IN THE SUPREME COURT OF NEW ZEALAND

SC 97/2016
[2017] NZSC 115

BETWEEN	JANET ELSIE LOWE Appellant
AND	DIRECTOR-GENERAL OF HEALTH, MINISTRY OF HEALTH First Respondent
	CHIEF EXECUTIVE, CAPITAL AND COAST DISTRICT HEALTH BOARD Second Respondent

Hearing:	10 February 2017
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	P Cranney and S N Meikle for Appellant J C Holden and M J R Conway for Respondents
Judgment:	7 August 2017

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no award of costs.

REASONS

ARNOLD AND O'REGAN JJ
(Given by O'Regan J)

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Introduction

[1] The matter for determination in this appeal is whether the appellant, Ms Lowe, comes within the definition of "homeworker" in s 5 of the Employment Relations Act 2000 (the ERA) when she works as a relief carer pursuant to a government programme known as the Carer Support scheme.

[2] The significance of the issue is that if Ms Lowe is a homeworker, she will be an "employee" under s 6(1)(b)(i) of the ERA. That, in turn, would mean she would be entitled to the benefit of rights enjoyed by employees including those under the Minimum Wage Act 1983, the Parental Leave and Employment Protection Act 1987, the State Sector Act 1988 and the Holidays Act 2003. It would also mean that the first respondent (the Ministry) or the second respondent (the DHB) would have the

responsibilities of an employer to her when she is working as a relief carer in the home of a disabled or aged person.

[3] Ms Lowe asked the Employment Relations Authority to determine whether she was engaged as a homeworker by the Ministry or the DHB, either on their own behalf or in combination with other persons. The Authority found she was not a homeworker.[1] Ms Lowe challenged this in the Employment Court, and a full Court found in her favour.[2] That decision was, in turn, reversed by the Court of Appeal.[3]

[4] Leave to appeal to this Court was granted on the question of whether Ms Lowe was a "homeworker" within the meaning of s 5 of the ERA and deemed to be an employee of the Ministry (or, as applicable, the DHB) when she undertook relief care pursuant to the Carer Support scheme.[4]

The issue

[5] The term "homeworker" is defined in s 5 of the ERA as follows:

> **homeworker—**
>
> (a) 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 in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
>
> (b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser

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1 *Lowe v Director-General of Health, Ministry of Health* [2014] NZERA Wellington 24 (Member MacKinnon) [*Lowe* (ERA)].

2 *Lowe v Director-General of Health, Ministry of Health* [2015] NZEmpC 24, (2015) 10 NZELC ¶79-050 (Judges Perkins, Corkill and Ford) [*Lowe* (EmpC)].

3 *Director-General of Health, Ministry of Health v Lowe* [2016] NZCA 369, [2016] 3 NZLR 799 (Harrison, Wild and French JJ) [*Lowe* (CA)].

4 *Lowe v Director-General of Health, Ministry of Health* [2016] NZSC 143.

[6] The definition of "dwellinghouse" in s 5 is as follows:

> **dwellinghouse—**
>
> (a) means any building or any part of a building to the extent that it is occupied as a residence; and
>
> (b) in relation to a homeworker who works in a building that is not wholly occupied as a residence, excludes any part of the building not occupied as a residence

[7] In order for Ms Lowe to come within the definition of "homeworker" when undertaking her role as a relief carer, it must be established that:

(a) She is engaged, employed or contracted by the Ministry or the DHB. In the present case the claim made by Ms Lowe is that she is "engaged" by the Ministry or the DHB.

(b) The engagement is in the course of the Ministry's or the DHB's trade or business. There is no dispute that, if there has been engagement by the Ministry or the DHB in this case, it would have been in the course of their trade or business.

(c) The engagement is to do work for the Ministry or the DHB.

(d) The work is to be done in a dwellinghouse. The relief carer duties undertaken by Ms Lowe were undertaken in the homes of those for whom she was caring, but this is not necessarily a requirement of the Carer Support scheme, and the respondents argue that this means that this element is not met in this case.

(e) As an alternative to (a) above, she is *in substance* engaged, employed or contracted as described above, even though the contractual arrangement is a vendor/purchaser relationship.

[8] For reasons that will become apparent, we see the case turning on two of these requirements: whether Ms Lowe was "engaged" by the Ministry or the DHB ([7](a) above) and, if so, whether the engagement was to do work in a dwellinghouse

([7](d) above). Before addressing those issues, we briefly summarise the factual background and the background to the "homeworker" definition and how it was interpreted in the Employment Court and the Court of Appeal.

Factual background

[9] The parties agreed upon a statement of facts, and it is convenient to set it out in full.[5] It stated:

> **The Carer Support regime**
>
> 1. Eligibility for Carer Support is assessed by a Needs Assessment Co-ordination (NASC) organisation, which decides whether the client is eligible for Carer Support, whether Carer Support is an appropriate support option for the client and full-time carer, and the extent of the client's eligibility. The NASC informs the client and full-time carer about their carer support allocation and how the system works. They also inform the Ministry how many days per year it has allocated to a full-time carer for support. Once the Ministry receives notification, it sends out the Carer Support form to the full-time carer for the full-time carer and support carer to complete and return when they claim for payment of Carer Support.
>
> 2. Payment of Carer Support is through Sector Operations, a shared payment agency that administers payments on behalf of the Ministry and all District Health Boards (DHBs). Generally, if a client is under 65 [years] of age, the payment is funded by the Ministry and if the client is over 65 it is funded by the relevant DHB.[6]
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> 3. The Ministry publishes a leaflet titled "How to Claim Carer Support". As set out in this leaflet, a full-time carer can arrange for anyone to be a support carer so long as they are over 16 years and are not a legal guardian, parent, spouse or partner of the client. A support carer also cannot live at the same address as a client.
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> **Relief care provided by Ms Lowe**
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> 4. Ms Lowe has on various occasions provided relief care for the following individuals who require care in their homes:
>
> 4.1 Keith Taylor
>
> 4.2 George Sanderson

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5 In this judgment, we use "relief carer" to refer to workers such as Ms Lowe and "primary carer" to refer to the unpaid carers who do most of the caring for the client. In Ministry documents they are sometimes referred to as "support carers" and "full-time carers" respectively. A "client" is the person being cared for, by reason of age or disability.

6 In his submissions, counsel for Ms Lowe, Mr Cranney, said that there are 35,000 relief carers, of whom 23,000 are paid by the Ministry and 12,000 are paid for by District Health Boards.

4.3 Jack De Bruin

5. Ms Lowe also may have provided relief care for a further individual, Bob Forsyth. However Sector Operations does not have any record of payments that may have been made in respect of relief care provided by Ms Lowe for Mr Forsyth.

6. The full-time carers submitted support forms to the Ministry seeking payment in respect of the relief care carried out by Ms Lowe. Both the full-time carers and Ms Lowe signed the forms.

7. The payment was made directly to Ms Lowe in respect of some of the relief care she provided. In respect of other relief care provided by Ms Lowe, the full-time carer was paid by the Ministry or the [DHB] (administered by Sector Operations) and the full-time carer then paid Ms Lowe.[7]

8. Where the Carer Support is funded by [the DHB], the Carer Support forms contain three different daily subsidy rates: the formal rate (applicable to GST registered carers), the informal rate (payable for family members) and the non-family rate. Where the Carer Support is funded by the Ministry the Carer Support forms contain two different daily subsidy rates: the formal rate (applicable to GST registered carers) and the informal rate. With regards to Ms Lowe, payment for relief care for George Sanderson and Jack De Bruin was funded by [the DHB] at the daily rate for a non-family member and for Keith Taylor payment for relief care was funded by the Ministry at the informal rate for a non-GST registered carer.

9. Ms Lowe was not contacted at any time by the Ministry, the [DHB] or Sector Operations in relation to the carer relief provided. Ms Lowe did however contact the Ministry on occasion when she had not received prompt payment for carer relief services.

[10] The Employment Court considered that evidence showed that Ms Lowe made a living in material part from working as a relief carer,[8] contrary to the view of the Employment Relations Authority.[9] The Court of Appeal expressed no view and we do not think it is necessary for us to make a finding as we do not consider anything turns on this.

Legislative history

[11] The statutory definition of homeworker originally appeared in s 2 of the Labour Relations Act 1987. That legislation was preceded by a Green Paper, which

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7 In his submissions, Mr Cranney said most payments are made directly to the relief carer (27,000 out of 35,000). The remaining payments are made to primary carers, to reimburse the primary carer for payments made to the relief carer.

8 *Lowe* (EmpC), above n 2, at [54].

9 *Lowe* (ERA), above n 1, at [43].

explained the purpose of the extension of the employee definition to include homeworkers. The Green Paper defined homeworkers as follows:[10]

> … those who, for a range of reasons, are prevented from or restricted in undertaking … regular work in a factory, commercial premise or customarily designated place of work, and who are employed by a firm or intermediary agent to carry out work in their own homes.

[12] The report noted the potential for exploitation of homeworkers resulting in long hours, underpayment and erratic pay as well as lack of training, lack of job security, no promotion prospects, inability to control type of work and possible safety hazards which the presence of children in the home could exacerbate.[11] If the initial intention was to limit the homeworker definition to those working in their own home, the definition that appeared in the Labour Relations Act did not reflect that restriction. The exception for work on fixtures, fittings or furniture in para (a) of the homeworker definition makes sense only if the work on fixtures, fittings or furniture was being undertaken by the worker in the home of another person.

Cashman v Central Regional Health Authority

[13] The definition of homeworker was carried forward into the Employment Contracts Act 1991 when that Act replaced the Labour Relations Act. The application of the definition (as it appeared in s 2 of the Employment Contracts Act) to those providing care to aged or disabled people living in their own home was the subject of a decision of the Court of Appeal in *Cashman v Central Regional Health Authority*.[12] The Court of Appeal made it clear that the concept of homeworker was broader than just pieceworkers working in their own home, and included anyone who was engaged to do non-tradesman's work in a dwellinghouse, not necessarily his or her own.

[14] In *Cashman*, the responsibility for disability services rested with the Central Regional Health Authority (the RHA), but that body had contracted out the responsibility for the operation of home support and carer relief schemes to a

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10 Ministry of Labour *Industrial Relations: A Framework for Review* (17 December 1985) vol 2 at 87.

11 At 88.

12 *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA).

company called Sunderland Community Support Services Ltd (Sunderland). Mr Cashman and his fellow appellants had been required to enter into contracts for services with Sunderland, and both the RHA and Sunderland argued that the carers were independent contractors to whom the Employment Contracts Act did not apply. The Court of Appeal found they had been "engaged" by the RHA and Sunderland to provide services to the aged or disabled persons for whom they cared. The Court said it was artificial to contend that they were not working for the RHA and Sunderland in doing so.[13]

[15] The Court in *Cashman* qualified its conclusion, however. It said family members, neighbours or friends who are paid under a home support scheme to look after a sick or disabled person, but who are not otherwise engaged in similar work for remuneration, would not be regarded as homeworkers. However, a carer who makes a living in whole or material part from the provision of homecare can be regarded as a homeworker.[14]

[16] *Cashman* resolves a number of the issues highlighted at [7] above, particularly those in (b) and (c). On the authority of *Cashman*, it is established that a carer who has been engaged by a public authority or its delegate to provide care to an aged or disabled person in that person's home is engaged in the course of the trade or business of the authority or its delegate to do work for the authority or its delegate.

[17] *Cashman* does not, however, resolve the essential issue in the present case, which is whether relief carers operating under the Carer Support scheme are "engaged" by the Ministry or the DHB (the issue at [7](a) above). Nor does it resolve whether an engagement to undertake work which may or may not be performed within the dwellinghouse of the aged or disabled person is sufficient to meet the requirement that the engagement be to do work "in a dwellinghouse" (the issue at [7](d) above). Those are the two issues we need to resolve in this judgment.

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13 At 10 and 11.
14 At 14.

The Employment Court decision

[18] The Employment Court found that Ms Lowe was "engaged" as a homeworker. It considered that the scope of the term "engage" was broad and may be different from employing or entering into a contract with a worker.[15] It considered that the use of the term "employed" in the definition of homeworker must be intended to have a wider meaning than the statutory definition as used in s 6(1)(a) of the ERA,[16] because otherwise it would be redundant. If the homeworker were an employee as defined, there would be no need to bring him or her within the deemed employee status of homeworkers.[17]

[19] The Employment Court referred to the decision of the Court of Appeal in *New Zealand Dairy Workers' Union Inc v Open Country Cheese Co Ltd* which considered the meanings of the word "engage" and "employ" in the context of s 97(2) of the ERA.[18] In that case the Union had given notice of a strike, upon which Open Country Cheese used employees of an associate company and volunteers to undertake work that would normally be done by the striking workers. Section 97(2) of the ERA provides that an employer may employ or engage another person to perform the work of a striking or locked out employee only in accordance with other provisions within s 97. It was common ground that those other provisions did not apply, so the sole issue before the Court of Appeal was whether those undertaking the work normally done by the striking workers had been employed or engaged by Open Country Cheese in terms of s 97(2). The Court of Appeal considered that in the context of s 97(2) it was not necessary to prove that an employer had taken active steps to engage another person. Rather, it was sufficient that the employer allowed those other persons to perform the strikers' work.[19] The proper inquiry was not into the means of a worker's employment or engagement but the nature of their use or deployment.[20]

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15 *Lowe* (EmpC), above n 2, at [46].
16 Section 6(1)(a) applies to a person who is employed "under a contract of service".
17 At [48].
18 *New Zealand Dairy Workers' Union Inc v Open Country Cheese Co Ltd* [2011] NZCA 56, [2011] 2 NZLR 350.
19 At [34].
20 At [31].

[20] The Employment Court relied on the *Open Country Cheese* decision. The Court acknowledged that the *Open Country Cheese* decision required consideration of the words "engaged or employed" in a wholly different context from the present case, but saw it as an illustration of Parliament utilising broad language in the ERA. The Court saw this as reinforcing the conclusion that Parliament had intended that the use of the composite phrase "engaged, employed or contracted" in the definition of homeworker should have an equally broad application.[21]

[21] The Court noted the requirement to consider the substance of the arrangement in para (b) of the homeworker definition. It determined that, although the term "in substance" is not used in para (a), the "in substance" requirement applied to para (a) as well. It saw this as reinforcing the need to apply a broad interpretation.[22]

[22] The Court then concluded that Ms Lowe was engaged, at least in substance. It took into account the fact that the Ministry offered to pay relief carers on certain terms and conditions, the work that would be undertaken would be defined by the needs assessment of the client and once the Ministry was assured the work had been undertaken, the worker was paid accordingly.[23] It also took into account the fact that Ms Lowe made a living in material part from the provision of homecare. It considered that she provided relief carer services with sufficient frequency to permit the conclusion that she undertook such work on a regular basis, notwithstanding that on some of the invoices provided to the Ministry, she described herself as a "friend" of the client.[24]

[23] It concluded:[25]

> Having regard to these factors, it is clear that the substance of the arrangement is one of engagement. Ms Lowe provided a service which the Ministry and the [DHB] required to be undertaken so that their responsibilities could be met. Her services were secured to that end; she was for their purposes "engaged".

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21 *Lowe* (EmpC), above n 2, at [49].
22 At [50].
23 At [53].
24 At [54].
25 At [55].

[24] The Court observed that the use of the label "subsidy" was not determinative and that the fact that neither the Ministry nor the DHB had any role in selecting the relief carer, and may not even know who that person is, did not alter the conclusion that the relief carer was engaged. It noted that the Ministry and/or the DHB could, if it wished, ascertain the identity of the relief carer and if need be audit and otherwise investigate the services being rendered.[26]

[25] The Court did not address the question of whether the requirement of the homeworker definition that the person be engaged to do work in a dwellinghouse was met in the present case. But its finding that Ms Lowe was a homeworker indicates that it must have considered this requirement was met.

Court of Appeal decision

[26] The Court of Appeal noted that the Employment Court had not made a finding as to who had engaged Ms Lowe. It said that the Employment Court had also not addressed why, if there was an engagement, it could not be by the primary carer either in their own right or possibly as an agent for the Ministry/DHB.[27] Its essential analysis was:[28]

> The word "engage" is a word of action. Its ordinary and natural meaning involves concepts of "securing" something, "involving intensely", and "participating".[29] In the context of engaging someone to do work, we consider the word "engage" in its natural and ordinary meaning requires that the person doing the engaging take an active role in both the selection and oversight or control of the work of the particular individual whose status is at issue. There must be a relationship. Parliament cannot have intended otherwise.

[27] The Court of Appeal noted that the Employment Court was influenced by the fact that Ms Lowe had been undertaking relief care for a long period. The Court of Appeal considered that either Ms Lowe was engaged on the first occasion she provided relief care or not at all.[30]

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26 At [57]–[58].

27 *Lowe* (CA), above n 3, at [15]. The Employment Court's finding is quoted above at [23].

28 At [24].

29 *Collins English Dictionary* (10th ed, HarperCollins Publishers, Glasgow, 2009) at 548; and Graeme Kennedy and Tony Deverson (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008) at 355.

30 *Lowe* (CA), above n 3, at [30].

[28] The Court of Appeal rejected a submission from Ms Lowe that the present case was indistinguishable from *Cashman*. It highlighted the differences between the arrangements at issue in *Cashman* and the present case. In *Cashman*, the claim was made by carers who provided home care services under written contracts they had with the RHA, and later Sunderland. The RHA or Sunderland arranged for the carers to provide the services. The carers were referred to the persons in need of care by the RHA or Sunderland. The contracts between the carers and the RHA or Sunderland specified the services to be provided and how they were to be provided and there was even an express contractual provision about training of carers.[31]

[29] The Court noted the contrasting factors in this case, in particular:[32]

(a) neither the Ministry nor the DHB has any role in selecting the relief carer;

(b) until the claim form is submitted after the relief carer has provided services for the first time to a particular client, the Ministry and DHB do not even know the identity of the relief carer;

(c) the Ministry and the DHB have no involvement in arranging the timing, nature or extent of the support to be provided or where it is to be provided: those matters are within the discretion of the primary carer;

(d) the primary carer could select an organisation such as a rest home to provide the care, rather than an individual like Ms Lowe;

(e) equally the primary carer could engage the relief carer for longer periods than those funded by the Ministry and the DHB; and

(f) the primary carer could also change or use different relief carers without reference to the Ministry or the DHB, yet, on the

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[31] At [25].
[32] At [26].

Employment Court's interpretation, the relief carer could then bring a personal grievance claim against the Ministry or the DHB.

[30] The Court concluded that the Carer Support scheme could fairly be described in substance as a subsidy.[33] It also considered that if Ms Lowe was engaged by anyone, it must be by the primary carer.[34]

[31] The Court of Appeal accepted that, in the context of an employment protection measure, words should be given a broad meaning and regard should be had to international instruments, such as the Convention Concerning Decent Work for Domestic Workers.[35] However, it held that to hold that third party funding amounts to engagement would be "to stray so far from the natural and ordinary meaning of the word 'engage' as to ignore it."[36]

[32] The Court therefore found there had not been an engagement by the Ministry or the DHB. This made it unnecessary for the Court to address the argument that the requirement that the person be engaged to do work in a dwellinghouse was not met in the present case. The Court observed, however, that the point was "distinctly arguable".[37]

Was Ms Lowe engaged by the Ministry or the DHB?

[33] We now turn to the first (and principal) issue: was Ms Lowe engaged by the Ministry or the DHB? We will begin by considering the statutory context, other cases involving the interpretation of the word "engage" and the relevance of International Labour Organization conventions to the interpretive exercise. We will then address the following questions:

(a) Does the reference to "in substance" in para (b) of the homeworker definition require that an "in substance" approach be taken to para (a)?

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33 At [27].
34 At [28].
35 Convention Concerning Decent Work for Domestic Workers ILO 189 (adopted 16 June 2011, entered into force 5 September 2013).
36 *Lowe* (CA), above n 3, at [31].
37 At [37].

(b) Does "engagement" require the hirer to have an active role in the selection and/or supervision of the engaged person?

(c) Did the Ministry or the DHB have such an active role in the selection or supervision of Ms Lowe?

(d) Is this case distinguishable from *Cashman*?

(e) Does the primary carer engage the relief carer as agent for the Ministry or the DHB?

Statutory context

[34] The statutory purpose of the extension of the concept of employment to include homeworkers is to protect those who are vulnerable because they work remotely from each other and therefore cannot organise, and who may otherwise be subject to exploitation. This is clear from the Green Paper referred to earlier.[38] Interpreting the definition of homeworker, therefore, requires, as the Court of Appeal noted in *Cashman*, an approach that gives effect to that purpose.[39]

[35] The term "engaged" is used in various forms in other provisions in the ERA, in a way which illustrates that it does take its meaning from its context. In particular:

(a) The definition of "independent contractor" in s 69B of the ERA is "a person engaged to perform work under an agreement that is not an employment agreement". That creates a contrast between engagement (independent contractor) and employment (employee). But it does little to assist the interpretive exercise in the present case.

(b) Section 97 uses the phrase "employ or engage". That section was the subject of the decision of the Court of Appeal in the *Open Country*

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38 Above at [11]–[12].
39 *Cashman*, above n 12, at 13.

Cheese case.[40] In that context, the Court was persuaded that the use of persons to undertake the work of strikers, in the sense of allowing them to perform that work, was sufficient to amount to engagement or employment for the purposes of s 97. That was clearly a purposive interpretation, designed to ensure the right to strike provided in the ERA was not undermined. The *Open Country Cheese* decision illustrates the flexibility of the term "engagement" and its adaptability to the context and the purpose of the statutory provision in which it appears. Other than that, we do not think it assists much with the present exercise because of the obviously different context in which the word "engaged" was used in that case.

Other case law

[36] We have also considered the use of the term "engaged" in other contexts, to see whether that provides assistance with the present exercise. What this reveals is that "engaged" is a flexible, ambiguous word, the meaning of which is substantially affected by context. To illustrate:

(a) In *Marbé v George Edwardes (Daly's Theatre) Ltd*, Lawrence LJ highlighted the flexibility of the term "engage".[41] In particular, he found that the term could mean an agreement to employ in the sense of retaining the services of an employee or could mean an agreement to afford the employee an opportunity of doing the work for which he or she was engaged.[42] That case concerned an American actress engaged to play a part in a West End play. A theatre company, having engaged her, did not allow her to appear in the play, even though it paid her remuneration. The Court held that the theatre company was obliged to let her actually perform the part for which she was engaged.

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40 *Open Country Cheese*, above n 18.

41 *Marbé v George Edwardes (Daly's Theatre) Ltd* [1928] 1 KB 269 (CA) at 289 per Lawrence LJ. See also Bankes LJ at 278–279.

42 At 289.

(b) In *Stanford v Imperial Guarantee and Accident Fire Insurance Co of Canada*, the Court had to decide on the interpretation of a life insurance policy.[43] One class of insurance did not apply if the accident causing death occurred while the insured was "temporarily or permanently engaged in any occupation … more hazardous than that in which he is insured".[44] The Court observed that the term "engaged" is a word of various meanings, and that it was ambiguous. It observed that one of the possible meanings of the term was to occupy oneself, or be busied, or take part.[45] The accident occurred while the insured was on a trial run with a view to becoming employed as a brakesman. Although he had not entered into a permanent or even a temporary contract with the railway company, he was found to be "engaged" in an occupation or activity more hazardous than that for which he was insured, and so the policy exception applied.[46]

(c) In *Secretary of State for Trade v Booth (The Biche),*[47] the point at issue was whether a prohibition on a ship carrying more than 12 passengers without a certificate as to survey had been breached.[48] The term "passenger" was defined as a person carried on a ship except a person "employed or engaged in any capacity on board the ship on the business of the ship".[49] The defendant had twice allowed over 20 young persons on to the ship for an excursion where they acted as unpaid crew members. The Court found that in light of the legislative history which indicated that "engaged" had a special meaning in shipping legislation connoting a contractually binding agreement to serve in some defined capacity, the young people were not engaged

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43 *Stanford v Imperial Guarantee and Accident Fire Insurance Co of Canada* (1909) 18 OLR 562 (CA).
44 See at 569.
45 At 570.
46 At 570.
47 *Secretary of State for Trade v Booth (The Biche)* [1984] 1 WLR 243 (QB).
48 In contravention of the Merchant Shipping Act 1894 (UK) 57 & 58 Vict c 60, s 271.
49 Merchant Shipping (Safety Convention) Act 1949 (UK) 12 & 13 Geo VI c 43, s 26(1)(a).

and thus remained passengers even though they undertook some responsibilities of the crew.[50]

(d) In *Benninga (Mitcham) Ltd v Bijstra*,[51] the relevant statute allowed a landlord to evict a tenant where the dwellinghouse was required by the landlord as a residence for someone "engaged in his whole-time employment".[52] The prospective tenant was party to a contract of service with the landlord but had not yet begun work. The question was whether the prospective tenant was engaged. MacKinnon LJ described the term "engaged" as "deplorably ambiguous". He expressed the view that the tenant had not become "engaged in" the whole-time employment of the landlord until actually working, even though he had entered into the contract for service well before the day on which he started working.[53]

(e) In *Buntine v Hume*,[54] the issue was whether Mr Hume had been "engaged on war service". He had been a member of the Volunteer Defence Corps and performed some military duties such as appearing in parades and speaking in schools, and was liable to be called up for service at any time. He was found not to be engaged in war service. The Judge observed that, in that context, engaged meant more than intermittent employment at irregular intervals, and connoted some continuity of employment for a substantial part of a person's time.[55]

(f) A similar interpretation to that taken in *Buntine v Hume* was adopted by the Court of Appeal in *Re Cowley (deceased)*.[56] In that case Mr Cowley's will provided that the family farm would pass to whichever of his grandsons was "actively engaged in farming" at the particular time. The Court concluded that "engaged" in that context

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50 *Secretary of State for Trade*, above n 47, at 249–250.
51 *Benninga (Mitcham) Ltd v Bijstra* [1946] KB 58 (CA).
52 Rent and Mortgage Interest Restrictions (Amendment) Act 1933 (UK) 23 & 24 Geo V c 32, sch I(g).
53 *Benninga (Mitcham) Ltd*, above n 51, at 62.
54 *Buntine v Hume* [1943] VLR 123 (SC).
55 At 127–128.
56 *Re Cowley (deceased)* [1971] NZLR 468 (CA).

must mean employment occupying a substantial part of a person's time.[57]

International Labour Organization conventions

[37] Mr Cranney suggested that we should have regard to conventions of the International Labour Organization interpreting the homeworker definition. He referred in particular to the Convention Concerning Home Work[58] and the Convention Concerning Decent Work for Domestic Workers.[59] However, New Zealand has not ratified either of these conventions and in those circumstances we do not think they can provide any assistance in interpreting a New Zealand statute.

"In substance"

[38] The Employment Court considered that the reference to "in substance" in para (b) of the definition of "homeworker" also required that an "in substance" approach be taken to para (a) of that definition.[60] In reliance on that, Mr Cranney argued that, in determining whether Ms Lowe was engaged by the Ministry or the DHB, the Court should take an "in substance" approach. We disagree. Paragraph (b) is dealing with a specific situation where a person working in a dwellinghouse is selling the output of his or her work to a business – a "pieceworker", whom the homeworker definition was intended to protect. It operates to ensure that a piecework contract which is, in strict terms, a vendor/purchaser contract, is treated as creating an employment relationship. An "in substance" approach is required because, in strict terms, the arrangement could otherwise fall outside para (a) and the intention of protecting pieceworkers would fail.

[39] We do not see any basis for interpreting para (a) as if the words "in substance" appeared in that paragraph. Nor do we see any role for para (b) in the

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57 At 471.
58 Convention Concerning Home Work ILO 177 (adopted 20 June 1996, entered into force 22 April 2000).
59 Convention Concerning Decent Work for Domestic Workers, above n 35.
60 *Lowe* (EmpC), above n 2, at [50].

present case: Ms Lowe is not a vendor and neither the Ministry nor the DHB is a purchaser, whether in strict terms or in substance. As will become apparent, we see the term "engage" as being a flexible term. We do not think its meaning can be extended by reading it as if it were amplified by the words "in substance" when that is not, in fact, the case.

Active role in oversight or control?

[40] The key element of the approach taken by the Court of Appeal was the finding that engagement involved an active role in selection and oversight or control of the work of the individual whose status is at issue.[61]

[41] Mr Cranney said this was a fundamental error on the Court of Appeal's part. He said the Court had described the attributes of the employer-employee relationship, which meant it was inappropriate for a definition designed to extend the ambit of the ordinary concept of employment to cover those who are not in law employees but are deemed to be to ensure that they are brought within the protection of employment law.

[42] The learned authors of *Mazengarb's Employment Law* have criticised the Court of Appeal's approach of requiring an active role in the oversight or control of work before engagement can arise. They suggest this approach is arguably inconsistent with the general employment law context of the word.[62] It was noted that "engage" conventionally denotes the performance of work by an independent contractor, whose work the hirer may be unable to oversee or control.

[43] We accept the criticism made by the learned authors of *Mazengarb* and by Mr Cranney in his submissions in the present case of the Court of Appeal's finding that some oversight or control was a necessary element of engagement. When an independent contractor is engaged, that is often because the contractor has an expertise which the hirer does not have and the contractor may often have a number of engagements that are current at any one time. In such a situation the hirer would not normally expect to exercise oversight or control, apart from setting the

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61 *Lowe* (CA), above n 3, at [24], quoted above at [26].

62 *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [ERA 6.30.6].

parameters of the task to be undertaken. We do not see any reason to treat the engagement of a homeworker any differently.

Selection

[44] That said, we agree with the Court of Appeal that the normal meaning of "engage" contemplates the hirer making the selection of the person engaged. In the present context the Carer Support scheme contemplates that the relief carer will be engaged by the primary carer, without any reference to the Ministry or the DHB. As the Court of Appeal noted, neither the Ministry nor the DHB will even be aware the relief carer has been engaged until a claim is made for payment.[63]

[45] Three other factors support the view that the primary carer is the party engaging the relief carer, with the Ministry or the DHB making payments to subsidise the cost of the engagement. The first is the fact that payments made by the Ministry or the DHB can be made by way of reimbursement of the primary carer. Where direct payments are made, this appears to be for convenience to avoid the need for double-handling and also as an assurance of the payment reaching the relief carer. It was not suggested that there was any difference between those methods of payment. The second is that the primary carer is entitled to pay the relief carer at a higher rate than the Ministry or the DHB will pay. The third is that the primary carer is entitled to engage the relief carer for longer periods than the Ministry or the DHB will pay for.

[46] We agree with the Court of Appeal that the Employment Court was wrong to see *Cashman* as supporting the conclusion that relief carers were engaged by the Ministry or the DHB under the Carer Support scheme.[64] In *Cashman* there was no dispute that the carers involved were contracted by the RHA and/or Sunderland so the issue that falls for determination in the present case was not a matter of dispute.

[47] Mr Cranney accepted that the selection or recruitment of relief carers was undertaken by primary carers, not the Ministry or the DHB. But he said this was not inconsistent with the relief carers being engaged by the Ministry or the DHB under

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63 *Lowe* (CA), above n 3, at [26].
64 At [25].

the comprehensive Carer Support scheme administered by them in accordance with their statutory duties to provide the care required by the aged or disabled clients.[65] He argued that, in its statutory context, and as part of the composite phrase "engaged, employed or contracted", "engage" should be seen as broad enough to include a situation where a worker does work for another (relying on *Cashman* for the proposition that the relief carers undertake work for the Ministry or the DHB) and is paid for by that other, particularly where the work that is performed is undertaken so as to meet a statutory obligation to provide disability services.[66] He argued that the Ministry or the DHB becomes obliged to pay the relief carer if a claim for payment is made where the primary carer has not made payment and claimed reimbursement.

[48] Mr Cranney relied on three aspects of the Carer Support scheme which, he said, indicate the clear involvement of the Ministry or the DHB in the arrangements under which relief carers undertake services, which were sufficient to establish an engagement of the relief carer. These were the needs assessment, the Carer Support Guidelines and the Ministry booklet on how to claim payment. We will consider these, and another aspect of the scheme not relied on by Mr Cranney, the audit, before evaluating Mr Cranney's argument.

NASC

[49] The needs assessment is undertaken by a Needs Assessment Coordination Service Agency (NASC) contracted to the Ministry. The evidence before the Employment Court on the nature of the needs assessment process is summarised in the statement that appears in para [1] of the agreed statement of facts reproduced above at [9]. The Employment Court described the assessment as follows:[67]

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65 Relevant provisions include: New Zealand Public Health and Disability Act 2000, ss 8 and 23; Health Act 1956, s 3A; and State Sector Act 1988, ss 32 and 34. The Employment Court found that the Ministry was required by statute to provide disability services in some manner and both counsel accepted that in providing Carer Support the Ministry was "in the business" of discharging their statutory responsibilities: *Lowe* (EmpC), above n 2, at [52].

66 As counsel for the respondents, Ms Holden pointed out (and as Mr Cranney accepted), there was no statutory duty to provide relief care of the kind provided by Ms Lowe in the present case, given the number of possible methods of providing assistance to aged and disabled persons.

67 *Lowe* (EmpC), above n 2, at [22].

> That assessment would have considered the allocation of a range of disability support services on the basis of the client's particular needs. This included relief support for the unpaid primary carer. In doing so, the NASC applied criteria approved by the Ministry.

[50] As this extract notes, carer support through relief carers is simply one of a suite of options available to primary carers.

[51] This is confirmed by the following statement in the Ministry's Carer Support Guidelines:[68]

> Assessment of the [primary] carer's need for support will be considered in conjunction with the needs assessment of the disabled person they support. A range of options to meet the [primary] carer's needs is available of which Carer Support is one.

[52] Once a needs assessment has been done, if the client is deemed eligible the NASC sends to the Ministry a Needs Assessment and Service Coordination Form (or an electronic equivalent) containing the relevant details of the client. Those details extend only to contact information for the client and the number of days of relief care allocated. The overall needs assessment is not provided to the Ministry, according to the evidence given by the responsible Ministry employee in the Employment Court. We do not see this regime as supporting the contention that the relief carer is engaged by the Ministry.

Carer Support Guidelines

[53] The Ministry published a document called "Ministry of Health Disability Services Directorate Carer Support Guidelines for Service Coordinators" (the Guidelines).[69] The "service definition" in this document is as follows:

> Carer Support is a service funded by [the] Ministry of Health Disability Services Directorate to allow for the essential relief of the full-time unpaid carer of a disabled person. This service offers the carer a break by contributing to the cost of an alternative carer to support the disabled person for a specified number of days based on assessed need. This break enables the full-time carer to continue providing the required support that allows the disabled person to live in the community.

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[68] See below at [53].

[69] Ministry of Health Disability Services Directorate *Carer Support Guidelines for Service Coordinators* (April 2005).

> Carer Support payments are intended to be a reimbursement towards the costs of providing relief support and are not a salary or wage.
>
> The full-time unpaid carer, assessed as needing Carer Support, is able to choose how they use their support days, subject to these Guidelines. It is the individual's right to choose and, in most instances, co-ordinate their relief support.
>
> Carer Support services will be delivered in a supportive manner that respects the dignity, rights, needs, abilities and cultural values of the disabled person and their family/whanau/aiga.

[54] As this extract makes plain, the services provided by relief carers are directed at providing respite for primary carers so that they can continue in their roles on a long-term basis. The description of Carer Support payments as being "a reimbursement towards the cost of providing relief support" reflects the fact that a primary carer is free to top up the payments made by the Ministry or the DHB, or to arrange additional relief care on an unsubsidised basis. Finally, the extract emphasises that it is the primary carer's right to choose the nature and timing of their relief support, emphasising the centrality of their role in the process.

[55] As already noted above at [51], the Guidelines provide a number of options for the provision of carer support. These include respite care (where the disabled person goes to another setting to receive support, such as a respite bed in a residential facility), the placement of a disabled child in a day care facility, support at school camps and so on.

Ministry booklet on how to claim

[56] The Ministry has published a booklet entitled "How to Claim Carer Support", which is directed to primary carers. This document also canvasses a number of options for carer support including residential care facility for the client for a pre-arranged number of days, homecare or other agency caring for the client in their own home, informal carers (friends or family members) and camps or other activities where the purpose is to provide relief for the primary carer and provide a safe and stimulating environment for the client. It distinguishes between formal and informal providers. A formal provider is a person or organisation that is GST registered for Carer Support. An informal provider is a person or organisation that is not GST registered for Carer Support. The booklet defines Carer Support as "a subsidy

funded by the Ministry of Health or a District Health Board". These features confirm what we have said above about the fact that relief care is one of many options to support primary carers.[70]

Audit

[57] Another aspect of the arrangements between the Ministry and primary carers is the possibility of an audit in circumstances where there is any concern that a false claim may have been made for payment for relief care. On the Carer Support claim form submitted to the Ministry for payment after a relief carer has provided service, the following statement appears:[71]

> Where a potentially false claim has been identified, the Ministry of Health may delegate audit agents to investigate. These audit agents can also carry out random audit checks, investigate claims or complaints.

[58] Although not relied on by Mr Cranney, the existence of the audit process was seen by the Employment Court as having some significance.[72] The Court of Appeal disagreed: it noted that the audit process was primarily designed to avoid false claims and ensure that money is being used for the funded purpose. It saw this as an integral part of any public subsidy scheme.[73]

[59] There was little evidence about the audit process. The responsible Ministry officer gave evidence that part of her role was to support audit and compliance to prevent fraud. But she disclaimed any knowledge of the audit process. There was nothing in the record to suggest that the audit is more than a financial audit; that is, nothing to suggest that the Ministry exercises any quality control function into the standard of care provided by relief carers. The evidence was also that the DHB does not monitor the standard of care provided by relief carers. A DHB employee, when questioned in the Employment Court about any avenue for complaints about relief care workers, said that she assumed that complaints would be made directly to the relief carer by the primary carer or the client. There was no further evidence about this in the Employment Court.

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70 See above at [51] and [55].

71 This term appeared on claim forms from early 2010 onwards: see Elias CJ and Glazebrook J, below at [104].

72 *Lowe* (EmpC), above n 2, at [26]–[27].

73 *Lowe* (CA), above n 3, at [35].

[60] On the evidence that is available about the audit, we do not think the possibility of an audit can be regarded as indicative of an engagement of the relief carer by the Ministry or the DHB.

Overall evaluation

[61] Mr Cranney highlighted the combined effect of the needs assessment, the arrangements for funding of the relief carer, the obtaining of a carer, performance of the work of the relief carer in accordance with the Guidelines and the needs assessment and the payment of the carer by the Ministry. He said that these combined steps were the method by which the Ministry or the DHB secured and paid for the services of homeworkers. He described the arrangements as follows:

> The picture is one of a claim for payment by the worker by way of invoice as against the respondents for money in return for work completed pursuant to the agreed scheme.

[62] Mr Cranney argued that when all of the aspects of the scheme outlined above are taken into account, the relief carer should be treated as having been engaged by the Ministry or the DHB.

[63] The difficulty with that argument, as we see it, is that the concept of engagement (particularly when read in the context of the phrase "engaged, employed or contracted") requires that an event occurs which creates a relationship between the hirer and the engaged person. We see that as lacking in the present case. We do not consider it is possible to extend the ambit of the concept of engagement to the extent that it applies in circumstances where the person said to be the hirer is not even aware of an engagement having taken place until after the initial period of care has concluded.

[64] As we see it the approach taken by the Employment Court has superimposed a relationship between the Ministry (or the DHB) and the relief carer that does not fit with the facts of the case. We agree with the Court of Appeal that it is not possible to argue that there is no engagement until the second or later period of care occurs[74] nor do we see it as possible to find that carers who provide service with some regularity

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[74] *Lowe* (CA), above n 3, at [30].

such as Ms Lowe are engaged, whereas those who provide it on a more intermittent basis are not.

[65] The key aspect of engagement, being the selection of the person who is to be engaged, is clearly undertaken by the primary carer and the work that is undertaken by the relief carer is undertaken for the primary carer without reference to the Ministry or the DHB.

[66] Mr Cranney accepted that, if the primary carer engaged the relief carer, that would not bring the relief carer within the definition of homeworker because the engagement was not in the course of the primary carer's trade or business. But he observed in his oral submissions that it may mean that the primary carer had employment obligations to the relief carer. In the absence of argument (and of anyone advancing the position of primary carers), we express no view about that observation.

Is *Cashman* distinguishable?

[67] Mr Cranney said the fact that the relief carers are selected by the primary carer is not inconsistent with engagement by the Ministry or the DHB. He said the relief carers are engaged by the Ministry or the DHB under a comprehensive scheme created and administered by them in accordance with their statutory duties to provide the care provided. He called in aid of his argument the Court of Appeal decision in the *Open Country Cheese* case and noted that the Employment Court had drawn attention to the fact that the decision of the Court of Appeal in that case had been found by this Court, when refusing leave to appeal, to be "unimpeachable".[75] He pointed out the work done by relief carers was similar to that undertaken by the appellants in *Cashman* and that the overall scheme under which relief carers operate was similar to that in issue in *Cashman*.

[68] Ms Holden supported the Court of Appeal's approach. She contrasted the situation in *Cashman*, where the carers were engaged by the RHA and/or Sunderland and then once engaged, were referred by the RHA or Sunderland to persons in need

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[75] *Open Country Cheese Co Ltd v New Zealand Dairy Workers' Union Inc* [2011] NZSC 59 at [3].

of care. In the present case the Ministry and the DHB had no role in arranging for Ms Lowe to care for clients and did not even know she was providing relief care until it received claim forms. She had no relationship at all with the Ministry or the DHB before carrying out the care and neither the Ministry nor the DHB had any contact with Ms Lowe, apart from queries initiated by Ms Lowe about late payments on a few occasions. Neither the Ministry nor the DHB gave Ms Lowe any instructions or guidance as to the manner in which the relief care services were to be performed. We agree with Ms Holden's submission.

[69] Ms Holden said the fact *Cashman* found that non-professional carers were not employees made it clear that the Court of Appeal in that case was not suggesting that a funding relationship alone was sufficient to give rise to a deemed employment relationship.[76] It was only professional carers who were contracted by the RHA and/or Sunderland who were found to be in such a relationship. She argued that the Court of Appeal's approach to the interpretation of the term "engaged" was correct. We accept that the fact that Ms Lowe was not party to a contract with the Ministry or the DHB is a significant difference between her position and that of the appellants in *Cashman*.

Agency

[70] Nor do we see any reason to construe the active engaging undertaken by the primary carer as an act undertaken as agent for the Ministry or the DHB: there is nothing in the Guidelines, the booklet or the claim form to suggest that such an agency relationship exists.

Conclusion: engagement

[71] We conclude that the engagement that occurred in relation to Ms Lowe was an engagement by the respective primary carers, and not the Ministry or the DHB.

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[76] Ms Holden said the arrangements relating to relief carers were not changed after the decision in *Cashman* because *Cashman* expressly provided that people doing care on an intermittent basis (as relief carers do) were not homeworkers.

Dwellinghouse requirement

[72] As indicated earlier, the Carer Support scheme allows for the provision of carer support in a number of ways, some of which involve care being provided by a relief carer in a dwellinghouse, and some involving care of other kinds. In the present case Ms Lowe did in each case provide care in the dwellinghouse of the relevant client (and primary carer). However, there is nothing in the Carer Support scheme documentation that requires that relief care be provided in a dwellinghouse. In *Cashman*, the Court of Appeal said that the dwellinghouse requirement would be met if "it is expressly or impliedly a term [of the engagement or employment or contract] that the place where the work will be done is to be a dwelling house".[77] In this case such an express term is lacking and there was no evidence before the Court that would justify implying such a term.

[73] The nearest that the Guidelines come to requiring that the work be undertaken in a dwellinghouse is the statement that relief care occurs "in an informal setting such as a domestic dwelling". As noted above at [55], the guidelines contemplate a variety of different types of relief care, only some of which involve the care being provided in the aged or disabled person's home. A Ministry witness in the Employment Court said that relief care does not need to take place in a dwellinghouse and a relief carer may take clients outside the home if they are well enough. However, this was in answer to a question put to her in cross-examination and there was no other evidence on the point.

[74] Like the Court of Appeal, we think it is distinctly arguable that the engagement of relief carers does not carry with it a requirement that care be provided in a dwellinghouse.[78] However, if this were determinative of the appeal we would be inclined to remit the matter to the Employment Court to allow for the issue to be fully argued. On the basis of the material before us, we doubt that if relief workers were engaged by the Ministry or the DHB, the requirement that work be undertaken in a dwellinghouse would be met.

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77 *Cashman*, above n 12, at 14.
78 *Lowe* (CA), above n 3, at [37].

Result

[75] We would dismiss the appeal. As William Young J has reached the same conclusion, the appeal is dismissed in accordance with the views of the majority.

Costs

[76] Neither party sought costs and no award is therefore made.

WILLIAM YOUNG J

[77] "Homeworker" is defined in the Employment Relations Act 2000 in this way:[79]

> **homeworker**—
>
> (a) 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 in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
>
> (b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser

[78] By way of explanation of the structure of what follows:

(a) I will discuss the case by reference to the position of the Ministry of Health because the positions of the respondents are the same.

(b) I do not address the question whether it matters that respite care is not necessarily provided only in dwellinghouses; this because on my approach the appellant's case fails for other reasons.

(c) I see the second part of the definition of "homeworker" (para (b)) as addressed exclusively to "pieceworkers" and, therefore, as not material for present purposes.[80]

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79 Employment Relations Act 2000, s 5.

80 I therefore agree with the views expressed by O'Regan and Arnold JJ on this point above at [38]–[39].

[79] This leaves in issue whether Ms Lowe was:

(a) "engaged, employed, or contracted" by the Ministry;

(b) "in the course of" its "trade or business";

(c) "to do work for" it.

[80] Syntactically, the "trade or business" requirement (in [79](b)) applies to the verbs "engaged, employed, or contracted" (in [79](a)) rather than the later noun "work" (in [79](c)). That said, I see the statutory language as best read as a whole, expressing a single concept. This leads me to the view that the "work" envisaged in [79](c) is of a kind which forms a subset of the "trade or business" of the employer.

[81] The Carer Support Scheme[81] operates on the basis that: (a) a primary carer who has already paid the respite carer will be reimbursed to the amount of the subsidy the Ministry is prepared to pay; and otherwise (b) the Ministry will pay the respite carer directly. As I construe the relevant material, the Ministry is offering to pay prospective respite carers providing: they (a) do the work; (b) fill in the forms; and (c) have not been paid by the primary carer.[82] This offer is accepted by the provision of work and the filling in of the forms. It follows that I accept that there is a contractual relationship between the Ministry and the respite carers, at least where the Ministry pays them directly.[83] I am nonetheless of the view that the appeal should be dismissed.

[82] In *Cashman v Central Regional Health Authority*, the relationships between the carers and the Health Authority and Sunderland Community Support Services Ltd were akin to employment; this even though the contracts provided that the carers were independent contractors.[84] The case addressed two periods of time: from

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81 Reviewed in the judgment of Elias CJ and Glazebrook J below at [97]–[117].

82 This is in the nature of what is often called a unilateral contract – see for instance the classic case: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA).

83 It is possible that this is also so where the respite carer is paid directly by the primary carer but here the contract postulated ("if you do the work, we will pay the primary carer") is more artificial and may not reflect the reality of particular relationships between primary and respite carers.

84 *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA).

1 October 1994 until 30 June 1995 when the Health Authority dealt directly with the carers and, through them, provided care to those who required it; and from 1 July 1995 when Sunderland provided care arrangements through its contracted carers. The Health Authority and/or Sunderland selected the carers, allocated them to those who required care and paid them directly. The carers provided care on behalf of the Health Authority and Sunderland and, in that practical sense, were working for them with their work being part and parcel of the services provided by the Health Authority and Sunderland to the elderly and disabled. It was thus not much of a stretch to conclude that the carers were employees by reason of the "homeworker" definition.[85]

[83] The Court in *Cashman* observed:[86]

> Nor does it follow that family members, neighbours or friends who are paid under a home support scheme to look after a sick or disabled person, but are not otherwise engaged in similar work for remuneration, will be regarded as homeworkers. The legislation must be applied in a commonsense way which takes account of the reality of a particular situation and does not treat a non-professional carer as a homeworker simply because some financial assistance is paid and received. It is only when it can be seen that the carer makes a living in whole or material part from the provision of homecare that, as a matter of fact and degree in each individual case, the carer can be regarded as falling within the definition of a homeworker. It would be ridiculous, also, to apply employment legislation to a medical practitioner making occasional house calls in the course of a general practice. These occurrences lack sufficient continuity to be regarded as the undertaking of work for a regional health authority even though it may be the source of payment of the doctor's fee.

[84] I do not regard an exclusion for "neighbours or friends" or the concept of making "a living in whole or material part" as providing useful guidance for the general application of the homeworker definition. This is particularly so in a context such as the present, as it would be impracticable for the Ministry to administer a scheme on the basis of factual permutations of which it could not be expected to be aware. These factual permutations are a result of the large measure of autonomy

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[85] In the Employment Court judgment on the referral back from the Court of Appeal, the Judge concluded that for the period after 1 July 1995, the Health Authority and Sunderland were both employers of the carers: *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 706 (EmpC) at 727. It appears that the Health Authority had continued to pay the carers after 1 July 1995 as Sunderland did not have in place the systems necessary to process payments. Apart from noting this fact at 727, the Judge did not give reasons for his conclusion, which, in contradistinction to those of the Court of Appeal, I do regard as quite a stretch.

[86] *Cashman*, above n 84, at 14.

accorded to the primary carers. I nonetheless regard the dicta in *Cashman* as relevant, indicating that the application of the definition requires a pragmatic assessment of the relationship in question and in particular whether, allowing for the homeworker definition, it can sensibly be regarded as employment.

[85] The relationships in *Cashman* were closely akin to a standard employment relationship. The carers were carrying out work at the direction of, and thus *for*, initially the Health Authority and later Sunderland. I see the present case as very different. It would be artificial to regard a primary carer as the agent of the state when looking after a family member. It follows that I do not accept that the primary carers are agents of the Ministry when they obtain the services of respite carers. I thus see the language of the scheme documents as capturing the reality that it is: (a) the primary carers who engage the respite carers; and (b) the role of the Ministry to subsidise the cost of them doing so. On this basis, the "trade or business" of the Ministry does not encompass the provision of respite care and the "work" carried out by respite carers is not "for" the Ministry.

[86] Accordingly, I would dismiss the appeal.

ELIAS CJ AND GLAZEBROOK J
(Given by Glazebrook J)

Table of Contents

Introduction

[87] Ms Lowe provides relief care to disabled persons in their homes. The issue in this appeal is whether she is a "homeworker" as defined in the Employment Relations Act 2000 (ERA).

[88] Section 6(1)(b) of the ERA includes, within the definition of employee, a "homeworker". This term is in turn defined in s 5:[87]

> **homeworker**—
>
> (a) 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 in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
>
> (b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser

[89] The question arising from this definition is whether Ms Lowe was "engaged, employed or contracted" by the respondents to do work for them in a dwellinghouse. It is common ground that, if she were, this would be in the course of the respondents' trade or business. This was a concession well made. As will become apparent, we consider the relevant "trade or business" is that of providing services to disabled and elderly persons.

A bit of history

[90] The Green Paper that preceded the introduction of the definition of homeworker treated homeworkers as those "who, for a range of reasons, are prevented from or restricted in undertaking regular work in a factory, commercial premises" or other place of work and who are employed "by a firm or intermediary agent to carry out work in their own homes."[88] It was noted that the majority of homeworkers work in the clothing industry.[89]

[91] The Green Paper identified the following advantages and disadvantages of homework:[90]

> 7. The consequence of homework raises similar issues to those discussed in section 3.3.[91] On the one hand the greater employment

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87 This definition was first introduced (in its current form) in the Labour Relations Act 1987, s 2.

88 Ministry of Labour *Industrial Relations: A Framework for Review* (17 December 1985) vol 2 at 87. The definition excluded "child minders and artisans, free-lancers and those such as handknitters, working without production specifications".

89 At 87.

90 At 88.

91 This section referred to the need for employment protection for young people engaged in casual and part-time work.

> flexibility can be more efficient for employers, letting them meet fluctuations in product demand or a possible expansion in product type. For some workers the system can provide important employment opportunities that would not otherwise be available. Many homeworkers also express a preference for the freer, more autonomous work environment.
>
> 8. On the other hand the potential and actual exploitation should also be noted. The absence of agreements can result in long hours, under payment, and erratic pay; the employee is disadvantaged by lack of training, lack of job security, no promotion prospects, the inability to control the type of work and the possible existence of safety hazards which the presence of children may exacerbate. The isolation, also a negative feature of homework, creates a further dimension to the possibility of exploitation.

[92] Existing protections, including under the Minimum Wage Act 1983 and the Holidays Act 1981, were considered inadequate:[92]

> The adequacy of the protective legislation depends on two factors: firstly the ability 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. Secondly, the effectiveness of legislation depends on worker appreciation of their coverage and rights under those Acts. Factors such as lack of both formal and union education, compounded by geographic spread and isolation, may militate against knowledge of rights and preparedness to press for them.

[93] The Green Paper considered that technological change may mean that the vulnerability of homeworkers would be shared by an increasing proportion of the workforce. Considerations governing the development of adequate protection of homeworkers should therefore include:[93]

> - the need for flexibility to enhance employment opportunities, ideally within a career structure recognising skill and making provision for training and advancement, thus allowing homework decisions to be made on other than financial grounds;
>
> - the means by which this protection can be framed to most adequately provide a means of identification of homeworkers to overcome the factors of isolation, fear of intimidation and victimisation;
>
> - the need for homeworker education on their employment rights; and
>
> - the need to establish a recognised relationship with their employers, which can also be effective in terms of enforcement.

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92 At 89.
93 At 93.

[94] The concept of homeworker used in the Green Paper would not include a person like Ms Lowe, who provides services to disabled people in their own homes.[94] However, the concept which was carried over into the Labour Relations Act and now the ERA was somewhat broader. We agree with O'Regan J that the exception in the second bracketed passage in (a) of the s 5 definition of homeworker in the ERA[95] makes sense only if the work on fixtures, fittings or furniture is being undertaken by a worker in the home of another person.[96] Therefore the fact that Ms Lowe does not provide services in her own home is not disqualifying under the definition of homeworker. We thus agree that the Court of Appeal in *Cashman v Central Regional Health Authority*[97] rightly held that the concept of homeworker is broader than pieceworkers working in their own homes and includes people, other than tradespersons, working in someone else's home.[98]

[95] We also agree with O'Regan J that *Cashman* resolves the issue (not in any event in dispute in this case) that, if Ms Lowe had been employed, engaged or contracted by the Ministry of Health or the second respondent, the Capital and Coast District Health Board, then it would have been in the course of their business.[99]

[96] We deal later with the contention of the Court of Appeal in *Cashman* that family members, neighbours or friends who are support carers would not be regarded as homeworkers unless they make a living in whole or material part from the provision of homecare.[100]

Carer Support scheme

[97] The Ministry of Health (Ministry) and District Health Boards (DHBs), including the second respondent, contract with Needs Assessment Service Coordination (NASC) organisations "to work with people with disabilities to identify

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94 *Industrial Relations: A Framework for Review,* above n 88, at 87. See also the comments of O'Regan J above at [12].
95 Set out above at [88].
96 See above at [12].
97 *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA).
98 At 14.
99 See above at [16]. We therefore disagree with William Young J on this point: see above at [85].
100 See above at [15] per O'Regan J and below at [165].

their support needs, outline what disability services are available for the person and determine their eligibility for Ministry[101] or DHB[102] funded support services".[103]

[98] Carer Support is a scheme to facilitate the provision of support care to enable full-time unpaid carers of disabled persons to take a break. Part of the role of NASC organisations is to assess against set criteria "who is eligible for carer support and the number of days to be allocated".

[99] If the disabled clients are deemed eligible, the NASC organisation informs them and the full-time carer[104] of the number of carer support days allocated and the annual review date for any further allocation from the NASC organisation.[105] It also provides a booklet outlining how the system works.

[100] The NASC organisation then sends to the Ministry a completed form (either physically or electronically) setting out the relevant details of the disabled person and his or her carer support allocation.[106] Once the Ministry receives notification, it sends out a Carer Support claim form to the full-time carer. That carer and the support carer must complete and return the form when they make a claim for payment for carer support.

The claim form

[101] The claim form says to refer to the "How to Claim Carer Support booklet" for instructions on completing the form.[107] It also says that the "Carer Support Guidelines" are available on request.[108]

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101 Generally for those under 65.

102 Generally for those over 65. This includes those who need support because of age-related conditions.

103 Other examples of support services include home and community support services.

104 As O'Regan J points out, there are a variety of terms used to refer to carers: see above n 5. We adopt "support carer" and "full-time carer" in this judgment.

105 In evidence Ms Alloway (a manager in Sector Operations, which is within the Business Services Team in the National Health Board Business Unit in the Ministry of Health) said that a NASC organisation is required to review the allocation once a year but can also review the allocation on request.

106 It does not appear from the evidence that the DHBs as well as the Ministry receive this form even if the disabled person is a DHB client.

107 This is the booklet referred to above at [99].

108 This was on the reverse of the claim form. The reverse of some forms in evidence was not copied, but it is on the back of the latest claim form available for download from the Ministry website.

[102] The claim form requires details to be provided about the support carer, including his or her name and address and relationship to the client (the disabled person), the dates and duration of the support services, the appropriate payment rate and, if the support carer is GST registered, a tax invoice. For the first part of the period at issue in this appeal, the form, after the question about "relationship to the client", had a bracketed phrase "(ie friend, aunt, uncle, grandparent)". The last form in evidence before the Court with this bracketed phrase was a form printed on 6 January 2010. On a form printed on 15 January 2010 the bracketed phrase had been removed. It did not reappear on the forms we have after that date.

[103] Both the full-time carer and the support carer must confirm the services provided by signing the form. If the support carer has already been paid for the services then this must be noted. In that case the form says that the full-time carer will be reimbursed "the lesser of the subsidy claimed or the amount already paid to the support carer".[109] If the support carer has not already been paid, payment is made directly to the support carer. If the claim for payment by either the full-time or the support carer is the first one made, then bank verification must be provided. The forms says that the carer is responsible for any GST or income tax and that amounts claimed in correctly completed forms will be paid within 10 working days of receipt.

[104] Until early 2010, the terms and conditions on the back of the claim form stated that reimbursement for carer support was made for a "satisfactory level of care". Since early 2010, the terms and conditions have provided that "where a potentially false claim has been identified, the Ministry of Health may delegate audit agents to investigate. Those audit agents can also carry out random audit checks, investigate claims or complaints".

Carer Support booklet

[105] The Ministry publishes the booklet entitled "How to Claim Carer Support" which is provided to the disabled person and his or her full-time carer by the NASC organisation. This booklet explains the Carer Support scheme as follows:

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[109] This was not contained in the earlier forms.

> Carer Support is a subsidy funded by the Ministry of Health or a District Health Board. It assists the unpaid full-time carer of a person with a disability (also called the client) to take a break from caring for that person.
>
> The full-time carer (also called the primary carer) is the person who provides a level of care that allows the client to continue to live in their home in the community.
>
> This service offers the full-time carer a break by contributing to the cost of an alternative carer (the support carer) to support the client for a specific number of days per year based on the assessed need. This break enables the full-time carer to continue to provide the required support that allows the person with a disability to continue to live in the community for as long as practicable.

[106] The booklet sets out the different ways that Carer Support can be used:

> Carer Support is designed to be flexible. The client and full-time carer are able to choose and in most instances co-ordinate their relief care. Short periods of care can be combined and claimed in half and full days. Common options include:
>
> - residential care facility for a pre-arranged number of days
> - homecare or other agency caring for the client in their own home, or for activities outside the home
> - friends or family members who are not full time carers of the client who are not excluded from providing relief care
> - camps or other activities where the purpose is to provide relief care for the full-time carer and provide a safe and stimulating environment for the client.
>
> If you are unclear about how you can use your Carer Support, please contact the person or agency who has allocated your Carer Support.

[107] This booklet explains that a full-time carer can arrange for anyone to be a support carer so long as they are over 16 years and are not a legal guardian, parent, spouse or partner of the client. A support carer also cannot live at the same address as a client.

[108] The booklet says that Carer Support is a subsidy and can be claimed in units of a full day (over eight hours and up to 24 hours) or half day (four hours and up to eight hours). The booklet explains that a disabled person is allocated a maximum number of carer support days in a year. It also says that the NASC organisation will advise the correct rate of payment.

Carer Support Guidelines

[109] The Carer Support Guidelines provide:[110]

> Carer Support is a service funded by Ministry of Health Disability Services Directorate to allow for the essential relief of the full-time unpaid carer of a disabled person. This service offers the carer a break by contributing to the cost of an alternative carer to support the disabled person for a specified number of days based on assessed need. This break enables the full-time carer to continue providing the required support that allows the disabled person to live in the community.

[110] It is said that Carer Support payments are intended to be a "reimbursement towards the costs of providing relief support and are not a salary or wage." The Guidelines make it clear that it is the choice of the full-time carer and the disabled person how to use the support care, subject to the Guidelines.[111] It is, however, stressed that:[112]

> Carer Support is a form of relief support and must therefore be provided in such a way that relief is actually given to the full-time carer. For example, it is not usually expected that relief would be achieved if the full-time carer remains in the presence of the disabled person while the relief takes place, however, the full-time carer may wish to stay in their home and engage in other activities while relief support is being provided.
>
> Relief support should be delivered in appropriate environments if provided in formal settings (see 8.3 for definition of Formal Providers), where all possible precautions have been taken to ensure the environment is safe. For example, disabled children should receive formal relief support in developmentally appropriate environments.

[111] The Guidelines distinguish between formal providers and informal carers:

> **8.3 Formal Providers**
>
> Formal providers are relief carers who provide support in a formal/commercial setting and/or via an organisation. These providers include organisations such as rest homes, private and public hospitals, professional home workers, voluntary organisations, day care centres etc.
>
> **8.4 Informal Carers**
>
> Informal carers are relief carers who provide support in an informal setting such as a domestic dwelling. These carers are typically other family

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110 Ministry of Health Disability Services Directorate *Carer Support Guidelines for Service Coordinators* (April 2005) at [1].

111 At [1] and [5].

112 At [5].

> members, friends, neighbours or people providing relief support outside the umbrella of a formal provider organisation. They are engaged to provide the relief support directly by the full-time carer.

[112] The Guidelines also provide:[113]

> The disabled person and/or their full-time carers have the choice over who provides Informal Carer Support services and so are responsible for the type and quality of support received.

[113] The Guidelines do, however, require services to be "delivered in a supportive manner that respects the dignity, rights, needs, abilities and cultural values of the disabled person and their family/whanau/aiga".[114]

[114] The Carer Support Guidelines are labelled as "for internal use only". In evidence, Ms Edwards (Senior Manager of Service Integration of the Capital and Coast District Health Board) said that the Guidelines are not given out by the NASC organisation but are used "in the background for the NASC to actually operate a system". As noted above, however, the back of the claim forms says that Carer Support Guidelines are available on request.[115]

Numbers and payment

[115] Carer support is provided to some 24,000 disabled persons yearly by some 35,000 paid carers. Around 23,000 of these are paid for by the Ministry and some 12,000 are paid for by the DHBs. In evidence Ms Alloway said there were more informal providers than formal.

[116] There are three different rates paid by DHBs: a formal rate (applicable to GST registered carers), an informal rate (for family carers) and a non-family rate. At the relevant times when Ms Lowe was providing care (March 2009 to August 2012), these daily rates were $75.56 (GST included), $64.50 and $75.56 respectively. The Ministry paid only two rates: a formal rate (again applicable to GST registered carers) and an informal rate. At the relevant times (April 2008 to May 2010) these rates were $85.50 and $76 respectively. A full-time carer can top up the amount paid

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113 At [8.4].
114 At [1].
115 See above at [101].

to the support carer, but there was no evidence as to how often this occurred. In evidence, Ms Edwards said that this would be a "private arrangement" between the full-time carer and the support carer.

[117] Payment of Carer Support is made through Sector Operations, a shared payment agency that administers the payments on behalf of the Ministry and all DHBs. Most carers (27,000 of the 35,000) are paid directly by Sector Operations. The remainder are paid by the full-time carer who is then reimbursed by Sector Operations.

The respondents' evidence

The Ministry

[118] The Ministry's evidence (through Ms Alloway)[116] was that it had no role in selecting Ms Lowe as a support carer and that Ms Lowe was not selected off any list of support carers held by the Ministry and was not vetted by it. Nor was any training or performance monitoring done.

[119] Her evidence was that the Ministry has no role in prescribing what the support carers do. All that has to be confirmed is that the support carer "assisted the full time carer to allow them to take a break for the amount of time claimed but not the type or level of services provided during that time." She said that the support does not have to be provided in a home and carers can take disabled people out of the home "if they are well enough".

[120] As a general rule, the Ministry only makes contact with support carers if there is an issue with payment and all other communication is with the full-time carer. The Ministry does not deduct any tax "as the payment is not a salary or wage".

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[116] A Business Manager in Sector Operations: see above at n 105. Ms Alloway said her area of expertise was payment and she was not able to answer all questions put to her. For example, she could not name any formal provider organisations, nor the amount of funding paid to formal and informal care providers. She was also not able to identify the NASC criteria against which the disabled person is assessed.

[121] Ms Alloway said that she was aware of very significant fraud cases with regard to Carer Support payments in the past, but that she did not have detailed knowledge of these cases. She was unaware of the total value, which counsel for Ms Lowe suggested was in excess of $1m. She said there was a "mixture" of minor and widespread fraud cases with Carer Support currently, but again that she did not have detailed knowledge of such cases.

The second respondent

[122] The evidence of Ms Edwards[117] for the second respondent DHB was that it was not involved in the selection of the support carer, the arrangements for the timing of care, the nature or extent of the support or any of the financial arrangements as the latter are channelled through Sector Operations in the Ministry. The DHB does not initiate audits of Carer Support payments or claims. It will be notified by the Ministry or Sector Operations if an audit is being undertaken (for example for suspected fraud) but does not have any involvement in the audit.

[123] Nor does the DHB routinely receive any information about the support carer, including identity. If there was a complex case involving different agencies the DHB has in the past been called on to put in place an appropriate care plan by consulting the agencies and participating in a "multi-disciplinary meeting coordinated by the NASC".

[124] It is up to the full-time carer to make the arrangements for carer support to meet the particular support needs and situation and sometimes allocations are not fully utilised. A support carer can be changed without reference to the DHB. The core of the scheme is to give flexibility and choice to the client and full-time carer.

[125] Ms Edwards acknowledged that generally speaking she was aware of what support carers do, based on the care needs the DHB's elderly clients would have, such as mobility, feeding and bathing. She said the needs of the disabled client were taken into account but also the need of the full-time carer for a break. She

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[117] Senior Manager of Service Integration of the Capital and Coast District Health Board.

acknowledged that one of the aims of the scheme was to enable a disabled person to continue living in the community.

[126] Ms Edwards said that she presumed a client would be able to complain to the DHB under their "health and disability rights" if they were abused by a support carer but later indicated she did not know if that was the case. She also accepted that the DHB expects the money it pays to be used in a way consistent with the identified needs of the client. She accepted that support carers would be expected to meet those needs.

[127] Ms Edwards agreed that there were four components of the Carer Support scheme:

> Q. Ms Edwards, I'd like to talk to you about the carer support scheme. There appear to be four components. Would you agree that the first component is the money, the funding, without which nothing happens?
>
> A. Yeah, that's one of the components.
>
> Q. And the second component is the obvious need to assess a client's [disabled person's] need for care.
>
> A. I would say that's the first component.
>
> …
>
> Q. Then of course the work needs to be done. The care needs to be provided to the client.
>
> A. Yes.
>
> Q. That's the third component. Finally, the provider of the care, the support carer, needs to be paid money. …

Ms Lowe's evidence

[128] Ms Lowe was a support carer for a number of disabled individuals aged over 65 on and off from 1994 until 2014. As found by the Employment Court, Ms Lowe made her living in material part from the provision of support care and she did not

provide these services only as a friend, although noted as such on the claim forms.[118] She said:

> When I filled the form in about whether I was family or friend, I was neither of those but it didn't have a part [for] stranger so that was the nearest I could get so that's why I wrote "friend" on it.

[129] When the form changed in early 2010 Ms Lowe continued to put her relationship to the clients as friend. She said that she did not know any of the clients before she began as their support carer, but they became friends and this then became a habit. She said she obtained support care work through word of mouth, but accepted that some of the clients she worked for she had met at a multiple sclerosis support group and two others were friends of a friend.

[130] The full-time carers of the clients Ms Lowe looked after submitted the claim forms to the Ministry seeking payment for her support care. Both she and the full-time carers signed the claim forms. Ms Lowe's evidence was that, when she first started work as a support carer, she "filled in a form for the Ministry of Health" given to her by the full-time carer, who also told her what hours she was to work and what to do when she was there. She was always paid by the Ministry before 2011. In 2011 there were delays in processing payments by the Ministry. From then, the full-time carer would pay her directly and claim the reimbursement from the Ministry. Ms Lowe never paid any income tax on the payments, as she was told by the Ministry that "it's not income, it's an allowance".

[131] Ms Lowe was paid between $75.56 to $76 per day (a day being more than eight hours but less than 24). This figure remained the same whether she was looking after one or two clients. It was not suggested that Ms Lowe received any top-ups from the full-time carers for whom she was providing relief. We note that the minimum wage for an adult worker paid per hour or by piecework is currently $15.75 ($126 for an eight hour day).[119]

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[118] *Lowe v Director-General of Health, Ministry of Health* [2015] NZEmpC 24, (2015) 10 NZELC ¶79-050 (Judges Perkins, Corkill and Ford) [*Lowe* (EmpC)] at [54].

[119] Minimum Wage Order 2017, cl 4(a) and (b).

Parties' submissions

Ms Lowe

[132] Ms Lowe submits that the term "engaged" has a wide meaning so that it is not necessary that the person doing the engaging take an active role in the selection or oversight and control of a homeworker. In this case, the respondents offered to and did pay Ms Lowe who performed work for them. That, in Ms Lowe's submission, suffices to constitute engagement. In any event, the full-time carer acted as the respondents' agent in Ms Lowe's engagement. In addition, the work she performed was in the homes of the disabled persons she cared for.

Respondents' submissions

[133] It is submitted that neither respondent engaged Ms Lowe to do work for them. They simply subsidised the costs of the carer support provided by Ms Lowe. In their submission "engagement" must involve a relationship between the employer and the homeworker and at the least require the employer to seek and secure the homeworker's services and have a degree of control and oversight over the work carried out.[120] It is submitted that neither condition was met in this case. The selection and oversight of the support carer is for the full-time carer alone.

[134] Further, there is no express or implied requirement that the support carer work be carried out in a dwellinghouse. It is submitted that the type of carer support Ms Lowe provides cannot be severed from the range of other carer support options. It is left to the full-time carer to decide how to use their carer support allocation. This can also include, for example, care in a residential facility, camps and other activities outside the home.

[135] Even if the type of care Ms Lowe provides is looked at in isolation to other parts of the carer support programme, the respondents submit that there is no express or implied requirement that the care must be provided in a dwellinghouse. While the

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[120] It is accepted by the respondents that this interpretation differs to that of "engage" in *New Zealand Dairy Workers' Union Inc v Open Country Cheese Co Ltd* [2011] NZCA 56, [2011] 2 NZLR 350 (see [33] and [34] in particular). The respondents, however, submit that it was appropriate in the context of s 97(2) of the Employment Relations Act 2000 [ERA] for "engage" to be interpreted broadly as allowing other persons to perform the strikers' work.

care Ms Lowe provides often may be provided in a dwellinghouse, the respondents are, in the words of the Court of Appeal in *Cashman*, "indifferent" as to the place of work.[121] The respondents point out that:

(a) the Carer Support Guidelines explain that the type of carer support Ms Lowe provides occurs "in an informal setting *such as* a domestic dwelling"; and

(b) in cross examination, the Ministry's witness Ms Alloway agreed that the type of support Ms Lowe provides does not have to take place within a dwellinghouse, and the support carer can take clients outside the home if they are well enough.

[136] Finally, it is submitted that, if Ms Lowe were held to be a "homeworker" that would require fundamental changes to the Carer Support scheme. The respondents would owe persons such as Ms Lowe obligations as an employer. This would require them to be involved in the selection of support carers such as Ms Lowe and have considerable oversight over the work being carried out. The changes to the Carer Support scheme necessitated by the Employment Court's approach would undermine the flexibility which is a fundamental part of the scheme.

Was Ms Lowe engaged, employed or contracted by the respondents to do work for them?

Nature of the work

[137] The starting point is to analyse the nature of a support carer's work. Access to the Carer Support scheme is provided as a service to the disabled clients of the Ministry and the DHBs on the basis of the assessment of the needs of individual disabled persons by the relevant NASC organisation.[122] It is one element of the services provided to disabled persons to allow them to remain living in the community.

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121 *Cashman*, above n 97, at 14.

122 A letter in evidence from the Ministry of Health Carer Support Team to Ms Lowe referred to her recent request for the details of payments she had received "for providing care for our clients". We note that the letter does also say that, in making the payments, the Ministry is not acting as an employer but only as a funder.

[138] It is true that support carers give the full-time carers of disabled persons a break but that does not detract from the fact that the support care service is for the disabled person as the client of the Ministry or the DHBs. We therefore disagree that the work that is undertaken by the support carer is "for" the full-time carer.[123] The work is "to support the client [the disabled person] for a specific number of days per year based on the assessed need".[124] The work performed will be related to the needs of the disabled person while in the care of a support carer, as Ms Edwards acknowledged.[125]

Payment

[139] The Ministry and the DHBs, in the Carer Support booklet and the claim form, make it clear that they will pay for support work to be performed, either directly to the support carer or as reimbursement to the full-time carer. That this may not be full payment for the work is beside the point.[126] The Ministry and the DHBs describe the payment as a subsidy in the documentation. Ms Lowe was told it was an allowance.[127] The label given to the payment (subsidy or allowance) is irrelevant.[128] The payment made is still for the work. Both the support carer and the full-time carer must certify to the work having been performed before the payment is made.

[140] We do not accept the submission that the primary responsibility for payment of the support carer rests with the full-time carer. There is nothing in the wording of the documentation provided suggesting that this is the case. There is a free choice given between direct payment and reimbursement. Nor does this submission accord with what actually occurs: 27,000 of the 35,000 care workers are paid directly by the

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123 See above at [65] per O'Regan J, above at [85] per William Young J and the holding of the Court of Appeal on this point: *Director-General of Health, Ministry of Health v Lowe* [2016] NZCA 369, [2016] 3 NZLR 799 (Harrison, Wild and French JJ) [*Lowe* (CA)] at [28].

124 See above at [105].

125 The nature and extent of the support are therefore not at the sole discretion of the full-time carer, contrary to the Court of Appeal's view: *Lowe* (CA), above n 123, at [26].

126 As mentioned above at [116], it is not known how many full-time carers provide top-up payments. Nor is it known how many could afford to make such top-up payments. The comment in the strategy document referred to below at n 173 may suggest that top-ups are not routinely made.

127 The claim form and booklet both describe the payment as a subsidy: see above at [103] and [105]. Ms Lowe was told by the Ministry that it was an allowance: see above at [130].

128 This is consistent with the approach required by s 6(2) of the ERA.

Ministry.[129] In any event, it would not have mattered if the primary responsibility for payment did lie with the full-time carer. This is because the Ministry and the DHB clearly promise in the claim form to pay if the full-time carer does not.

Contracted?

[141] The general nature of the work is outlined in the booklet (to provide support care for a disabled person). The allocation of carer support hours is made by the NASC organisation on behalf of the Ministry and the DHBs as part of their services to disabled persons. The support carer, the disabled person and the full-time carer know that the work will be paid for by the Ministry and the DHBs because the claim form, the booklet and, if they seek them, the Guidelines, say so. On the basis of the circumstances as a whole, we consider that this means there is a contract between a support carer and the Ministry or the DHB.[130]

[142] Even if viewed in traditional offer and acceptance terms, there is a contract. The Ministry and the DHBs offer (through the provision of the claim form and booklet) to pay eligible[131] support carers to provide care to their disabled clients for a set number of relief days. The offer is accepted by a support carer performing the care work and the acceptance is communicated by the return of the claim form, which is in fact the means of acceptance stipulated in the documentation. There is no requirement in the documentation for communication before sending the

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129 See above at [117].

130 See for example *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560 (CA) at 563 per Cooke J: "a mechanical analysis in terms of offer and acceptance may be less rewarding than the test whether, viewed as a whole and objectively, the correspondence shows a concluded agreement". See also *Meates v Attorney-General* [1983] NZLR 308 (CA) at 377; and *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [29]. This approach concerns itself with the conduct of the parties: see, for example, *Wilmott v Johnson* [2003] 1 NZLR 649 (CA) at 656.

131 This was therefore not an offer to the entire world. In any event it would not matter if it were. As was said in *Carlill v Carbolic Smoke Ball* Co [1893] l QB 256 (CA) at 268 per Bowen LJ "…why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? … although the offer is made to all the world, the contract is made with that limited portion of the public who come forward and perform the conditions on the faith of the advertisement."

completed form back. In these circumstances it is inconceivable that, if the Ministry or a DHB refused to pay for the work, it would not be held liable to do so.[132]

[143] In terms of the definition of homeworker, support carers, including Ms Lowe, are persons who are contracted by the Ministry and the DHBs to do work (care for disabled persons) and are therefore contracted to do so in the course of their trade or business. That work is part of the services provided by the Ministry and the DHB to disabled persons. The work is therefore for the Ministry and the DHBs, even if it also benefits the disabled person and the full-time carer. That suffices to meet the definition of homeworker if the work is in a dwellinghouse. Whether that last aspect is met is discussed below.[133]

Engaged or employed?

[144] Although it is not necessary to decide whether support carers are also engaged or employed, we consider that they were. The term engaged can be one of wide import.[134] Remembering the policy behind the definition being to protect vulnerable workers,[135] a wide reading of the term is justified so that employers cannot avoid the homeworker definition through technicalities.[136] That a wide reading is meant is made even clearer by the extension of the homeworker definition to include a contract that is technically one of vendor and purchaser. The circumstances described above would therefore in our view suffice to constitute engagement.

[145] The term employed must also be used in a wider sense than requiring an employment relationship. This is because there would be no need to have a

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132 Contrary to the view of the Court of Appeal, we do not accept that the claim form is "essentially about the mechanics of claiming and receiving the subsidy": *Lowe* (CA), above n 123, at [35]. The claim form sets out the timing of payments and contains the audit clause indicating the Ministry's control over performance of the contract. Viewed in conjunction with the NASC organisation's assessment and the booklet, the essential terms of the contract are clear.

133 See below at [167]–[173]. We note, however, that, if support care workers are employees in any event, this requirement need not be met. See discussion below at n 171.

134 As evidenced by the case law discussed by O'Regan J: see above at [36].

135 As explained in the Green Paper: see above at [90]–[93].

136 It had been submitted in *Open Country Cheese*, above n 120, that "engage", when coupled with "perform", are active words requiring positive action by the employer to engage substitute workers. The Court rejected what it call a gloss on s 97(2) contrary to its statutory purpose: at [33]–[34]. The policy behind the homeworker definition of protecting vulnerable workers means that the same kind of considerations apply in this case.

definition of homeworker to extend the definition of employee if the person was in any event an employee. This means that the definition was designed to include employment as independent contractors and would cover support care workers.

[146] In any event, it seems to us that the phrase "engaged, employed or contracted" is a composite one designed to cover all means of getting a person to do work for an employer and to ensure that regard is to substance as against technicalities.[137]

Need for control?

[147] We do not accept the respondents' submission that the term engage (and presumably employ and contract) require that an employer have a degree of control and oversight over the work carried out.[138] Control over how the work is carried out was one of the main common law tests for assessing a relationship of employer and employee and remains relevant under the current employment legislation.[139] If an employment relationship already existed, there would be no need for an extended definition of employee.

[148] The work in this case was specified as being to care for the disabled person's needs while the full-time carer has a break. This suffices to define the work. It is of no moment that the details of how this care would be provided is left to the support carer, the full-time carer and the disabled persons themselves.

[149] In any event, it is evident from the documents involved in the Carer Support scheme, such as the booklet and the claim form, that there is at least some control exercised by the Ministry (or the DHB). The work is described as providing support care to the client. The full-time carer may not be present during the provision of carer support. The relief carer must not live at the same residence as the client.[140]

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137 Again, this is consistent with the approach required by s 6(2) of the ERA.

138 This argument was successful in the Court of Appeal: *Lowe* (CA), above n 123, at [24]; but O'Regan J does not agree with this analysis: see above at [43]. We note, in any event, that, even if control had been necessary, it would be provided by the full-time carers as agents: see below at [156]–[164].

139 See *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [ERA 6.5.3]; and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [32]–[33].

140 See above at [107].

The Guidelines note that relief provided in formal settings should be delivered in appropriate environments. For example, disabled children "should receive formal relief support in developmentally appropriate environments".[141] If these conditions are not met, then the Ministry or the DHB would be justified in saying that the terms of the contract were not met.

[150] We also do not accept that, if the client or the full-time carer complained about a particular support carer, the Ministry or DHB would not be obliged to follow up on the complaint and, if it was found to be justified, take suitable action, including at least making sure the support carer was not contracted by another client. Such an obligation exists in light of the responsibilities owed by the Ministry and the DHBs to the disabled persons they provide the services for.[142]

[151] Further, the evidence of significant fraud cases, as acknowledged by Ms Alloway, and what appears from her evidence to be continuing monitoring of such cases,[143] indicates that the Ministry and the DHBs are concerned with the work actually being done and do take steps to monitor that it is performed.[144]

Selection and procurement?

[152] It is also submitted by the respondents that the employer must seek and secure the homeworker's services in order for that worker to come within the definition of homeworker. We consider this was in fact the case, if indeed it is necessary.

[153] The Ministry and the DHBs accept the NASC organisation's needs assessment. The booklet provided to the disabled person and his or her full-time carer explains the scheme. The Ministry and the DHBs must anticipate at least the possibility this booklet will be shown to potential support care workers. The Ministry then sends the claim form to the full-time carer. This form has to be seen by the support carer, given that he or she has to sign it. That seems to us to suffice to

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141 See above at [110].
142 *Lowe* (EmpC), above n 118, at [52].
143 See above at [121].
144 Of course this is not definitive. It is public money and there would be an obligation to ensure it was being spent for the allocated purpose.

conclude that the Ministry and the DHBs seek and secure the services of support carers. That they may not know the identity of the support carer until after the fact seems to us beside the point. They authorised the support care and promised to pay for it.

[154] Further, while it was said in evidence that the full-time carers have the right to choose the type of support carer (informal or formal), the particular support carer, and the type of work performed, this is not strictly correct. The disabled person, as the client, also has a role in all of these matters, as the booklet and the Guidelines make clear.[145] This is in any event in line with the Convention on the Rights of Persons with Disabilities which recognises the importance that persons with disabilities should be actively involved in the decision-making processes about their care.[146]

[155] It is not the disabled person, however, who authorises the provision of support care services provided by the Ministry or the DHB to him or herself. That is done by the Ministry and the DHBs accepting the NASC organisation's recommendations and by the Ministry sending out the claim forms. Disabled persons, to the extent of their ability, have the right to choose, within the framework set, the type and content of support care services provided to them by the Ministry or the DHB.[147] The same applies to the full-time carers. They choose among the different types of care, based on what is best for the disabled person in their care. Their choice is constrained by the options provided by the Ministry and the DHBs.

Intermediary or agent?

[156] But, even if we are wrong and the services of support care workers are secured by the full-time carers, this only means that the services have been secured through an intermediary, as was envisaged may be the case in the Green Paper.[148] In our view, given the need for substance as against technicalities, an intermediary need

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145 See above at [105]–[114].

146 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 20 March 2007, entered into force 3 May 2008), preamble.

147 See also art 19.

148 See above at [90].

not be strictly an agent of the employer, although we accept the submission made on behalf of Ms Lowe that the full-time carers are agents in this case.[149]

[157] A relationship of principal and agent can arise by agreement, by the doctrine of estoppel, by subsequent ratification or by implication of law where it is urgently necessary that one person act on behalf of another, the last inapplicable in this case.[150]

[158] For an agency to arise by agreement, there need not be any contractual relationship between agent and principal.[151] It is possible for authority to be conveyed by implication, rather than express words.[152] Nor is there a requirement that the principal exert extensive control over the agent.[153]

[159] By accepting a NASC organisation's needs assessment relating to carer support and by sending the claim form to the full-time carer, the Ministry or the relevant DHB authorises the full-time carer to contract with or engage or employ a support carer, with payment to be made by the Ministry or the DHB.

[160] Agency by estoppel arises where one person "has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that behalf".[154] If a person, without any authority, purports to act as an agent and the purported principal later ratifies that conduct, the principal is bound in the same manner as if the agent had been fully authorised.[155]

[161] If the full-time carers had no actual authority, then the Ministry and DHB must be estopped from denying this to a support carer: either because they clothed

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149 On this point we disagree with O'Regan J: see above at [70]. We note that both the Ministry and DHBs have the authority to appoint agents.

150 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at [16.2].

151 *Nathan v Dollars & Sense Finance Ltd* [2008] NZSC 20, [2008] 2 NZLR 557 at n 21; see also Peter Watts (ed) and FMB Reynolds *Bowstead and Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014) at [1–014].

152 Watts and Reynolds, above n 151, at [2–031].

153 At [1–017].

154 *Pole v Leask* [1861-73] All ER 535 (HL) at 541 per Lord Cranworth.

155 *Wilson v Tumman* (1843) 6 Man & G 236 (Comm Pleas) at 242.

the primary carers in ostensible authority, through the representations as to payment in the claim form, or because later they ratified the contracts by accepting the claims for payment to the support carer or by reimbursement.

[162] In the Court of Appeal, it was held that full-time carers cannot act as agents for the Ministry or the DHBs because "the degree of autonomy enjoyed by the full-time carer is inconsistent with the existence of any agency".[156] But, as noted above, strict control by a principal is not necessary.[157] And, while there is flexibility, there are clear limits on the authority of the full-time carer in that the worker must be eligible to be a support carer. There are also limits on the type of formal care that qualifies and the hours that will be paid for. Further, the care must provide relief for the full-time caregiver and the needs of the disabled client must be met.[158] Indeed, as Ms Edwards says, this is in fact the first component of the scheme.[159] Because each disabled person and each full-time carer is different, flexibility for the agent is sensible.

[163] In any event a full-time carer's authority would be no broader than that of, say, the manager of a company who has been empowered to hire and manage a new staff member or to arrange for someone to provide a specific service to the company (for example, cleaning). In addition, while primary carers also derive a benefit from hiring support carers, this does not preclude them from acting as agents.[160] The interests of the full-time carer and those of the Ministry and the DHBs are aligned – both are acting in the best interests of and to meet the needs of the disabled person.[161]

[164] The fact that full-time carers are free to pay support carers more than the Ministry or the DHBs are prepared to fund cannot mean there is no agency. It just means that the agency is limited in terms of binding the principals to what they have authorised by way of payment. As Ms Edwards said, any "top up" would be "a private arrangement" which would have nothing to do with the Ministry or the

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156 *Lowe* (CA), above n 123, at [29].
157 See above at [158].
158 See above at [149]–[150].
159 See above at [127].
160 See *Dollars & Sense Finance*, above n 151, at [41]–[42].
161 Certainly, they were no more self-interested than Mrs Nathan's son in *Dollars & Sense Finance.*

DHB.[162] Support carers would know (from the claim forms) that the Ministry or relevant DHB was not prepared to pay any extra, so they would not be able to claim the excess amount from them in the event that the full-time carer did not honour any promise to top up the payment for support care. In any event, insofar as Ms Lowe is concerned, there is no evidence that any full-time carer has ever "topped up" a payment to her. Nor do we know how many other support carers have payments topped up.

Friends and family

[165] As noted above, *Cashman* suggested that only those who make a living in whole or material part from homecare would come within the definition.[163] It seems to us there is nothing in the wording of the definition or indeed the policy behind it to suggest this is the case. If a friend or a family member,[164] is contracted to perform the same sort of work as Ms Lowe, they may well be homeworkers. However, given that this issue does not arise in the current proceedings, there is no need to decide the point.

Conclusion

[166] Having regard to the nature of support carer work and the communications between the Ministry and the second respondent and Ms Lowe, including the claim form, we are satisfied that Ms Lowe was employed, engaged or contracted by the Ministry or the second respondent to provide support care to their disabled clients. In the alternative, we are satisfied that Ms Lowe's services were secured by the full-time carers as the agents of the Ministry or the second respondent.

Is the work in a dwellinghouse?

[167] It is clearly envisaged, in the claim form and the accompanying booklet, that support care workers could work in the disabled person's home. In accordance with that option (and accepting the offer of work contained in those documents), Ms Lowe provided support care in the houses of the disabled people she looked after.

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162 See above at [116].
163 *Cashman*, above n 97, at 14.
164 So long as they were eligible carers as set out at [107] above.

She was thus contracted to provide work in a dwellinghouse and, as a result, meets the definition of homeworker.[165]

[168] It does not matter that other support care workers might not work in the homes of the people they care for. They would not be homeworkers (unless of course they provide care in some other dwellinghouse, including their own). Whether someone is an employee is considered taking into account the particular circumstances of the individual. There is no reason why that approach should not also apply to homeworkers. There is nothing in the definition of homeworker to require every person contracted to do similar work for an employer to perform that work in a dwellinghouse before any person in the group can be classed a homeworker.

[169] It does not matter that it is the choice of the full-time carer and, to the extent able, the disabled person whether the care is provided in someone else's premises, in a dwellinghouse or some other arrangement. If the particular support carer in fact works in a dwellinghouse that suffices. In any event, as noted above, to the extent the choice of where a person works is made by the full-time carer, this choice is made as an agent of the Ministry or the relevant DHB and, if the option of homecare is taken, that binds the principals and would mean the support carer is contracted to work in a dwellinghouse.

[170] We do not accept the respondents' argument that there has to be a requirement that the work be performed in a dwellinghouse for the definition of homeworker to apply. The policy, as outlined in the Green Paper, was that homeworkers are those who are obliged to work at home either because no workplace is provided or because going to a workplace is not feasible, including for reasons personal to the worker.[166] The concept of homeworker was, at the time of the Green Paper, confined to those working in their own homes, primarily as pieceworkers (and of course the definition still applies to such persons).

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[165] It is common ground that the contract arose in the course of the respondents' trade or business: see above at [89].

[166] See above at [90].

[171] Against that policy background, it is inconceivable that, for example, employers of pieceworkers could avoid the definition by maintaining that, while they provide no work premises, their workers are free to work anywhere and, as there is no requirement that the work is performed in a home, they do not employ homeworkers. Nor could they say that they employed intermediaries to arrange the provision of product and those intermediaries are free to employ pieceworkers to make the product or have a small factory manufacture it, and that this means the pieceworkers are not homeworkers. Yet that would be the effect of the respondents' argument in this case. To allow such arguments would drive a horse and cart through the legislation.

[172] In any event, we do not accept the respondents' submission that the Ministry and DHB are "indifferent" as to where the work takes place.[167] There is no workplace made available by the Ministry or the DHB. An individual support carer is unlikely to have access to premises that meet the requirements expected of formal providers.[168] In the booklet, home based services or outings outside the home are noted as one of the common options for providing support care.[169] This means it is clearly envisaged care can be home-based. Outings would, as Ms Alloway noted, only be possible if the disabled client was well enough.[170] In any event such outings would, at least in most cases, start in the home with preparations and end back in the home with care required to settle back in. To the extent that is the case, it seems to us to be home-based care.

[173] We are satisfied that Ms Lowe is employed, engaged or contracted to do work in a dwellinghouse and therefore that this part of the definition is also met.[171]

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167 Relying on *Cashman*, above n 97, at 14.

168 See above at [110] and [149].

169 In addition to residential care facilities and camps.

170 See above at [119].

171 We comment, however, that, although it was not argued, support care workers may well be engaged by the Ministry and the DHBs as employees in any event. Their agents, the full-time carers, do have day-to-day control over the support care workers, one of the hallmarks of an employment relationship. If that is the case, as noted above at n 133, the work does not need to be in a dwellinghouse.

Need for changes to the scheme

[174] The respondents submit that a finding that Ms Lowe is a homeworker will mean fundamental changes to the Carer Support scheme and that, in particular, flexibility will be lost. There will, in their submission, need to be more control of support care workers.

[175] We do not necessarily accept that there would need to be more day to day control exercised. The current philosophy is that the full-time carers and the disabled person as the client are best able to ascertain the needs of the disabled person and the type of support care required. As an assumption that would appear sound.

[176] We accept that the Ministry and the DHBs may have to exercise more ultimate control over the standard of care, but that may be no bad thing. After all, support carers have sole care of very vulnerable people, even if for limited periods. Where eligible family or friends are not available, full-time carers must top up payments or find people who are prepared to perform work that is not easy for substantially less than the minimum wage. Not all people prepared to accept this rate of pay may be suited to the work.

[177] Finally, that it may be inconvenient or expensive to give carers like Ms Lowe the rights to which she is entitled[172] is not a reason to read down the definition of homeworker.[173]

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[172] We note that, as an employer, the Ministry and the DHBs would be required to pay the minimum wage and would owe duties under other legislation such as the Holidays Act 2003 and the Health and Safety at Work Act 2015. As to the latter, one would expect that the Ministry and the DHBs would in any event want houses safe for disabled persons and their full-time carers to avoid injury.

[173] In any event, it is apparent that changes to the Carer Support scheme are already in contemplation. In Ministry of Health *Transforming Respite: Disability Support Services Respite Strategy 2017 to 2022* (19 July 2017) at 1, it is accepted that the administration and conditions of use of the scheme are outdated. It is said, at 6, that full time carers "tell us that it is very difficult to find relief carers in their area who have the right skills, experience and attitudes, especially because of the low subsidy rate".

Conclusion

[178] We would have allowed the appeal and held that Ms Lowe was a homeworker as defined in s 5 of the ERA.

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