

MR CRANNEY:
Yes. As I've said in my submission, they've actually imposed actual employment obligations on primary carers. They're not homecare workers anymore because they're not in the course of any business, but they're simply employees of the primary carer. They've created a large number of employers, in my submission.

GLAZEBROOK J:

And as you're possibly in a slightly odd position where they don't, they're not responsible for payment, effectively. I know they're supposed to be able to top up but I doubt anyone does.

MR CRANNEY:

Yes, the pre-statute materials, which are in the last document in the common bundle, the very last document they say one of these papers which related to the formation of the homeworker definition in the first place and –

GLAZEBROOK J:

What are you referring to?

MR CRANNEY:

Tab number 17 Ma'am.

ELIAS CJ:

Of the authorities.

MR CRANNEY:

I beg your pardon. And then the one before that, Your Honour, tab number 16, which is *Government Policy Statement on Labour Relations* September 1986, and on –

ELIAS CJ:

Sorry, just on your submission that the effect is to make the primary carers employers, does that undermine your submission that these people are outside the pale, because presumably the minimum wage attaches.

MR CRANNEY:

Yes, I think in some ways it does. But in practical terms, I mean they're not really going to be able to sue the primary carer under a scheme like this for holiday pay or minimum wage.

ELIAS CJ:

Well that may be absolutely right as a matter of practicality, but I'm just trying to think of the structure of…

WILLIAM YOUNG J:

What did the Court of Appeal say about this? Did it address the position of a primary carer as an employer?

MR CRANNEY:

Yes it did.

WILLIAM YOUNG J:

Whereabouts?

MR CRANNEY:

It said, if anything, this is in tab 6, paragraph 28, "If Ms Lowe is engaged by anyone it must be the full time carer."

WILLIAM YOUNG J:

I see, but then they say they're not the employer because they're not engaged in a business.

ELIAS CJ:

Or they're not homeworkers –

MR CRANNEY:

They're not homeworkers.

WILLIAM YOUNG J:

No, because the full-time carer is not engaged in the course of a trade or business.

MR CRANNEY:

Yes, but the point is, Your Honour, that they're still employees. They may not be homeworkers…

GLAZEBROOK J:

Although they could be, I suppose, engaged could be engaged as an independent contractor I suppose.

MR CRANNEY:

They could be.

GLAZEBROOK J:

I'm not sure, did they, somewhere people were talking about control and I can't remember where. If they were under control then presumably they're engaged as employees, but I can't remember now whether the Court of Appeal went into that.

MR CRANNEY:

No, I think it was in my submissions, Ma'am, I said that the Court of Appeal wrongly tried to apply the normal tests of employment to what was, in effect, a deeming provision.

GLAZEBROOK J:

In terms of whether the DHB, yes, I understood that submission.

MR CRANNEY:

Yes, and so paragraph 28, the effect of that, of course they're not homeworkers anymore because they're not engaged by someone in the course of a business, but they are something, and they're probably employees.

ELIAS CJ:

So that's – but is that to say that the Court of Appeal didn't engage with the question of employment? They didn't –

MR CRANNEY:

No, it's a funny sentence. It says in – if she's engaged by anyone it must be a full-time carer.

GLAZEBROOK J:

Presumably she has to be engaged by somebody. There has to be a contract somewhere.

MR CRANNEY:

I think there are only, there are very few options. There are either the DHB or the primary carer. And we say it's the primary carer.

ELIAS CJ:

Or the independent contractor option.

MR CRANNEY:

Yes, although independent contractors, the Act, the definition, the law really frowns on independent contracts in these kind of situations, and they allow the Court to determine something which is an independent contract is actually employment, if the real substance of the relationship is employment. So that option doesn't really help the independent carer much.

ARNOLD J:

But the substance of the arrangement couldn't be employment so far as the primary carer was concerned, could it? I mean if you're entitled to one day assistance per month, or two days per month, you know, like get a physiotherapist to come in on those two days and work with my elderly parent, there'd be no sense in which I'd be that physiotherapist's employer, would there?

MR CRANNEY:

No, you wouldn't be, and that does happen, not so much physiotherapists, but there are, you can use carer support to do things other than, the way it's normally used, which is at home, and those things do happen. So sometimes someone is taken to a rest home for day, and that doesn't make you the employer of the rest home, but the rest home is then providing the service to the DHB in the same way as the relief carer would be.

ARNOLD J:

So in what sense, then, would the primary carer be the employer of somebody in Ms Lowe's position. If she came a day a month, or two days a month?

MR CRANNEY:

A physiotherapist or Ms Lowe?

ARNOLD J:

No, no, Ms Lowe.

MR CRANNEY:

No, I don't think –

WILLIAM YOUNG J:

Well there might be. There might be someone to say, right, I may have someone I'm responsible for, I say well I want to employ a part-time nurse to come in 20 hours a week, but I would presumably get a subsidy for that in relation to whatever the entitlement was, but I'd be responsible for the balance.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

And I probably would be the person's employer wouldn't I?

MR CRANNEY:

Yes, probably you would.

WILLIAM YOUNG J:

Certainly I'd be entering a contract with that person anyway.

MR CRANNEY:

Yes, you see if you employ a babysitter, even though people don't like saying this, it's an employee. And if you mistreated a babysitter, and the babysitter

took you to the Employment Tribunal, to the Employment Relations Authority, they would be quite entitled to say that I was racially harassed or I had a short-term employment engagement for two nights babysitting. There's nothing unusual about that. They wouldn't be a homeworker because you didn't engage them in the course of your business, but they would be an employee.

ELIAS CJ:

Explain to me why, if your argument is right, if the client was taken to a rest home for the day, the rest home isn't an employee of the DHB.

MR CRANNEY:

Well they're in – well. Well normally to be an employee you have to be a human being, I think. A person.

GLAZEBROOK J:

They would be an independent contractor because they are in the course of their business they provide rest home care services, and the fact that they might provide relief care for somebody is just part of their care services.

MR CRANNEY:

Yes.

ELIAS CJ:

Or some homeworker but I'm just more hung up on the employment –

GLAZEBROOK J:

No that would be engagement. Well I think engagement can mean employment or as an independent contractor. But homeworker definition assumes they're not otherwise employees doesn't it? Because if they're otherwise employees of the DHB then it's actually irrelevant isn't it?

MR CRANNEY:

Yes.

GLAZEBROOK J:

Because if they're, the whatever you call them, the homecare workers are employees, oh no the carers, sorry, I've now forgotten your terminology, but anyway they are employees, but they don't need the homecare worker definition to become employees, they just are.

MR CRANNEY:

Yes, if they're employed by the DHB, and I think –

GLAZEBROOK J:

Yes, that's what I mean.

MR CRANNEY:

Yes, and so we could possibly have argued that these people are employees of the DHB, but what we did was we looked at the word "engaged" and thought why would we try and raise the bar in trying to say which type of engagement it is, because they're all caught by engagement, and there's a problem anyway with the control aspect of employment –

GLAZEBROOK J:

For the DHBs –

MR CRANNEY:

Yes, so the DHB would be the employer.

GLAZEBROOK J:

– as against the primary caregiver, yes.

MR CRANNEY:

But having said that it's not fatal because if you look at somewhere like Parliamentary Services, for example, the employee is Parliamentary Services, but the person who controls the person is not Parliamentary Services, it's someone else, the MP or the Minister, or a labour hire company sending people to a factory, so you don't necessarily need control. So we went for

engage, because it was a broader concept and it seems to us pretty clear that they were paying for it, they were doing the work for them, it was just the same system rearranged as had previously been upheld by the Court of Appeal, and then we ran into this problem in the Court of Appeal about selection and about oversight and we thought those things were quite irrelevant. The whole idea of the section is if you like to put a square peg into a round hole. You are going to get contradictions with strange elements, strange aspects to it, and I was going to refer Your Honours to this document number 16 –

ELIAS CJ:
Before you do that, so the homeworker category expands the category of employees.

MR CRANNEY:
Yes.

ELIAS CJ:
Really to get around arguments, presumably, about control.

MR CRANNEY:
Yes, and about selection.

ELIAS CJ:
I mean it's just really what Justice Glazebrook was putting to you but I hadn't quite thought of it like that.

MR CRANNEY:
Yes, well the point which I'm about to make about this document number 16 which is the same point. I won't give you the page numbers, Your Honours, it's the fifth page in because they are all strangely numbered, and it's headed, “Union and employer negotiations, persons not cover.”

GLAZEBROOK J:

I'm sorry, I've now lost you again.

MR CRANNEY:

It's all right Ma'am, tab number 16 of the common bundle, five pages in.

GLAZEBROOK J:

Sorry, that was my fault.

ARNOLD J:

And what was it, page 5?

MR CRANNEY:

Five pages in and there's a heading, "Union and employer negotiations, persons not cover."

ELIAS CJ:

Yes, I see.

MR CRANNEY:

It's very strange numbering. Now you see there the second to last paragraph of that, there will be measures – do we have it?

GLAZEBROOK J:

Mine is slightly oddly – okay, I'm there now.

MR CRANNEY:

And you will see there, the third to last paragraph on the left, "There will be measures to assist the organisation and the ward coverage of wards that were previously not covered, for example, where homeworkers have no access to their employers except through a post office box employers will be required to provide a physical address to the homeworker."

So people find themselves working for people, they might not even know the identity of them let alone where they are and in a case such as this here with these forms what's happening is someone is doing some work, they are getting paid for it by the DHB. It's got the Ministry of Health on the claim support form. There are guidelines in place, not very comprehensive by the health board, and we say that's enough to constitute an engagement. We also say that it doesn't impose unreasonable results. The workers are only going to end up here if they succeed with very minimum rights, that is, to get paid for their work according to the minimum legislation in the Holidays Act 2003, there are a few other statutes, the Parental Leave and Employment Protection Act 1987, other basic statutes of workers that they will be covered by.

ARNOLD J:

The homes will become workplaces, won't they, in terms of the legislation. What's the implication of that?

MR CRANNEY:

I think workplace includes – the definition of workplace –

ARNOLD J:

It just says –

GLAZEBROOK J:

That will be any way, won't it, in terms of health and safety and employment because that covers visitors and independent contractors and everybody, so it already will be, I'd assume.

ARNOLD J:

All I'm saying is the definition of workplace is a place where an employee works from time to time and so I am just asking, well what terms of the Act, what are the implications of that?

MR CRANNEY:

Well there is actually a, probably the biggest implication might be to have a look at the rights of access of unions to the workplace and –

ELIAS CJ:

But there might be implications under other legislation like the Health and Safety at Work Act 2015, mightn't there.

GLAZEBROOK J:

But as I said, I think that's a very broad definition there so whatever they are it they would be covered.

MR CRANNEY:

I think those Acts, I'm sorry I haven't got it to my fingertips, but I think that those Acts exclude dwellinghouses from rights of access.

GLAZEBROOK J:

From rights of access, I'm sure that's probably right as well.

MR CRANNEY:

But it's not really a practical problem because it's a bit like when we first started to argue about access in the ’90s there’s a case called *Service Workers Union of Aoteroa Inc v Southern Pacific Hotel Corporation (New Zealand) Ltd* (1993) 4 NZELC 98,228; [1993] 2 ERNZ 513 where the employer said, well you might want to get access to the hotel rooms while there’s people in them and if you're right the access and there’s a rather funny part of the judgment where I refuse to concede that I wouldn't be allowed in and I think the Court upheld it, but it's all a bit artificial. Why would you want to visit a worker during the period of when they are doing the care?

The argument that my friends have raised about, they say, “We don't know who she was, we didn't know Ms Lowe,” but the facts are that she had been working for them for 25 years or longer, in various forms doing homecare work, and they had been paying her. They had as much knowledge of her as

they have of many other workers that work for them, including people who are their employees, doing cleaning and so on. It's an artificial argument that the whole group of 30,000 people, no one knows who they are. They're integrated into the health system in the sense that the needs assessment process identifies a particular need amongst others, and they fill it. It's not an isolated service on its own.

WILLIAM YOUNG J:

I'm just flicking through the documents you put and I see at tab 17, which is the review part of the white paper I think which preceded it, the definition of homeworkers is discussed at page 87 as confined to people who work in their own homes, so I mean *Cashman* probably would have, in a sense the Court, sold the pass from the point of view of the respondents.

MR CRANNEY:

Yes, that's the problem for the respondents. The New Zealand position is broader than the ILO position which is you get protected if you're working in your own home. If you're doing piece work in your own home it's considered to be protected, but the New Zealand position is the dwellinghouse itself, for this group of workers at least, is considered to be a –

WILLIAM YOUNG J:

Someone else's dwellinghouse.

MR CRANNEY:

Yes, someone else's dwellinghouse. And it was a five Court panel of the Court of Appeal.

WILLIAM YOUNG J:

Well we're not invited to revisit it. It would be a bit tough revisiting now when there's been so much legislative water under the bridge.

MR CRANNEY:

Yes, it's all been put back into place in the same form, and I don't understand my friend's from the Crown to be arguing that the work is not done for the DHB, and that's been found by both Courts.

ELIAS CJ:

Yes, we're not invited to look at that, but I am a bit curious. You say it's work that the DHB is required to fund. What's that under? Under the –

MR CRANNEY:

Have I gone so far as to say it's required?

ELIAS CJ:

Well, no, I was just trying to think of the word you used, and it probably didn't go quite as far as that, it was –

WILLIAM YOUNG J:

In work for.

GLAZEBROOK J:

I think he just said they, it was part of the services that they were entitled to provide under the Act and did provide under their Act.

MR CRANNEY:

Yes. I think the –

GLAZEBROOK J:

Ie relief care services, because to be honest it probably saves them money in the long run.

MR CRANNEY:

Yes.

GLAZEBROOK J:

In that, otherwise you might have primary caregivers saying I can't –

ELIAS CJ:

They're empowered to – there's no question of their being entitled to make these payments, but you can't go further and say this is work they have to provide. There's nothing like that.

MR CRANNEY:

Yes, I think I said that it's an open-ended authority to provide care for the people in the country. The normal word used, from the point of view of the relief carer, sorry, of the primary carer, is that they're eligible for it. So it's not even regarded as an entitlement. I use the word "eligible" as my friend just said in his submission, they say that she's eligible for it because she meets certain criteria, having gone through a needs assessment and service coordination service.

WILLIAM YOUNG J:

What happened after that? Presumably for a while relief workers were paid the minimum wage and had other employee benefits. When did that stop or how did that come to stop?

MR CRANNEY:

Well nobody really knows, Your Honour. There's nothing in the evidence about it, and the same question was asked by the Employment Court. It just seems to have drifted back, gone backwards.

GLAZEBROOK J:

I suppose if people aren't unionised, and nobody's helping them, then it can perhaps easily arise I suppose.

WILLIAM YOUNG J:

With the RHA going, regional health authorities going, and the health system being reorganised, the system seems to have been, sort of, I suppose, dropped down from one that's closely run by the Government authorities to one that puts more reliance on the primary caregivers.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

So there's no Sunderland equivalent in the current regime.

MR CRANNEY:

There's a Sunderland equivalent for the homecare workers.

WILLIAM YOUNG J:

Is there?

MR CRANNEY:

Yes, so the Sunderland, the homecare workers are all employees, well not all, but many of them are employees of the homecare employers.

WILLIAM YOUNG J:

Yes, I understand that.

MR CRANNEY:

As opposed to the relief carers.

WILLIAM YOUNG J:

Oh I see.

MR CRANNEY:

These people are below the lowest. So the lowest ones would be the homecare workers. So these are the ones that go around to your house and to help you out of bed and that's the, you often see them if you're visiting, they'll come into the house and they'll talk away and say you should be drinking more water et cetera, and they're the homecare workers, and these ones are the ones that relieve the carer, which is a very important function because anyone that's ever been involved, even with disabled children, or people with autism or all that stuff, it's absolutely necessary, it's a necessary

service both for the client, that is the patient or the service user, and for the care provider.

WILLIAM YOUNG J:
So this is a different regime for homecare workers.

MR CRANNEY:
Yes.

WILLIAM YOUNG J:
And so was *Cashman* dealing with homecare workers?

MR CRANNEY:
Cashman dealt with both.

ELIAS CJ:
And relief?

MR CRANNEY:
Yes, both, and you'll see all the way through the judgment, referring to both classes.

WILLIAM YOUNG J:
Okay so if homecare workers have always, ever since *Cashman* been treated as subject to the homeworkers regime, but for some reason the relief workers –

MR CRANNEY:
Yes. The relief workers aspect of it regressed.

ARNOLD J:
To the extent that respite, this kind of respite care need not occur during, in the home, but you could arrange a trip or to go to another facility, something like that.

MR CRANNEY:

Yes.

ARNOLD J:

How does that impact on the analysis. Does that end up saying that if the primary carer wants the care, the respite care to take place in the home, then the relief carer isn't a homeworker and therefore an employee, but if the primary caregiver wants the respite care to occur outside the home, either in another environment, or an outing or something like that, some different analysis applies.

MR CRANNEY:

There's arguably a gap, yes. The argument arguably doesn't apply to them, probably doesn't apply to them.

ELIAS CJ:

Sorry, I thought the argument was that relief workers are homecare workers.

MR CRANNEY:

They are, the vast majority of them –

ELIAS CJ:

Homeworkers.

MR CRANNEY:

Most of it –

ELIAS CJ:

No, I just mean in terms of the statute.

MR CRANNEY:

Yes.

ELIAS CJ:

Well there's no separate concept of relief workers.

MR CRANNEY:

No, no, they're home, I think they're –

GLAZEBROOK J:

But if they're not providing it in the home –

ELIAS CJ:

Yes, yes.

MR CRANNEY:

Yes, you're talking, homecare workers, we're using a different phrase.

ELIAS CJ:

Yes.

MR CRANNEY:

By homecare workers we're talking about people who don't relieve carers but just do cleaning and –

ELIAS CJ:

Yes, yes, I understand that. But is that a concept, that's not a legislative concept?

MR CRANNEY:

No, no, it's not Ma'am. So it is true that the, and my friend's have raised an argument in their submissions and said, look there's no requirement that this be done in a home.

WILLIAM YOUNG J:

Well you can take the time out for a walk you mean?

MR CRANNEY:

Well I think they even go further and say well, even though it's done in a home, because it's not required to be done in a home, it doesn't get caught by it.

WILLIAM YOUNG J:

That's against *Cashman* though?

MR CRANNEY:

I think so. *Cashman* does refer, there is some authority for that in *Cashman* for that position, I'll just refer Your Honours to it. It's the last document in volume 1.

GLAZEBROOK J:

That would rather, even if you narrow it to pieceworkers, that would run a cart and horse through the provision to say, well you could actually do this wherever you like –

MR CRANNEY:

Yes, but it's not a strong argument Ma'am.

GLAZEBROOK J:

I wouldn't have thought it was the strongest argument.

MR CRANNEY:

It's under tab 8 in the common bundle. Very near the end of the judgment there's a sentence there which is probably a little bit against me, line 10, "An engagement, employment or contract is within the definition if it is expressly –"

GLAZEBROOK J:

Sorry, I've lost it, page 10, where are you?

MR CRANNEY:

I beg your pardon. It's page 14 of the judgment, line 10.

WILLIAM YOUNG J:

But they take that as encompassing relief workers, relief carers.

MR CRANNEY:

Yes, look, I don't think there's much of an issue. I mean the work is done, in all of these, for this particular worker anyway, was done in the dwellinghouse, and you can see why that's the case. The whole purpose of it is to let someone that's in the dwellinghouse out of the dwellinghouse to have relief while the caregiving is done by the relief carer. Now that's enough, I think to say there's an implied term that it be done in a dwellinghouse. I just don't think that it's a very strong argument that my friend has raised to try and knock it over on that basis.

GLAZEBROOK J:

Well presumably, anyway, even if you're taking someone for an outing you have to prepare them for the outing in the home.

MR CRANNEY:

Yes.

GLAZEBROOK J:

And then also take off their outside clothes and do whatever you might need to do to settle them down after the outing.

MR CRANNEY:

Yes, and I suppose that raises an issue about how could they go across the threshold of assess to be a homeworker but really it's not really a big issue. I mean if you take someone to the garden, I don't think that's really a strong point.

Really I think Your Honours that, unless I can assist you, there's nothing I think I have missed, and I can pick up the rest of it in reply.

ELIAS CJ:

Thank you Mr Cranney. Yes Ms Holden?

MS HOLDEN:

I thought it might be useful to start with the genesis of the section and where the definitions came from and work through from that and then turn to the particular arrangements here and how the respondents say that fits within the definition in the Act.

My friend has referred to the green paper, which is in the bundle of authorities at the end, under tab 17, and this was the paper that preceded the Labour Relations Act 1987, which is where the homeworkers definition first appeared and under tab 16 there's the Government statement in which the Minister of Labour explains that the green paper was done to look at the industrial relations system as it existed at that time in order to develop the new legislation which was the Labour Relations Act 1987.

So in the green paper, as Your Honours already referred to Justice Young, the background the definition of homeworker was focused on those people who were doing piecework, essentially, in their own home. So that was where the Government was coming from, where the green paper came from, in that definition under paragraph 1 under background. So it was looking at people who weren't working in factories, and so on, but were working in their own home. It expressly said in the green paper that it was intended to exclude, "Child minders, artisans, freelancers and handknitters, working without product specifications." So it was people, they were thinking about people who were sewing jeans in their kitchens on a piecework basis.

GLAZEBROOK J:

Where does it say excluding child minders, just so we've got that?

MS HOLDEN:

On page 87, at tab 17.

GLAZEBROOK J:

I see, yes, it says at the end of that paragraph.

MS HOLDEN:

Definition excludes child minders. Then on page 89 of the green paper, at paragraph 11(a), it looks at the difficulty that exists where you've got different arrangements and they're concerned that people might fall through the cracks and so it talks about how there's a need, "To define a master/servant relationship in a situation where many regard themselves as self-employed and where loose arrangements make it difficult to establish whether they are employed under a contract of service or are independent contractors." So that's your classic situation, is this person an employee or are they an independent contractor, or the concern expressed here that you might fall between the cracks. Now I think that's significant when you then turn to the definition that ended up being enacted in the Labour Relations Act and basically carried through the subsequent legislation to the definition we now have in the Employment Relations Act. And so in my submission the intention in including in the definition of homeworker, and that's at tab 1 if Your Honours want to turn to it, to having engaged, employed or contracted was to ensure that you captured arrangements that might fall between the cracks. So it was a sort of belts and braces approach to what would become within that definition. So the components for our purposes of –

GLAZEBROOK J:

You accept that it would have to be an expansive definition because if it requires an employment relationship then you don't need homeworkers because they're employees anyway.

MS HOLDEN:

Absolutely, yes, it's clearly intended to go beyond a traditional employment relationship or even a traditional and identifiable independent contractor relationship it's intended to capture something broader than that otherwise there would have been no need for it.

GLAZEBROOK J:

Yes.

MS HOLDEN:

Part (b) of the definition also covers off the vendor purchaser possibility. So it clearly was intended not to be able to have someone drive a truck through it basically. It's intended to be broad enough to pick up all those sorts of things that might appear in a different form but what my submission is, is that it wasn't intended to go completely beyond the idea of a relationship. As I say in my submissions, it sits in the Employment Relations Act and the title of the Act I think is a significant guide to what it's talking about. The reason for the Employment Relations Act is to govern relationships between people who have employment arrangements. So it's intended, the overarching purpose of the Act is to require people to act in good faith towards each other, to be open and communicative, all those things. It does give rights to personal grievance claims and so forth under the Act. So in my submission, you work from a foundation where the Act is intended to govern a relationship and here we're talking about something where there is no relationship between the funder –

WILLIAM YOUNG J:

Well there is some relationship.

MS HOLDEN:

Well at the time –

WILLIAM YOUNG J:

Not least there's a relation in payment and there's a promise to pay.

MS HOLDEN:

Well not in advance there isn't, no. Perhaps if we –

WILLIAM YOUNG J:

Well there may be because presumably one would expect a relief worker to look at the brochure before providing services.

MS HOLDEN:

The brochure, perhaps if we turn to the brochure because I know you raised that with Mr Cranney and that's in the –

WILLIAM YOUNG J:

Tab G, I think.

MS HOLDEN:

– case on appeal at A, volume 3, 13A. This brochures is directed to the primary carer.

WILLIAM YOUNG J:

But it's also to the supported –

ELIAS CJ:

Sorry, can I just find it, it's not under G.

MS HOLDEN:

It's in volume 3, tab 13, tab A, so it's subtab A.

ELIAS CJ:

Tab A?

MS HOLDEN:

Yes. So it starts out, "How do I claim carer support?" That's directed to the primary carer.

ELIAS CJ:

Yes.

MS HOLDEN:

So the primary carer is sent the forms or attends the NASC as my friends refer to and at the NASC the people who work for the NASC work with the family and the primary carer and identify a package of help to assist them to

care for the person in their home, and that is a package so there is reference in the evidence and in the documents to the package might comprise partly the community care people who come in, you will probably be aware of them, who come in and will do showering and dressing of a patient and then go, so they come in for an hour in the morning, that sort of person might be part of the package and then part of the package they might be offered a certain number of days to use for the carer support scheme.

So they are addressing different things and they are a part of a package and different parts of the package will work for different people. So the NASC will say to a primary caregiver, “Well have somebody come in every day to shower your husband and dress him in the morning and come back at night and do this and that,” and they will be sort of full on work, you know, they'll come in for an hour and work. “We will also offer you this number of days so that you can get somebody from your extended family or a friend or a neighbour to come in while you go out and do some of the things that you want to do and that help you keep connected to your community.” So that's, so the purpose, they're for different purposes and they operate in different ways.

Now I'm not saying that the person who is providing the carer support might not do some of the same tasks as the person who is the community employed carer but the nature of the arrangement is different. The purpose of the arrangement is different. The purpose is directed to the primary carer to enable that person to stay connected to the things that they do outside the home and I think that's very important.

ELIAS CJ:

Well that might be the reason for it but I just wonder whether it's quite right to say it's such a different relationship from the community care worker because they'll be performing the same tasks. It may be to give respite to the primary caregiver, that may be the motivation but I'm just not sure about the distinction you're seeking to draw there?

MS HOLDEN:

Well, there are a number of distinctions, legal ones and just the way it operates.

ELIAS CJ:

Yes.

MS HOLDEN:

In terms of how it operates, I agree there is definitely overlap and I'm not suggesting otherwise, I'm not suggesting that there won't be tasks that a relief carer may be performing that would otherwise be done by a professional carer, they may be, they may not be. It may be that the primary carer goes out for a couple of hours to do something, go to their Bridge club or whatever and their granddaughter comes in and just is in the house or sits with the grandfather and so on. So I mean there will be a range of different things but there will be overlap, yes, so it's more the intensity I think that's different.

WILLIAM YOUNG J:

Can I just ask something? You said that how to claim carer support is not addressed to the relief carers.

MS HOLDEN:

That's right.

WILLIAM YOUNG J:

Well if you look at tab B. The back of that form is plainly addressed to relief carers as well as primary carers.

MS HOLDEN:

Yes, yes. No, I agree with that.

WILLIAM YOUNG J:

And it specifically refers to, “Please refer to the, ‘How to claim carer support booklet.’”

MS HOLDEN:

Yes, the form is signed as sent out to the primary carer but it is for both the primary carer and the relief carer.

WILLIAM YOUNG J:

So there is a promise made by the respondents to the relief carers that if they do the work they will be paid.

MS HOLDEN:

But this is sent out after the work is done.

WILLIAM YOUNG J:

I know, but that may be a fair enough comment for the first time someone does it but as soon as a person does it more than once they will know the system and they will know the deal and they will have filled in these forms which say to them if you do the work we'll pay you.

MS HOLDEN:

They will know about it but in my submission it has to be –

WILLIAM YOUNG J:

Say the respondents didn't pay, say they just said, "Well we're not going to pay," wouldn't the relief carers be able to sue them?

MS HOLDEN:

No I don't think they would. Their remedy is against the primary carer and the primary carer may well –

GLAZEBROOK J:

Well, no, it's absolutely clear that's not the case from the brochure.

WILLIAM YOUNG J:

We will pay. It would be a pretty mean spirited submission to say that that means we won't pay.

MS HOLDEN:

The payment is to the primary carer.

GLAZEBROOK J:

No it's not. It's made clear that unless the support worker has been paid by the primary caregiver the money goes to the carer which makes sense because there is no way, as a responsible funder, that you would want the money going to the primary caregiver and then not being handed on to the support worker.

MS HOLDEN:

It's a matter of election for the primary carer as to whether they pay the relief carer and then claim a reimbursement or whether they get –

GLAZEBROOK J:

I'm sure it does work like that and I would have thought it was a very silly idea if –

ARNOLD J:

But that's what the form says.

GLAZEBROOK J:

No the form says that if you have already paid the caregiver then it's a reimbursement but you can't just decide you're going to have the money if you haven't already paid the caregiver, can you?

MS HOLDEN:

Well it's either a reimbursement –

GLAZEBROOK J:

Because you have already paid?

MS HOLDEN:

Because you have already paid or –

GLAZEBROOK J:

Or it's a payment directly. It's not a payment that you can get absent having paid the relief worker.

MS HOLDEN:

No, that's right.

GLAZEBROOK J:

Right.

MS HOLDEN:

But I am saying –

GLAZEBROOK J:

So it's not a payment to the primary caregiver?

MS HOLDEN:

Well I think –

O'REGAN J:

Well yes it is, it still is, it's a payment – the primary caregivers made a payment and then afterwards the DHB –

GLAZEBROOK J:

No, no, that's a reimbursement.

O'REGAN J:

Yes, but it's still a payment.

GLAZEBROOK J:
I know, I understand that.

O'REGAN J:
The money goes from the Crown to the primary carer, that was all she was saying.

GLAZEBROOK J:
No, no it doesn't.

WILLIAM YOUNG J:
Well say it doesn't happen –

GLAZEBROOK J:
That's the point, it goes directly to the relief worker if the relief worker hasn't been paid by the primary caregiver, that was my only point.

MS HOLDEN:
But my point is that that is an arrangement that is at the option of the primary carer.

WILLIAM YOUNG J:
Well that's true but I mean, okay, that's a qualification but is it not a promise to the relief worker that if you haven't been paid by the primary carer we'll pay you?

MS HOLDEN:
No I don't accept in law it is.

WILLIAM YOUNG J:
So when it says, "We will pay within 10 days, working days," and someone is, on the face of it, entitled because they have done the work and they haven't been paid by the primary carer, do you say that they couldn't rely on that?

MS HOLDEN:

I'm saying that they are entitled to payment either from the primary carer.

WILLIAM YOUNG J:

Okay, they haven't been paid by the primary carer so let's assume that that hasn't happened. Are they not entitled to payment from the respondents?

MS HOLDEN:

Well that would be on the behalf of the primary carer the respondent will be making the payment.

WILLIAM YOUNG J:

Say the primary carer has got no money, perhaps claimed reimbursement but never paid it, wouldn't the carer be able to look to the respondents?

ARNOLD J:

Sorry, did you say the primary caregiver has been given the money by the Ministry?

WILLIAM YOUNG J:

Say somehow or other the primary carer has got the money but never paid the relief carer, say that that had happened?

ARNOLD J:

And you're saying the relief carer could sue the Ministry?

WILLIAM YOUNG J:

Well isn't the relief carer entitled to say, you promised to pay me unless I was paid by the primary carer and I haven't been paid by the primary carer.

O'REGAN J:

But the primary carer can't claim it unless they have paid –

WILLIAM YOUNG J:

I know, I know, I'm assuming a fraud.

O'REGAN J:

So you're assuming they are plain fraud?

WILLIAM YOUNG J:

I'm assuming a fraud. I'm assuming that somehow or other something has gone wrong.

O'REGAN J:

Why does a fraud define a relationship?

WILLIAM YOUNG J:

Well let's say that they simply haven't been, well the alternative, the primary carer simply hasn't paid them.

GLAZEBROOK J:

No but the primary carer isn't required to pay them, they can choose to pay them but if they don't choose to pay them they get a payment directly from the DHB or the Ministry. The was my only point I was making and they are entitled to get that payment directly, that's what the form says.

MS HOLDEN:

Yes, in terms of the practical arrangements that's right, yes.

GLAZEBROOK J:

Well, no, in terms of what it says here. If I'm a relief worker and I haven't been paid by the primary carer I'm entitled, both me and the primary carer are entitled to have that payment made directly to me as relief worker, that's what the form says and the Ministry or the DHB will pay within 10 days and that's obviously assuming I did the work.

MS HOLDEN:

Yes, if the form is provided as set out then it's agreed that the Ministry will pay the relief carer direct.

GLAZEBROOK J:

Well all Justice Young was putting to you is if the Ministry says, “No I'm not going to pay,” then presumably the primary caregiver can say, “But you promised me you would and please do.” And if they went to Court they would be told they were going to pay.

O’REGAN J:

The support carer, you mean?

GLAZEBROOK J:

If the relief worker went to Court and said, “The DHB promised to pay me within 10 days and they haven't and I want them to do so,” surely the Court would say pay up.

MS HOLDEN:

But I don't think they would do that as a contract issue. I mean there’s a representation that they –

GLAZEBROOK J:

What else is it?

MS HOLDEN:

Well they've represented they would pay.

WILLIAM YOUNG J:

Well isn't that like a contract? I mean isn't that normally what a contract is? It's a promise to pay, a representation that you'll pay if, sorry, if something happens and something has happened, the promise to pay is engaged, why isn't that a contract?

MS HOLDEN:

Well the form is sent in after the work is done so there's no offer and acceptance at the outset.

GLAZEBROOK J:

Because you've got a brochure that says this is the basis that this is being paid so it's an offer out there, the offer is taken up. The form is then done afterwards, I mean you will often have invoices sent afterwards or payments made afterwards, won't you? Because you accept the offer that's out there in the brochure and that is actually provided to you by the primary caregiver on the basis that the DHB is going to pay you.

MS HOLDEN:

I don't think the brochure would be sufficient to enable a relief carer to say that there is an offer out there from the Ministry that they will pay me –

WILLIAM YOUNG J:

What about after the first time they've done some work?

ELIAS CJ:

Please let her finish the answer.

WILLIAM YOUNG J:

But what about, I mean, that assumes that all we look at is that but after the first time services have been provided they will have filled in a form.

MS HOLDEN:

They will have filled in the form for the first care that they provided, yes, and they will know how the system works but I don't think that changes what the nature of each care provision is. They each have to –

ARNOLD J:

Well I think the – sorry.

MS HOLDEN:

You go.

ARNOLD J:

I was just going to say I think the Court of Appeal said that it was agreed that the relationship, whatever the relationship was that existed from the first occasion.

MS HOLDEN:

Yes, and I think that has to be the case just as –

WILLIAM YOUNG J:

Why? Say it changed after the first occasion? Say if the absence of a form was critical to the first occasion wouldn't the situation change once the form has been seen and signed? And tell me this perhaps just before we adjourn.

ELIAS CJ:

No, let's take the adjournment.

WILLIAM YOUNG J:

Can I just ask you one question so you can look at it over the adjournment? If a GST invoice is rendered, to whom is it rendered and what happens to the – is input credit tax reclaimed?

MS HOLDEN:

I will answer that after –

WILLIAM YOUNG J:

Yes, that's why I wanted to ask it now.

ELIAS CJ:

All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 11.29 AM
COURT RESUMES: 11.49 AM

ELIAS CJ:
Thank you.

MS HOLDEN:
Thank you. If I turn to the GST issue at this point in answer to Justice Young's question. Ms Lowe of course was not GST registered and this was dealt with in the evidence in the Employment Court and if you go to tab 12 of volume 2 of the case on appeal at page 104 of the bundle and you will see in the re-examination towards the bottom line –

GLAZEBROOK J:
Page what, sorry?

MS HOLDEN:
Page 104 of the bundle, page 26 of the transcript. So starting at line 19, "Is Ms Lowe GST registered?" "She is not GST registered." "When someone is GST registered and you require an invoice what form does the invoice come in?" "It can come in any form that they provide so long as it meets the GST tax invoice form." "Who would the invoice be made out to?" "It can be made out to the Ministry, the DHB or the full-time carer." So that's what happens in practice and under the Goods and Services Tax Act 1985 because of the broad definition of consideration, the GST applies to, it doesn't follow that because payment is GST, has GST attached to it that there's a contract between the supplier and the person paying and that comes out of the –

WILLIAM YOUNG J:
I think there may be some quite complex, from recollection some quite complex provisions in the GST Act about how Government departments account for GST particularly in a, I suppose a subsidy or a situation, but is

GST, presumably it is recovered because otherwise there wouldn't be any requirement for a GST –

MS HOLDEN:
Presumably, I mean I don't know, there was no evidence about that but I would have assumed that will be the case but it doesn't, because the GST is paid by the Ministry doesn't mean that the services are being supplied to the Ministry, that was the point that I was wanting to make and that comes out of the definition of consideration in the GST Act and there have been some cases on it, the *Turakina Māori Girls' College Board of Trustees v CIR* (1993) 15 NZTC 10,032 (CA) case, Justice McKay in the Court of Appeal made the point that it's not necessary that there should be a contract between the supplier and the person providing the consideration so long as the consideration is in respect of or in response to the supply. So that's really just the point that I wanted to make.

It came up in the Employment Court as well and the Employment Court's comments on that are in the case on appeal in their judgment which is at tab 5, page 51 of the bundle at paragraph 56.

ELIAS CJ:
Sorry I missed that, what volume?

MS HOLDEN:
Volume 1, the case on appeal at page 51 of the bundle, paragraph 56 and in my submission that's the correct position that's expressed there by the Employment Court so really the GST issue doesn't, in my submission, isn't relevant to the consideration of who the principal is here.

Now I wanted to turn to the discussion that took place with my friend this morning about what had happened in between *Cashman* and today and whether there had been a change back first to pay people as if they are employees and then to take them out again and the *Cashman* decision itself is helpful in the Court of Appeal, that's at tab 8 of the bundle of authorities and it

certainly was the case that some of the women who were employed by the DHB, or actually the RHA, for Sunderland did both respite care and the community care. But there also was recognised that there were schemes such as this, and on page 14 of the judgment of the Court of Appeal at tab 8 there is the paragraph that has been referred to in, I think, all the decisions up until, well perhaps not the Court of Appeal. At line 29 on page 14 the Court of Appeal recognises that there are home support schemes and that it doesn't follow that family members, neighbours or friends who are paid under a home support scheme to look after a sick or disabled person, but not otherwise engaged, will be regarded as homeworkers. So in my submission that was recognising exactly the sort of scheme we have here. A scheme that is aimed at getting somebody from the wider family to assist with some respite care and the Court of Appeal in *Cashman* clearly saw that as a difference scenario to the people who were engaged under formal independent contractor contracts with Sunderland and with the RHA to provide professional services.

WILLIAM YOUNG J:
But doesn't, I mean I may be wrong, but isn't it the case that Ms Lowe does do this for a living?

MS HOLDEN:
No, well she has been a professional carer, there is her evidence about that, the care that she's given in the past, and she, the Employment Court found that she did make, I just need to find the exact words, material I think, made her living in material part from the provision of relief care. So yes.

WILLIAM YOUNG J:
It's a hard distinction to make because it would be such a question of degree.

MS HOLDEN:
Yes and I think that you, what is necessary is to look at the nature of the scheme rather than the individual people doing the services. I don't think – if this is a home support scheme of the sort that the Court of Appeal is referring

to, and when you look at the invoices you will see, well the forms that are filled in, that it's expected that the person providing the relief care is part of the family, a friend or a neighbour. If it's that sort of scheme –

GLAZEBROOK J:
You say it's clear from the forms in *Cashman* or –

MS HOLDEN:
In our case Ma'am. if you look at the form that gets filled in, if you go to the case on appeal, volume 3, tab D for example, and on the first page you will see Ms Lowe fills in her details, and then underneath it it's got relationship to client i.e. friend, aunt, uncle, grandparents. I think it means e.g. but it's got i.e., and she's written in "friend".

WILLIAM YOUNG J:
Is that connected, is that related to the different rates, family and non-family rates?

MS HOLDEN:
No Sir. I don't believe it is. The formal rates are for GST registered carers. The informal rates are these sorts of people.

WILLIAM YOUNG J:
No, there's a non-family rate. I'm just looking at page 199.

MS HOLDEN:
I think that is –

WILLIAM YOUNG J:
And she's claimed a non-family rate.

MS HOLDEN:
That may have changed, but it still was intended, you'll see she's got "friend" there, but the nature of this scheme is that the person supplying the relief care is part of the family's circle of community, or their support.

GLAZEBROOK J:

Is there anything other than these forms that says that. Where…

ARNOLD J:

There's a bit of it in that original of that pamphlet.

GLAZEBROOK J:

Yes, that's what I was trying to find.

ARNOLD J:

Under relief care it says, "it may take a number of forms, may be a friend or relative. Alternatively relief care may be provided in other settings."

GLAZEBROOK J:

Yes, I see it.

WILLIAM YOUNG J:

The GST, the provision, I mean I suspect the GST may be a bit of a red herring because I imagine it hardly ever applies, but the formal rates suggests that it's not just confined to people who are family, friends or neighbours.

MS HOLDEN:

No, that's right, and when you look at the booklet that the Ministry has, and I'll just find that, tab C in that case on appeal volume 3, the carer support guidelines, so on page 149 under 5, "There are a variety of ways to utilise the days of carer support." Then over the page on page 150 it talks about options that may include respite care, so going to another setting, like a respite bed in a residential facility, school camps, daycare, foster care, those are some of the options, and then on page 153, when it talks about informal carers, at paragraph 8.4, "Carers are typically other family members, friends, neighbours or people providing relief support outside the umbrella of a formal provider organisation. They are engaged to provide relief support directly by the full-time carer." So this is the brochure that people are told they can get if they want to from the Ministry.

GLAZEBROOK J:

And do we get to the bottom of that formal rates, informal rates and family rates? Is there anything that actually explains the payment structure anywhere?

MS HOLDEN:

I'm not sure if it gets into that level of detail in the evidence.

WILLIAM YOUNG J:

There's a little bit more about it at 153. So there's 8.3 deals with formal providers.

MS HOLDEN:

Yes, so those are the organisations and so on. I'm not sure why there is a distinction there between informal rates and non-family, I don't know what that – I don't think it was dealt with in the evidence.

ELIAS CJ:

Well presumably it's because they usually are family members, is it?

MS HOLDEN:

Well presumably non-family would include neighbours and friends as well, which is why Ms Lowe, if you look at that form with the three rates she has filled in above that in the box above, relationship to client, friend.

WILLIAM YOUNG J:

Presumably all she would have had to fill in was non-family.

MS HOLDEN:

Well she has to answer that question under the support carer details, relationship to client.

WILLIAM YOUNG J:

Yes, but why is the question asked?

GLAZEBROOK J:

There's certain relationships where you can't do it even if you don't live in the same address.

WILLIAM YOUNG J:

So they're exclusions?

MS HOLDEN:

There are some exclusions, people who are under 16, I think, and people who live in the same address can't provide –

GLAZEBROOK J:

And certain, parents can't claim it, it says on the form.

MS HOLDEN:

Yes, that's right, they live at the same address.

GLAZEBROOK J:

Even if they don't live in the same address.

MS HOLDEN:

So –

ELIAS CJ:

So these are the guidelines but are there regulations –

MS HOLDEN:

No.

ELIAS CJ:

– or something behind those guidelines, are there policy statements or are there just…

MS HOLDEN:

There are, in the bundle at tab 5, so that's again volume 3 of the case on appeal, that is the information sheet from the Ministry of Health's website, what is carer support.

GLAZEBROOK J:

And is disabilities the next one fairly similar is it.

MS HOLDEN:

The next one is, actually it's quite a useful contrast, the next one is the home and community support services.

GLAZEBROOK J:

That's the ones that do live at home.

MS HOLDEN:

So these are the more formal arrangements where you have people come in to assist in particular tasks like bathing people and dressing them and so on. So these are the sort of professional people who are employed by a company usually like Sunderland's was and they come in and they provide this sort of level of support.

GLAZEBROOK J:

Does the evidence say how much people normally get or is it just too variable to make a –

MS HOLDEN:

I think there are some limits on how many days they can get –

GLAZEBROOK J:

Obviously but what would be the average sort of time is what – is that possible to answer that question or did the evidence deal with it is what I'm trying to say?

MS HOLDEN:

I don't think the evidence specifically dealt with that.

ELIAS CJ:

Does the authority that is provided to the primary caregiver specify that they can get informal as opposed to formal care assistance?

MS HOLDEN:

No, my understand –

ELIAS CJ:

Right. Sorry?

MS HOLDEN:

My understanding is that at the NASC the primary carer will work with the NASC people and they will identify well this, your partner needs to have somebody come in for an hour a day to do these jobs for them and so you'll get this much of the – I get muddled round with the different terms – this much of the home and community support services, so you will get an hour a day of that and in addition you can access up to 30 days per year of carer support services. So that's offered as an option, it's not always –

GLAZEBROOK J:

And you are using carer support as relief workers just so we're making sure –

MS HOLDEN:

Yes, these people, yes.

GLAZEBROOK J:

Yes.

MS HOLDEN:

People like Ms Lowe. So carer support is the name of the scheme.

GLAZEBROOK J:

No, I understand that I'm just double checking that I'm on the right page.

MS HOLDEN:

Yes, that's right, so there will be a package and it is always the option of the primary carer whether they actually use what's on offer. So for some families it just won't work, it just, either they don't have somebody who can come in or it's not something that's a pressing need for the primary carer, they don't need to go out two hours a week to do whatever it is they want to do in the community. So they often won't uplift that or sometimes they won't and there's evidence of that in the Employment Court hearing. I'll find some references for you.

So these things are put together as a package by the NASC. So they say you get this much home and community support, you can access this many days carer support and then the person can go away and put that together that suits their family and if you look in the transcript which is in the case on appeal, volume 2 at tab 12, at page 38. This was the woman from the DHB, Ms Edwards, giving evidence and it –

ARNOLD J:

Hang on, it's 38 of the transcript?

MS HOLDEN:

38 of the transcript.

GLAZEBROOK J:

116.

MS HOLDEN:

And 116 of the bundle, it starts at line 9. So, "The NASC takes a certain number of days." "Is that always used?" "No it's not. Sometimes it turns out that it's not what they need." So, "Sometimes it is allocated and then not used or not fully used and it's the full-time carer who makes the decision whether

they are going to use that part of the package." And, of course, you know, they have other options as has already been noted. They could employ somebody direct, you know, that might be what suits that family but they don't have to use this –it's not something that the Ministry or the DHB is requiring the primary carer to go out and use.

ARNOLD J:
So when the primary carer has selected the form of respite care that they want and the person they want then the rate of payment will be determined by that, the nature of that person?

MS HOLDEN:
Yes.

ARNOLD J:
So it's not, we're giving you so much to spend.

MS HOLDEN:
No, as I understand it it's allocated by days or half days and then the form dictates how much they get for that particular type.

ARNOLD J:
And you can combine two hours over two days to make a half day and something I think.

MS HOLDEN:
Yes, I think you can do that, yes.

ARNOLD J:
Yes.

MS HOLDEN:
There's a lot of flexibility around the scheme so I think you can put it together. And the booklet that we were looking at before, tab C in the third volume of

the case on appeal at page 147, at paragraph 3.2 shows that, you know, the carer can choose that they no longer want to use carer support so there's no, the carer has full autonomy over whether they use it, how they use it, and whether they exit from the programme entirely. So the point I was making earlier was that I didn't want the Court to be under the impression that after *Cashman* started being paid for this and then they were pulled back from that. There always has been this distinction between the formal care providers and schemes such as this where a subsidy is provided by the Ministry or by the DHB to enable people to –

GLAZEBROOK J:

It's a very odd distinction, isn't it? Because what is the basis for the distinction? Because it's informal I would have thought the informality can create greater dangers for people who are in that work position than if they're contracting through an organisation.

MS HOLDEN:

Well I think it's, and I'm really, there wasn't any evidence of this, and I think fundamentally it's a question of policy, that it's an extension of the family being the carer for their family member, and here you've got extended family or, as I say, a sort of community of friends and so on, helping, and perhaps it's seen as closer to the primary carer than it is to a professional carer. But that really is not something there was any evidence about and I probably can't take it any further. I've probably taken it further than I legitimately can as to the rationale behind it.

GLAZEBROOK J:

Well I can understand that that might be, but just in terms of looking at it in an employment situation, and people who are earning their living, without the sort of protections that one would normally expect, does it make it better or worse that they are friends or family? One might have thought worse.

MS HOLDEN:

Well the intention isn't that people make a living out of relief care. That's not the intention of the scheme.

GLAZEBROOK J:

Yes, but Ms Lowe makes a material part of her living from it.

MS HOLDEN:

Yes she does and the difficulty for the Ministry and the DHB, they're reliant on the information that she provides and she says she's providing that care as a friend.

GLAZEBROOK J:

Well the Ministry would know whether they were paying her for that or not.

MS HOLDEN:

Well they knew they were paying her the rates that applied to non-family informal carers but they didn't know much more beyond that. The only information they have about Janet Lowe is the information that's on the forms.

WILLIAM YOUNG J:

I mean it's quite a, the passage you took from *Cashman* is quite problematical because in terms of, at least if construed literally, in terms of a home support scheme sometimes the people who provide services will be doing so on the basis of their making a living in whole or material part from it, and in other cases they won't, and yet it would be very hard to run a scheme that depends on an impressionistic assessment of that kind.

MS HOLDEN:

Yes Sir, and I think that, as you say, read literally I think that paragraph is problematic but what I do say is it shouldn't matter in the end whether a family chooses, or a granddaughter, for example, is a registered nurse, that shouldn't means she suddenly falls into the professional category if she's providing the relief care under this scheme and I think that the scheme itself is

what should dictate whether it's in the professional camp or whether it's a subsidy such as this.

ELIAS CJ:

That might be very sensible but there is no legislative underpinning for this distinction so it's difficult to fit in with the breadth of the definition that we're dealing with here. It may well be that nobody in setting up this system within the Ministry of informal and formal payments thought that informal payments would be sought by those who are actually making a living out of providing this sort of care but I'm not sure that that's a sufficient answer if you're trying to work out where it fits within the legislative scheme that we have and it may be that some legislative differentiation should be provided but we don't have that.

MS HOLDEN:

No, and in the Court of Appeal, of course, they were trying to apply a practical overlay to the definition when they –

ELIAS CJ:

But I don't know that you can have practical overlay, it's a question I have about the Court of Appeal fact and degree thing. It's a bit difficult to have that when you're talking about entitlements and rights.

MS HOLDEN:

In the *Cashman* decision?

ELIAS CJ:

Yes.

MS HOLDEN:

Yes, I accept that could be a problem, yes. And of course our principal argument is that there is no engagement here so we don't need to get to whether this is outside the Ministry. I was just trying to address the perception that the Ministry had moved away from paying these people as professionals

into this subsidy scheme. I'm just pointing out that there always had been recognition that there were these family support schemes that would provide some contribution.

ELIAS CJ:

But you acknowledge that post-*Cashman* the professional providers are treated very differently and yet there doesn't seem to be any basis for that distinction in the legislation.

MS HOLDEN:

Well the *Cashman* decision, it was dealing with a formal contract and so, yes, after *Cashman* people who were engaged on a formal contract were held to be caught by the definition and there were two issues in *Cashman* neither of which are relevant here, or not, I mean, we're looking at different issues here. In *Cashman* the argument was about whether the work was being done for the Regional Health Authority and Sunderland, that was the first question, and the second question was whether there were policy reasons to keep it outside the definition and that was when the argument was right, that it was meant to be talking about, you know, pieceworkers not talking about people like this and on the first argument where they were actually contracted to the Regional Health Authority and to Sunderland the Court said well they are clearly doing work for them, they've been contracted by them so that they were contracted so we didn't get, the *Cashman* decision didn't have to consider the term "engage" because there was a contract in place and then there was the question about whether there was a policy reason to read the definition narrowly and again –

WILLIAM YOUNG J:

So were the Sunderland employees also treated as employees of the Regional Health Authority or not?

MS HOLDEN:

No.

WILLIAM YOUNG J:

Or did that not matter? It probably didn't matter anyway.

MS HOLDEN:

I think, as my friend pointed out, there might have been at the cusp but what the – in terms of payment both Sunderland and the Regional Health Authority were defendants in the case so they were first and second defendants and they both had to pay the people their remuneration and then there was general damages also against the Regional Health Authority, who was sort of seen as the principal actor.

ELIAS CJ:

The argument that was raised against the Regional Health Authority must have been the same sort of argument that's been run here, because the contract was with Sunderland, wasn't it?

MS HOLDEN:

No, originally it was with the Regional Health Authority, and then it got transferred to Sunderland, that's why they were the two defendants.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

That doesn't answer the engagement issue.

ELIAS CJ:

No.

MS HOLDEN:

Engagement wasn't an issue in the *Cashman* case, so it is of limited –

GLAZEBROOK J:

Well they were clearly engaged.

MS HOLDEN:

They were clearly contracted, so they came under that other word, so they didn't have to consider the engagement question, which is the core of this case. It's in the statement of claim, which is in the case on appeal. You'll see that that's at tab 2 of volume 1 of the case on appeal, the claim, at paragraph 4.7 is that, "At all material times the plaintiff was either engaged by the first defendant or engaged by the second defendant or was engaged by either of them or both of them jointly with the persons for whom she was caring." So engagement is the key issue in this case.

So that brings me back to the first point I was making about the scheme of the Act and that it governs relationships and so in my submission the Court of Appeal was correct in saying that there had to be some relationship between the relief carer and the Ministry DHB in terms of the services being provided.

ELIAS CJ:

I'm sorry, I'm now probably getting a little confused, but is the, you accept that the professional providers, the home carers, was that the – that they are engaged.

MS HOLDEN:

Well they are employed or contracted.

ELIAS CJ:

Oh they're contracted, of course they are, yes. Are they all contracted?

MS HOLDEN:

The people under that scheme, I believe so yes. Under the…

ELIAS CJ:

So then the distinction is not between formal and informal.

WILLIAM YOUNG J:

I think you're talking about two different things.

ELIAS CJ:

Yes it is.

MS HOLDEN:

Yes I think we probably are talking about two different things.

GLAZEBROOK J:

They often operate, don't they, through service providers, independent service providers. In fact usually operate through independent service providers, rather than being employed directly by the DHB. So it –

MS HOLDEN:

The home and community support workers.

GLAZEBROOK J:

– isn't usually a Sunderland situation.

MS HOLDEN:

Yes, that's right. so home and community support workers are employed or contracted by somebody. They're employed or contracted either directly by the DHB or by somebody like Sunderland. So there's no question about them. They are covered.

GLAZEBROOK J:

Well not as homeworkers, they're just…

MS HOLDEN:

No, well –

GLAZEBROOK J:

Well I suppose they could be if they are independent contractor they could nevertheless be deemed employees because –

MS HOLDEN:

Yes, if they were independent contractors then you would have that question about whether, yes, they would become homeworkers. Well assuming the dwellinghouse issue is clear.

ELIAS CJ:

But wouldn't –

GLAZEBROOK J:

I'm just assuming for these purposes –

MS HOLDEN:

Yes, if they're engaged, if they're independent contractors who are, part of their job is to come into the home and care for an elderly person and help them shower and so on then they are covered. They are covered by the homeworker definition.

WILLIAM YOUNG J:

There are different forms, the forms are similar but not exact, that are exhibited, are similar but not exactly the same, and part of that is because in relation to two of the arrangements the reimbursement was made directly, the payment was made by way of reimbursement. So there's a reimbursement, I mean in relation to, for instance…

MS HOLDEN:

So I think this is Sanderson who's under tab –

WILLIAM YOUNG J:

I think in the case of Patricia Taylor she paid direct and was reimbursed.

MS HOLDEN:

Yes, there was some evidence about Mrs Taylor that initially it was Ms Lowe was being paid by the Ministry but because of slowness in payment

Mrs Taylor paid her direct and then got reimbursed so that was, yes, there was evidence about that but, yes, the forms did change over the years.

WILLIAM YOUNG J:
Is it the case that the formal providers will normally be rest homes?

MS HOLDEN:
I don't think –

WILLIAM YOUNG J:
Would anyone else be GST registered?

MS HOLDEN:
I don't think I could say, I mean, there is also –

ELIAS CJ:
Which covers children.

MS HOLDEN:
Well for disabled people –

ELIAS CJ:
Yes.

MS HOLDEN:
– you have children and there's quite a lot of camps that they go to and things like that.

WILLIAM YOUNG J:
I see, yes.

MS HOLDEN:

So there's a range and it's in that booklet it sets out some of the examples but certainly rest homes day beds and rest homes or overnight in rest homes is an option.

GLAZEBROOK J:

Actually, presumably the independent companies that provide community support would also provide relief care but presumably at a higher cost than is being paid under this scheme so there would be a part-payment at least.

MS HOLDEN:

That may be the case. There wasn't any evidence about that or it may be that the amount paid is enough to cover a person in a day care, I don't know, but that's certainly one of the options and it's in that booklet and also referred to in the evidence before the Employment Court. There could be day centres, school camps, generally they're non-Government organisations, so that's in the transcript in the case on appeal at page 97 of the bundle.

WILLIAM YOUNG J:

So the scheme covers a range of respite services, not all of which could sensibly be treated as being within the homeworker regime, because they're not provided in a rest home, in a dwellinghouse.

MS HOLDEN:

That's right. What the scheme does is it says, we will provide a certain number of days. You go away and pick whatever you like out of it. So it's the primary carer who is entitled to apply the subsidy to whatever arrangement they wish to use it for.

WILLIAM YOUNG J:

You probably, I don't think you have, and you probably couldn't because it's a finding of fact, I think, challenge the conclusion that Ms Lowe made a material part of her living from providing these services.

MS HOLDEN:

Well, as you say, it's a finding of fact. The figures are in the evidence and she did receive several thousand dollars over a, quite a long period, but the evidence is in the transcript if you want to have a look at it.

WILLIAM YOUNG J:

Was she providing other types of broadly related services too?

MS HOLDEN:

Not that I'm aware of, no. I don't think she was. She had previously. She gave evidence about her previous experience but I think at the time that she was providing this care, this was, she may even have been receiving superannuation, I'm not, I just don't know. But I think this was the only thing she was doing.

So coming back to what I suggest is necessary for there to be an engagement, and it's the analysis that the Court of Appeal adopted as well, and that is that there has to be a role in seeking and securing the services, and there has to be a degree of control and oversight over the work carried out, and the Employment Court did make a finding that there was some oversight in the Court of Appeal, in my view correctly, said there wasn't enough oversight here to move this from –

WILLIAM YOUNG J:

Well it changed over time, didn't it? Did the original arrangements, that the oversight argument was a bit stronger, wasn't it, because there was a requirement that the services be provided to a particular level, whereas later is just became subject to audit.

MS HOLDEN:

I think the form change, the claim form changed and the other thing, or the other document that was relied on by Ms Lowe is the carer support guidelines, which are those ones at tab C that we've looked at in volume 3 of the case on appeal and in particular at page 146 of the bundle under the heading, "Service

Definition" there's a paragraph at the bottom of that section, "Carer support services will be delivered in a supportive manner that respects the dignity, rights, abilities and cultural values of the disabled person and their family/whānau/aiga." So that is the paragraph essentially that is relied on to say that the Ministry or DHB was describing the manner in which the services were to be provided, and so my submission that is really high level. It is describing in any detail the manner in which – it's more an aspirational expectation, not a –

GLAZEBROOK J:
What if there were concerns that had been raised about the way the carer was providing services.

MS HOLDEN:
This is an interesting point. In the –

GLAZEBROOK J:
Because one can imagine that there, one would expect that these would be responded to.

MS HOLDEN:
Well the evidence on that is, and I think I would like to take you to it because it is on point. At tab 12 in the second volume of the case on appeal at page 130 of the bundle, and this was evidence being given by the woman from the DHB and she was being cross-examined I believe by Mr Cranney. So at page 130 if you start at, well, virtually at the top really, the first question. So 129, at the bottom of 129, "Do the service, shall I call them patients, the elderly people over 65s, do they have any rights if they are mistreated by a support carer?" So that's your question, Your Honour. "Yes if they are contracted it would be the health and disability rights so they would be able to complain to the DHB in this situation, "and then the question, "If they are abused or mistreated by a carer support person?" So now we're talking about this situation and the answer is, "I'm not too sure about that, I'm presuming they would." So that was the answer given there.

And then if you go down further, “We're talking about abused by an employee of a home support agency?” “Yes.” “What about these people?” So here we're talking again about the respite carers. “You presume they would be able to complain?” The answer is, “No actually I don't know.” So that was the evidence in the Employment Court.

ARNOLD J:
Was there any evidence about, other evidence about the audit function?

MS HOLDEN:
About?

ARNOLD J:
The audit function, what does that relate to?

MS HOLDEN:
Yes there was. Some evidence about that. Perhaps I can come back to you once my friend finds the reference but, yes, there was evidence about looking for fraud so it was about the financial fraud it wasn't to do with the way the services had been done.

So it's in that context that I have to, that I think you have to look at the finding that the Employment Court made that there was some oversight over the work carried out. The Court, in its judgment –

GLAZEBROOK J:
I was just looking at the rest of that cross-examination and it was really being put that the NASC process itself would identify the sort of things that might be needed.

MS HOLDEN:
Certainly that's true, the NASC process –

GLAZEBROOK J:
And so presumably that's the sort of process that then enables the primary caregiver to go out and get whatever or whatever has been decided that person needs and how that's going to be provided is up to the primary support carer is what you say?

MS HOLDEN:
Yes.

GLAZEBROOK J:
But it will during the NASC process have identified what those needs might be?

MS HOLDEN:
That is the purpose of the NASC process is to work with the families and identify what sorts of supports they would find useful and reach a view about how much of or the different parts of the package they will be allocated and then they can go away and use those or not use those as they see fit.

GLAZEBROOK J:
I was looking at page 133 for that part.

WILLIAM YOUNG J:
In terms of the standards, were the carer support guidelines made available to carers, the coversheet says it's an internal document?

MS HOLDEN:
Yes, it's an interesting one. It says that they are available on request and there was no evidence about whether Ms Lowe or as I understand, she didn't request them but there was no evidence about how often they were requested and it is an internal document but it was accepted that if they were requested they would be provided.

The other thing, it seems to be the only carer support document and it was the only one produced in evidence and it's directed to disability services rather than age related people so it's a bit of a disjoint but that seems to be the document that is available to people if they request it but there was no evidence about how often it was requested.

WILLIAM YOUNG J:
At page 44 of volume 1 at para 26 of their judgment, the Employment Court said that, "Until early 2010 the care had to be satisfactory," what's the document that's based on?

MS HOLDEN:
I think that's on the claim form, I'll just find a page where it might show you that. I might have to come back to you Sir, hang on, no I can do it now. So page 166 of the bundle, six in volume 3, there are standard terms and the first paragraph, "You confirm that you are being reimbursed for a satisfactory level of care that has been provided for the person named the client." So that's what that's referring to. So there was that in the original form that came out and then there was the carer support guidelines that we've talked about and so those were the things that the Employment Court was relying on and saying that there was oversight, some oversight.

GLAZEBROOK J:
And that just came off the claim form, did it, and you just had to say you'd provided the care?

MS HOLDEN:
Yes, that's right, and so there's still the financial details but not that particular one so it was just signed the carer has been provided and there was no evidence about why that changed.

So in the Employment Court judgment under tab 5 in volume 1 of the case on appeal, the ultimate finding was in paragraph 27, it's on page 45 of the bundle, "We conclude that the documents we have reviewed did provide for

some oversight and control of the carer support service. The parties are entitled to and do ensure, for example, they are not fraudulent and that services are rendered for the time allocated in a particular manner." But then if you go back to paragraph 26 which was what we were just looking at the manner is that manner that I referred you to in the carer support guidelines being that high level supportive manner respecting the dignity, rights, needs, abilities and cultural values of the disabled person."

GLAZEBROOK J:
But also presumably what was decided in the NASC as being appropriate.

MS HOLDEN:
I don't think the NASC, and I think –

GLAZEBROOK J:
Well they will discuss whether they need to go out at particular times, et cetera. Now obviously that's left to them at that stage but the NASC at least says, "Why do you need this? How much do you need and how are we going to work it through?"

MS HOLDEN:
That presumably is correct and I think there is evidence, Ms Edwards in the Employment Court gives evidence –

GLAZEBROOK J:
Yes, that's what I was referring to before.

MS HOLDEN:
– about the way the NASC operates. So one would expect that Mrs Sanderson, for example, would have said, "I would like to go out on Thursday afternoons to my golf club or whatever and that's something that's important to me to stay connected with my friends and family," and so that would be identified as the time that might be suitable to have, you know, how much time should be allocated for this.

ELIAS CJ:

Well I wonder whether it's quite right to say that it's pitched at a high level if it has to reflect needs and abilities?

MS HOLDEN:

Well when I say high level there's no discussion and I do submit that that's a high level statement, that it doesn't, it doesn't have any of the elements that you would expect in an employment situation, for example, where you dictate what the work is to be done and how it's to be done in a technical sense. This is a sort of, almost a cultural expectation.

ELIAS CJ:

Well do we have any indication of what the NASC assessment was here?

MS HOLDEN:

I don't think there's –

ELIAS CJ:

I mean, presumably it does go into that to some extent at least.

MS HOLDEN:

Well the whole, the core value of the scheme is flexibility for the family so I wouldn't expect the NASC to be drilling down into second guessing the primary carer as to what they primary carer thinks is needed. So again the NASC would look at picking up what it is this family, what would be a good package for this family for support for caring for somebody in their home and puts together a package like that. So on page 132 of the bundle –

GLAZEBROOK J:

Is that volume 2?

MS HOLDEN:

It's in volume 2.

O'REGAN J:
132?

MS HOLDEN:
Yes, 132. So that sets out some of the evidence that there is an expectation that the NASC would identify some of the needs and that the primary carer would communicate those to the replacement carer, for example, to give the carer a break in which case they may be just keeping the family, the patient company. And then if you go down right to the end of the page that the NASC recognises that the person is living in the community with a carer who needs relief. So they don't specify that the carer, or that they are giving that funding to the carer for those particular needs, the money, the allocation is to relieve the carer. So when we're looking at this particular part of the packaging what we're looking at isn't the patient, we're looking at the carer and what does the carer need. So you wouldn't expect there to be descriptions of what carers then provided to –

GLAZEBROOK J:
No, one can understand that expect that you can't, that can't be done irrespective of what the patient needs as well because it can't be, well you can get anybody in at all however unsuitable just because you then get to go out. I mean not that there would be primary caregivers who would actually do that if they are actually caring for their people in that way they're unlikely to do that which is presumably why the Ministry and the DHB leave it to the primary caregiver in the sense that that primary caregiver will best know the needs of the person they're looking after.

MS HOLDEN:
Actually, they pretty much can pick anybody they want.

GLAZEBROOK J:
But I understand that but the reason it's left is because it would be assumed that that primary caregiver would have the best interests of the person they're caring for.

MS HOLDEN:
That's right.

GLAZEBROOK J:
And the best knowledge of what that person might need in the day or half day that they are being relieved.

MS HOLDEN:
That's right, but apart from those very limited exceptions, people under 16, somebody living in the same home.

GLAZEBROOK J:
Yes, exactly.

MS HOLDEN:
Apart from that it is entirely up to the primary carer who they bring in and the NASC will not second guess that, they won't know about it and nor will certainly the Ministry of Health and the DHB don't know who that is.

So I was just talking about the test that the Court of Appeal adopted as to what needed to be there for the term of engagement to be met and as noted in paragraph 29 of my submissions, so that's seeking and securing the services and having a degree of control and oversight over the services beyond what the Employment Court had found to be there.

GLAZEBROOK J:
Can I just refer you to page 134 because they do say the focus on the NASC is on the needs of the patient by which I don't think they mean the primary caregiver and accepted that it's not a separate process for relief care. So

while they can get anybody that must be on the assumption that that's a good thing for the patient being the disabled person?

MS HOLDEN:

Absolutely, the NASC is focused on the client, the patient, but the scheme as part of that is keeping the carer healthy and connected and with the community and it's the core element of the scheme, that flexibility and that ability for the family themselves to decide what best suits them and –

GLAZEBROOK J:

That must be still thinking that that will do the best for the patient. I'm not criticising it in any way because it seems sensible that the primary caregiver will know the person best that they're caring for.

MS HOLDEN:

There is that as –

GLAZEBROOK J:

And have their best interests at heart.

MS HOLDEN:

That's right, and in the evidence, right at the end of the evidence in the Employment Court, so in the case on appeal, volume 2 at page 135 of the bundle. Judge Corkill was asking some questions about this point so it starts at a, I guess at line 16 and down to 24. "So the particular model we're looking at is designed to be a flexible model?" "Yes." "And one which gives the family or the carer and the client involved as much choice as possible?" "That's correct." "That's an important element of this particular product, would that be a fair way of putting it?" "Absolutely the core of what it's about." It's absolutely the core that this is about flexibility for the family, both in what way they use the respite care allowance and if they do choose to use an informal or a family carer who that person is, that's at the heart of this scheme.

ELIAS CJ:

Ms Holden, where were you wanting to take us further in developing your argument?

MS HOLDEN:

I –

WILLIAM YOUNG J:

Can I just go, perhaps, before you?

ELIAS CJ:

Yes, that's fine.

WILLIAM YOUNG J:

If I can just ask you one question of history. I'm just looking at the definition of "homeworker". At the end of it it has, "Not been work on that dwellinghouse or fixtures, fittings or furniture in it." I take it that wasn't in the original definition? Because if it was, I mean it does, those words make it clear that dwellinghouse is not necessarily only the dwellinghouse of the employee.

MS HOLDEN:

Yes, it wasn't in the green paper, I'm not sure whether it was in the original Labour Relations Act or not. I don't think that's new. I think that's just intended to make sure that the builder who comes into work on a house is not captured by it.

WILLIAM YOUNG J:

I understand that, it's just that –

MS HOLDEN:

So it's certainly in the Employment Contracts Act 1991 it was there.

WILLIAM YOUNG J:

But that's 2000.

MS HOLDEN:

Yes, we'll have to check over the lunch break what the Labour Relations Act had there.

WILLIAM YOUNG J:

Okay, I mean if that was in the Labour Relations Act provision then the conclusion the Court of Appeal reached on this issue was practically inevitable, that is, that dwellinghouse didn't mean employee's, doesn't mean the employee's dwellinghouse.

MS HOLDEN:

I don't think there can be an argument that –

WILLIAM YOUNG J:

Now there can't be but, sorry, I'm just actually interested in whether it was there in the definition that was in issue in *Cashman*?

GLAZEBROOK J:

It was in the Employment Contracts Act which was the Court of Appeal decision in *Cashman*.

WILLIAM YOUNG J:

Okay, sorry.

MS HOLDEN:

Yes, and it was in the Labour Relations Act as well not being work on that dwellinghouse or on fixtures, fittings or furniture in it.

MR CRANNEY:

It's set out at tab 8 of the bundle of authorities.

GLAZEBROOK J:

Yes it's page 9 of the *Cashman* decision.

MR CRANNEY:

Page 9, so that's the Employment Contracts Act version.

MS HOLDEN:

Yes, I don't think there can be any argument that it has to be person's own dwellinghouse to be captured or that it ever, that that didn't seem to translate through from the green paper in to the legislation.

ELIAS CJ:

So *Cashman* was right?

WILLIAM YOUNG J:

Yes, I suspect that by covering what was thought to be a problem, the drafters actually created a more serious problem. If those words hadn't been there I would have thought the conclusion that it had to be in one's own house was a very strong one but those words there it suggests that otherwise than when you're dealing with a tradesman it's any work in a dwellinghouse.

MS HOLDEN:

So Your Honour asked where I was wanting to go next.

ELIAS CJ:

Well I'm just wondering whether you have virtually concluded what you wanted to say?

MS HOLDEN:

I think I have, Your Honour, yes, unless there were particular questions that the bench had.

ELIAS CJ:

I didn't want to inhibit you from developing it.

MS HOLDEN:

No, no, and I don't want to continue –

GLAZEBROOK J:

Yours is a simple point, isn't it, it says payment isn't enough because there is absolutely no control over who or except to the limited extent that's through the NASC process and the guidelines there's no other control and engagement does need that, is that –

MS HOLDEN:

It also, in my submission, needs something at the front of the relationship as well, that there has to be some – the idea that you could be, that somebody could be engaged without the principal even knowing that they exist, in my submission.

ELIAS CJ:

But that, I mean that might be quite a bold argument because if there is an established pattern of payment one could see that you would have entered into a relationship. As *Cashman* says it's fact and degree I suppose.

MS HOLDEN:

Well I adopt the Court of Appeal's point, I think if either is an engagement at the beginning or it's not an engagement at all. I don't think you can morph into an engagement.

WILLIAM YOUNG J:

Why can't it change? I mean contractual relationships particularly of a relational kind do tend to evolve over time.

MS HOLDEN:

I think the elements have to be there at the time.

WILLIAM YOUNG J:

But why?

MS HOLDEN:

Well for there to be –

WILLIAM YOUNG J:

But I mean why is that, I mean you're just asserting it, why is it that the deal is set in concrete in relation to the first provision of service and it can't change over time?

MS HOLDEN:

I mean, certainly if facts change then relationships can change.

WILLIAM YOUNG J:

Well here the facts did change a little perhaps in your favour because a satisfactory service requirement was dropped.

MS HOLDEN:

Well when I say, I mean, there are situations where people are engaged under an independent contract and that might be the case initially but things change and the nature of the engagement changes to employment, I accept that, but what I say here is that if the carer support scheme says that it has the Ministry of Health or the DHB as the employer then they are employer right from the beginning. I don't think –

GLAZEBROOK J:

I don't quite understand why they are not an employer from the beginning in the submission you're making. Is it coming back to the argument you were making earlier about there being no right of payment because you only get to pay it after you see the form or is there something more than that because there's not even any knowledge of who the person is, there's no involvement.

GLAZEBROOK J:

I can understand that but the DHB knows that they will be employing somebody. I know that, or they will likely be employing somebody at some

stage because they've been given, that has been a need that's been assessed. Now it might turn out that they don't but they do know that's possible and when the primary caregiver goes to the support person they're going to say possibly give them the pamphlet and say, "Don't worry, you'll be paid by the DHB," or the Ministry depending upon who's responsible. And you're being employed to do these things that I've been given authorisation under the NASC to do. "So I've been given authorisation for this under the NASC and you will be paid by them," that would be what the primary caregiver would say because before I went in I would want to know those things, I'd want to know that I was going to be paid and there was authorisation.

MS HOLDEN:
Yes.

GLAZEBROOK J:
So I'm not quite sure why you say there's no relationship because they know somebody will be employed or likely be employed.

MS HOLDEN:
Well I submit that someone likely will do the work or possibly will do the work and it possibly will be an informal carer is not enough.

GLAZEBROOK J:
Okay.

GLAZEBROOK J:
That's fine, I was just wondering what else there was apart from what we'd been discussing before so is that, that's it.

MS HOLDEN:
That's essentially it, that in the scheme of the Act and in the scheme of the section engagement requires more than that the Ministry of Health through the NASC has told a primary caregiver you can apply for a subsidy for, you know,

15 hours a year or whatever, 15 days a year. That's not enough in my submission.

Your Honour, I would rely on my written submissions in relation to the dwellinghouse point as well, that is a second part to the argument. As you know the Court of Appeal didn't turn its mind to that beyond saying it was distinctly arguable of its finding on engagement but, nevertheless, it is part of our submission that that is another requirement and that it is necessary for that to be a requirement of the engagement that it be in a dwellinghouse, it's not enough that it simply did happen.

WILLIAM YOUNG J:

Was there evidence about this? I mean obviously the scheme covers provision of services not in a dwellinghouse, for instance, schools, respite care, et cetera and it's a matter of, also obvious that sometimes that sort of respite care might be provided by someone like Ms Lowe without actually doing it in a home. It might be just taking someone for a walk or going for a drive or something. Has that been fleshed out in the evidence?

MS HOLDEN:

The evidence, yes, there was evidence, if you turn to volume 2 of the case on appeal at page 95 of the bundle.

WILLIAM YOUNG J:

Sorry, I've lost that?

MS HOLDEN:

Page 95, and Mr Kynaston who was counsel –

ELIAS CJ:

Was that in volume 2?

MS HOLDEN:

Yes, volume 2. So Mr Kynaston, who was counsel for the DHB in the Employment Court is asking questions of the Ministry's witness, I assume, seeing it's cross-examination, and he takes her through starting I guess about line 18. "Informed carers or relief carers who provide support in an informal setting such as a dwelling, domestic dwelling, support doesn't need to be provided in a domestic dwelling?" "No it doesn't have to be," and following on from there, there is some evidence.

ARNOLD J:

And I think Mr Cranney, at 97, asks some questions and as to the proportion between sort of informal providers and more formal providers and the majority are informal.

MS HOLDEN:

Yes.

ARNOLD J:

A majority are, yes, informal but the precise –

MS HOLDEN:

That's right, but that doesn't – and, you know, I don't want to overplay it but because they are informal doesn't necessarily mean it's in a dwellinghouse though, it could be somebody taking somebody out.

ARNOLD J:

No, no I understand that. So there's obviously some significant proportion do go into a formal other sort of thing.

MS HOLDEN:

Yes. So I'm conscious of the time, Your Honour, do you want to take the lunch adjournment?

ELIAS CJ:

Well have you concluded or do you want to review that over the lunch time?

MS HOLDEN:

Well perhaps if I review it over the lunch time and confirm.

ELIAS CJ:

All right.

MS HOLDEN:

But it would only be on this point so if Your Honours had any more questions about the dwellinghouse point then that would be –

ELIAS CJ:

We'll take the adjournment now.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.19 PM

ELIAS CJ:

Yes, thank you Ms Holden, did you wish to be heard further?

MS HOLDEN:

I have nothing further unless Your Honours have any further questions.

ELIAS CJ:

Any questions? Right, thank you. Yes Mr Cranney.

MR CRANNEY:

Thank you, Your Honours. Your Honours, I will be extraordinarily brief. I think the issues have narrowed as the day has gone on. I have only got, I think, three points to make but the first is on this issue about whether Ms Lowe was a friend of the person for whom she cared and there is some quite detailed evidence in this from page, volume 2, tab 12 and the first part of the transcript

of evidence deals with that issue for each of the named persons for whom she cared and she was cross-examined about this. She said, if you look, for example, at page 80, lines 7. “When I filled the form in about whether I was a family or a friend I was neither of those but it didn't have a part for stranger so that was the nearest I could get to and I wrote, ‘Friend,’ in it.”

GLAZEBROOK J:
Sorry, I'm just losing this. I see, yes, thank you.

MR CRANNEY:
Page 80.

GLAZEBROOK J:
Yes, I've found it.

MR CRANNEY:
And then, Your Honour, over the page on page 83 you will see there that it's referred to again at line 10, the same sort of thing under cross-examination from Mr Kynaston and again at line 16 he says, “And you've written, ‘Friend,’ on the right-hand side of the column?” And he said, “No Jo wrote that, that's her writing.” And then at line 25 she talks about the Sandersons. “Were you friends with the Sandersons at this time?” “They became friends as did all the people I worked with,” and over the page, page 6, lines 1 to 4. And then I think the nearest we get to a friend is on page 8 of the transcript, page 86 of the bundle, she says, “I knew Pat Taylor and her husband Keith,” at line 15.

GLAZEBROOK J:
Sorry, I've lost your page number?

MR CRANNEY:
Sorry, I beg your pardon, page 86, Ma'am.

GLAZEBROOK J:
Page 86, thank you.

MR CRANNEY:

Line 15. “I knew Pat Taylor and her husband Keith had MS and she would go, if she was at golf she’d go away to the tournaments,” and then the next page 87, line 15, Mr De Bruin, “Word of mouth.”

So this was all pressed in some detail at the time in the evidence.

ARNOLD J:

So this work over the weekend while the golf was going on was that under this scheme or independently of that?

MR CRANNEY:

No I think she was a golfer and would go away and I think it was independent. I don't know, maybe it was part, no, I think it was part of the scheme.

ARNOLD J:

Or it might have been, some of it may have been –

MR CRANNEY:

Could have been respite care.

ARNOLD J:

Yes, but some may not –

MR CRANNEY:

Could have been.

ARNOLD J:

I see.

MR CRANNEY:

So that on that issue, and that's quite realistic when one thinks about life that somebody would hear that you were available and she says she gets calls from people, “Could you do my respite care,” when those passages are read.

Then the second point is on the issue of the statement made by the Court of Appeal that you would have to be engaged in the very first engagement or not at all and I think it really records me of having agreed with that. I don't agree with it and it is simply an unrealistic way of looking at it to say that you can never, ever become engaged on that test because on every single occasion you become engaged it is a new occasion by the family who wish to engage her for the rest of the care, and on each occasion the employer does not know the DHB and the Ministry –

ARNOLD J:

So is the outcome the consequence of that then that a person who does this once or irregularly may not be, fit the definition but somebody like Ms Lowe who is doing it more regularly would, is that your position?

MR CRANNEY:

No, my submission is that on each occasion it's done the person is engaged by the DHB or the Ministry.

ARNOLD J:

Anyone, so if I do it once I'm engaged?

MR CRANNEY:

Yes, if you do it once you're engaged for the day.

ARNOLD J:

Well then you are saying that on the first occasion you're engaged.

MR CRANNEY:

Yes I do think that’s right, but they went further –

WILLIAM YOUNG J:

That's not what the Court of Appeal thought in *Cashman* though, was it?

MR CRANNEY:

This is the Court of Appeal in this case.

WILLIAM YOUNG J:

But in *Cashman* the Court of Appeal didn't think that a person who was engaged, say, a friend who did it once –

MR CRANNEY:

No I don't think it was dealt with by the Court of Appeal in *Cashman.*

WILLIAM YOUNG J:

Well I think it was actually.

ARNOLD J:

Well there was that passage that we were taken to where it says it doesn't cover?

MR CRANNEY:

Yes, yes, and I think that's the, that passage is the answer to Justice Young's question about why this has occurred because I think it's quite clear from what's been said that that passage has been relied on by the Ministry and the DHB as authority for the proposition that these people are not employees, sorry, are not homeworkers.

O'REGAN J:

But that passage contradicts what you just said, doesn't it? That's someone in the position of Ms Lowe the first time they engage, or someone who is just a friend who does it two or three times –

MR CRANNEY:

Yes.

O'REGAN J:

– wouldn't be a homeworker, that's what the Court of Appeal said in *Cashman*.

MR CRANNEY:

Someone, yes, I think there is, they're trying to distinguish between someone like in *Cashman,* I say, and other people. Yes it could be read that way.

O'REGAN J:

Well that's the only way it can be read, isn't it?

MR CRANNEY:

Well I think it's a bit vague, Your Honour.

GLAZEBROOK J:

Well it can only be obiter anyway because it's not, that wasn't what was before them so, and to me it doesn't strike me as a particularly sensible distinction.

MR CRANNEY:

No, it's –

GLAZEBROOK J:

Because if you're a family or friend you can be engaged in the same way as anybody else one would have thought.

MR CRANNEY:

Yes, for some reason he was trying to narrow down the reason, the Judge was trying to narrow down the reasoning at the end of the judgment, but in this circumstance here, if you adopt the position, if one adopts the position that you're not engaged until the second time that doesn't work as a matter of logic either because the second time just then becomes the first time because

the second time they still don't know you're going to be re-engaged. So there has to be an engagement from – the first one is an engagement or the analysis proposed by Justice Young is the correct one and that is whatever the case is with the first one you are certainly engaged and people have been doing it for 20 years. It's not logical to say or realistic to say, should I say, that you've never been engaged because of the event, because of the first time.

ARNOLD J:
Can I just follow up one thing? You said that the Ministry had reshaped these things on the basis of that statement in *Cashman*. I had thought from the evidence that this sort of family assistance programme had been running since the 1970s?

MR CRANNEY:
Yes, it had been.

ARNOLD J:
And I thought that was the point that it was a different sort of system from the sort of system that was at issue in *Cashman.*

MR CRANNEY:
Yes, I think it had been running since the 1970s according to *Cashman* 1, the history set out in *Cashman* 1. Then the Court of Appeal in a kind of a crises scenario dealt with Sunderland and the RHA, everything was frozen and that's why there is a bit of vagueness in the judgments about who is doing what because everything got either sent out from the original judgment of Judge Palmer. And then following the Court of Appeal's judgment in *Cashman* for some reason these people were excluded from the judgment by the powers that be and I think it's probably because of that passage, that's my guess. It's only a guess because there was no evidence on it.

Now the third point relates to international conventions which my friend referred to in her submissions and said they weren't relevant, in her written submissions. They are relevant at least to the extent that one of the purposes

of this Act is in section 5, the section objects, the objects section. One of them is an object that acknowledges that, one object of the Act is to acknowledge and address the inherent inequality of power in employment relationships. That's an object of the Act and employment relationships are then expanded to include homeworkers and that overlaps, I think, with many of the themes contained in the International Labour Organisation *Convention C189 and Recommendation R201 – Decent work for domestic workers* (2011) which we haven't yet ratified but which actually dovetails with our own Act and our own section defining home work.

So it's a useful thing to look at the convention because it shows what the international standard is, the sorts of issues their convention tries to deal with are quite similar to what's before the Court here and it's an international norm adopted by a tripartite authority, governance –

GLAZEBROOK J:
Although it's a much narrower definition, isn't it? Or is that the other one?

MR CRANNEY:
No that's the ILO *Convention C177 – Home Work Convention* (1996).

GLAZEBROOK J:
Right.

MR CRANNEY:
The domestic worker convention –

GLAZEBROOK J:
Oh domestic workers is, makes it, right, right.

MR CRANNEY:
It's a very interesting document and it talks about, and the convention considering decent work. The homeworker convention, it's very useful about the undervaluation and the invisibility of the workforce, the female nature of it

and also the extent of the problem. Not so much in countries like New Zealand, but the vast nature of this issue and how it's beginning to be addressed around the world, and I think it's useful for that purpose.

WILLIAM YOUNG J:
Mr Cranney, is there a document anywhere that sets out the basis upon which payment is to be made?

MR CRANNEY:
Yes, I think I gave you some wrong figures before. The $74 figure was the 24 hour figure.

WILLIAM YOUNG J:
Yes.

MR CRANNEY:
And the half day is 12 hours.

WILLIAM YOUNG J:
So where is that? I mean I know it's set out on a daily basis on the claim form.

MR CRANNEY:
It's $3 an hour Sir.

WILLIAM YOUNG J:
Where's that?

MR CRANNEY:
That's dividing 24 by $75.86.

WILLIAM YOUNG J:
Yes I know, but is that specified anywhere?

MR CRANNEY:

I'm sure it is, Sir, in here somewhere. Let me just try and find it. My learned junior might be able to help me. I think it's in the evidence actually, it's in the briefs. Page 69, volume 2, paragraph 8.

GLAZEBROOK J:

They're talking about non-family, the non-family is talked about there.

WILLIAM YOUNG J:

And a day means 24 hours.

MR CRANNEY:

Yes Your Honour, and a half a day is 12.

WILLIAM YOUNG J:

So what is envisaged is that someone is going to go into, say, a residential home for a day.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

A 24 hour period.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

But what happens if Ms Taylor wants to go and have a game of golf in the afternoon, how does that get covered?

MR CRANNEY:

Your Honour Justice Arnold was mentioning before that these hours could be collaborated into - I don't think, I think Your Honours got that from *Cashman*

number 1, and I think in *Cashman* number 1 they, in fact, say you can't do that, you have to actually use the –

ARNOLD J:
I thought on these forms we saw a sample somewhere which said that you could?

MR CRANNEY:
My learned friends are helping me.

ARNOLD J:
I think it maybe in that policy document.

MR CRANNEY:
Tab A of volume 3, yes, the third column you see a full day is over eight and up to 20. A half day is four to eight. And the minimum unit claimable is a half a day. Periods of care of less than four hours can be combined. Yes, that's where it is Sir. And there's an example there of 1.5 hours, 2 hours and 1.5 hours becoming a half a day. So that five hour period would become a half a day. Then you'll see the rates set there, are an example only. So that's the document for that information.

GLAZEBROOK J:
So if you do the game of golf over three weeks you…

MR CRANNEY:
Yes.

GLAZEBROOK J:
But you add them up and that might become a day.

MR CRANNEY:
I've never played it Ma'am. And those, unless I can be of any further assistance, are my submissions.

ELIAS CJ:

Thank you counsel for your assistance. We'll reserve our decision in this matter.

COURT ADJOURNS: 2.35 PM