IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-000570
[2023] NZHC 480

UNDER	the Judicial Review Procedure Act 2016 and the Declaratory Judgments Act 1908
IN THE MATTER OF	COVID-19 Public Health Response (Vaccinations) Order 2021
BETWEEN	JENNIFER WRIGHT First Applicant
	PAULETTE SALES Second Applicant

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AND	MINISTER FOR COVID-19 RESPONSE First Respondent
	ATTORNEY GENERAL Second Respondent

Hearing: 8 March 2023

Appearances: A P Miller for the Applicants
K B Bell for the Respondents

Judgment: 10 March 2023

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 10 March 2023 at 3:30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar
Date……..

Solicitors:
Frontline Law, Wellington
Crown Law, Wellington

DONNA PRESTON
Third Applicant

SARAH VILI
Fourth Applicant

JUDE BIGNELL
Fifth Applicant

Introduction

[1] The applicants are persons who provide care and support services to family members in need of care (Family Carers). They seek judicial review of an order by the Minister for COVID-19 Response (the Minister) amending the definition of "care and support worker" (the Amendment Order) in the COVID-19 Public Health Response (Vaccinations) Order 2021 (Vaccinations Order).

[2] The effect of the Amendment Order was to include Family Carers within the definition of "care and support worker". As a consequence, Family Carers were required to be vaccinated against COVID-19. If they were not vaccinated, they could lose their Government funding for the services they provided to family members. Except for one applicant, who became vaccinated to continue to act as a paid carer for her child, the applicants were unvaccinated and did not consent to vaccination.

[3] In their statement of claim, the applicants alleged that the Amendment Order was ultra vires the COVID-19 Public Health Response Act 2020 (the Act), an unjustified limit on rights contained within the New Zealand Bill of Rights Act 1990 (NZBORA) and irrational.

[4] The respondents, the Minister and the Attorney-General, accept that the Minister's decision to make the Amendment Order was not one that could have been made, based on the information that was before the Minister.

[5] The applicants and the respondents agree on the form of declaratory relief that should be granted. They agree that this Court should make two declarations as follow:

(a) A declaration that the Minister's decision to amend the definition of "care and support worker" in the COVID-19 Public Health Response (Vaccinations) Order 2021 (commencing 11:59 pm on 6 November 2021) to include persons providing care and support services to a family member in that family member's home or place of residence was invalid as it was not a decision that was available to the Minister on the basis of the information that was before him at the time; (the First Declaration); and

(b) A declaration that the definition of "care and support worker" in the COVID-19 Public Health Response (Vaccinations) Order 2021 that was effective from 6 November 2021 to 26 September 2022 did not include a person providing care and support services to a family member in that family member's home or place of residence (the Second Declaration).

[6] However, the applicants and respondents advance different reasons in support of that relief. They also accept that whether to grant relief and in what form are matters for the Court's discretion.

[7] Prior to the hearing on 8 March 2023, the applicants and the respondents filed a joint memorandum (the Joint Memorandum) setting out the agreed legal framework and factual background to the application. The Joint Memorandum also set out the discretionary factors regarding the grant of discretionary relief in judicial review and the basis on which the parties have agreed to the discretionary relief, including their different reasons for making the declarations sought.

[8] At a hearing on 8 March 2023, counsel for the parties addressed the Court briefly in support of their clients' respective positions and responded to questions from the Court.

[9] Ms Miller for the applicants confirmed that Family Carers come and go from the respective residences at which they live and provide care and accepted that, in so doing, they would have been at risk of being exposed to COVID-19 in the community. Ms Miller also explained that Family Carers are employed and paid by a variety of agencies and organisations but that funding for their salaries is provided by the Government.

[10] Ms Bell for the respondents confirmed that the Crown is taking steps to ensure that Family Carers who lost income as a result of the Amendment Order are reimbursed. Ms Bell explained that the process is still in train and that the Government is concerned to ensure consistency of approach across the various agencies and organisations involved. Ms Bell confirmed that the declarations to which the respondents have agreed are not required for the purpose of reimbursing the Family

Carers who lost income as a result of the Amendment Order. However, the respondents still consider the declarations should be made.

Legal Framework and Background

[11] The following section is taken from the Joint Memorandum.

> 7. The COVID-19 Public Health Response Act 2020 (**the Act**) was passed by Parliament in response to the COVID-19 pandemic.
>
> 8. The Act's purpose is set out in s 4 and provides:
>
> > The purpose of this Act is to support a public health response to COVID-19 that—
> >
> > (a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and
> >
> > (b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
> >
> > (c) is co-ordinated, orderly, and proportionate; and
> >
> > (ca) allows social, economic, and other factors to be taken into account where it is relevant to do so; and
> >
> > (cb) is economically sustainable and allows for the recovery of MIQF costs; and
> >
> > (d) has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.
>
> 9. The Act empowers the Minister to make COVID-19 orders and various orders have been made under the Act to address risks presented by COVID-19. One of these orders, and the order that is the subject of the judicial review proceeding, is the COVID-19 Public Health Response (Vaccinations) Order 2021 (**the Order**).
>
> **The Order**
>
> 10. The Order was made under ss 9 and 11 of the Act, which at all relevant times provided:
>
> > **9 Requirements for making COVID-19 orders under section 11**
> >
> > (1) The Minister may make a COVID-19 order under section 11 in accordance with the following provisions:
> >
> > (a) the Minister must have had regard to advice from the Director-General about—
> >
> > (i) the risks of the outbreak or spread of COVID-19; and

(ii) the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks; and

(b) the Minister may have had regard to any decision by the Government on the level of public health measures appropriate to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (which decision may have taken into account any social, economic, or other factors); and

(ba) the Minister must be satisfied that the order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990; and

(c) the Minister—

(i) must have consulted the Prime Minister, the Minister of Justice, and the Minister of Health; and

(ii) may have consulted any other Minister that the Minister (as defined in this Act) thinks fit; and

(d) before making the order, the Minister must be satisfied that the order is appropriate to achieve the purpose of this Act.

(2) Nothing in this section requires the Minister to receive specific advice from the Director-General about the content of a proposed order or proposal to amend, extend, or revoke an order.

11 Orders that can be made under this Act

(1) The Minister or the Director-General may, in accordance with section 9 or 10 (as the case may be), make an order under this section for 1 or more of the following purposes:

(a) to require persons to refrain from taking any specified actions or to take any specified actions, or comply with any specified measures, so as to contribute or be likely to contribute to either or both of the following:

(i) preventing, containing, reducing, controlling, managing, eliminating, or limiting the risk of the outbreak or spread of COVID-19:

(ii) avoiding, mitigating, or remedying the actual or potential adverse public health effects of the outbreak of COVID-19 (whether direct or indirect):

(b) by way of example under paragraph (a), requiring persons to do any of the following:

…

(v) refrain from carrying out specified activities (for example, business activities involving close personal contact) or carry out specified activities

only in any specified way or in compliance with specified measures:

11. The Order provides that any modifications or amendments to an existing Order, are subject to the same requirements when making an Order. Section 15(4) states:

> Requirements that apply in relation to the making of a COVID-19 order also apply, with all necessary modifications, in relation to its amendment or extension.

12. The Order first came into force on 30 April 2021 and applied to border workers. On 25 October 2021 the Order was extended to cover health, disability and education sector workers.

13. Care and support workers were included in the order when the Order was extended to cover health, disability and education workers in October 2021. They were originally defined as:

> **care and support worker** means a person employed or engaged to carry out work that includes going to the home or place of residence of another person (not being the home or place of residence of a family member) to provide care and support services

14. This definition essentially excluded Family Carers. The Ministry of Health advice provided to cabinet at the time was that "for family arrangements, current public health measures may be adequate given the potential for the person receiving care to be a lower risk vector for transmission to the community."

15. In a briefing dated 3 November 2021, the Minister was advised to amend the definition to "revoke the exemption" for care and support workers who live in the same house as the person they provide services to and include them in the general definition of care and support workers to ensure that they are captured by the order on the basis that it:

    15.1 supported the move towards having a workforce that is vaccinated against COVID-19; and

    15.2 was consistent with the Government's overall response to the Family Carers' litigation (that Family Carers should be treated the same as other carers).

16. No public health advice was included in the 3 November briefing as to why the position set out at [14] above had changed.

The Amendment

17. On 6 November 2021 the definition of "care and support worker" set out in the order changed to read:

> **care and support worker** means a person employed or engaged to provide care and support services within a home or place of residence

Current status of the order

18. The definition (along with the Order) was revoked on 26 September 2022.

Employment Court Decision

19. In early 2022 a challenge was made in the Employment Court to the application of the Order to a care and support worker who was providing care and support services to a family member that they resided with. In July 2022 the Employment Court issued the decision, *CSN v Royal District Nursing Service New Zealand Ltd* (Employment Court Decision), and interpreted the definition in a way that excluded the worker concerned.

Grounds for review

[12] It is common ground that there was an absence of sufficient information before the Minister to make the Amendment Order.

[13] However, the applicants contend that the Amendment Order arose from more than a failure by the Minister to take into account relevant considerations, which is how the applicants characterise the respondents' position. The applicants also challenge the Amendment Order on the grounds that it was made for an improper purpose, without regard to whether the Amendment Order would justifiably limit rights under the New Zealand Bill of Rights Act 1990 (the NZBORA), and that it was irrational.

Applicants' reasons in support of declaratory relief

[14] The applicants say that the Amendment Order was made with the improper purpose of achieving consistency in the Government's treatment of care and support workers rather than to address the risk of spread or infection of COVID-19. The applicants submit that the Act required the Minister to be satisfied the Amendment Order would achieve the purpose of the Act, and that the Minister could not have been satisfied this was the case when the Amendment Order was made.

[15] The applicants further say that the Act also required the Minister to be satisfied that the Amendment Order would not limit, or that it would be a justified limit on, the rights and freedoms contained in the NZBORA. They submit that there is no evidence that this requirement was considered and that the Minister cannot have been satisfied that requiring Family Carers to be vaccinated, or to lose funding, was a justified limitation on NZBORA rights, such as the right to manifest religion.

[16] The applicants also say that the decision was irrational. They say that requiring Family Carers to become vaccinated, or to lose funding, would in some cases result in an increased risk of infection due to the need for a vaccinated, external carer to come into the household to provide the care which the unvaccinated carer would no longer be funded to provide. They submit that the effect of the Amendment Order was to increase the risk of the spread or infection of COVID-19 rendering the Amendment Order irrational.

[17] The applicants say that this matter is not directly comparable to any previous judicial review challenges, but that it is analogous in part to *Yardley v Minister of Workplace Relations and Safety*, where Cooke J found that the Minister of Workplace Relation's order – that work carried out by certain Police and Defence Force personnel could be undertaken only by workers who had been vaccinated against COVID-19 – was an unjustified limitation on the applicants' rights in that case.[1] They also say that it falls under the category of cases outlined in *Fowler & Roderique Ltd v Attorney-General*, where the Court of Appeal reaffirmed that the Court will interfere where a decision reached is, on the available material, one which no reasonable Minister could reach, but also said that it will not interfere if two views are reasonably open to the Court, unless the decision-maker has not followed the statutory path.[2]

[18] Finally, the applicants say that, notwithstanding *CSN v Royal District Nursing Service New Zealand Ltd*,[3] where the Employment Court held that the definition of "care and support worker" as amended by the Amendment Order could not have been intended to include Family Carers, the Minister's clear intention was to extend the

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1 *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.
2 *Fowler & Roderique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA) at 71.
3 *CSN v Royal District Nursing Service New Zealand Ltd* [2022] NZEmpC 123.

Vaccinations Order to care and support workers that provided care to a family member who resided in the same house. They say that is clear from a briefing document prepared for the Minister.

[19] With respect to the First Declaration, the applicants say the Minister's errors were significant and that the declaration is sought to provide the applicants a pathway to obtaining financial relief.

[20] With respect to the Second Declaration, the applicants do not accept there is an interpretation issue or that the presumption of validity is persuasive in the face of clear evidence of the Minister's intentions when making the Amendment Order. However, the declaration achieves the outcome sought by the applicants, provides a pathway to obtaining damages and promotes administrative efficiency.

Respondents' reasons in support of declaratory relief

[21] While acknowledging that the Minister did not have sufficient information before him to make the Amendment Order, the respondents say there were compelling reasons to include care and support workers in the Vaccinations Order. These were to protect a vulnerable population who were at greater risk of adverse outcomes from COVID-19 and because the recipients of such care would have had a reasonable expectation that those providing care to them had taken all reasonable precautions to prevent the spread of COVID-19, including appropriate vaccinations.

[22] The respondents accept that when the Minister was advised to amend the definition of "care and support worker" to include carers who live in the same residence as the person being cared for (usually a family member), the advice did not contain public health advice advising of why the public health position had changed. This advice was needed for the Minister to make a properly informed decision. The respondents say the situation is analogous to that in *Air Nelson Ltd v Minister of Transport*,[4] where the Court of Appeal found that the Minister had failed to take into account relevant considerations because of defective advice from officials.

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4 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26.

[23] Accordingly, the respondents have accepted in their statement of defence, and in response to the first ground of review that "there was insufficient information before the Minister which would have allowed him to make the decision to include, within the order, care and support workers living in the same house as the person they are providing services to." However, the respondents otherwise deny the applicants' claims.

[24] The respondents say the original relief sought would run the risk of excluding care and support workers in their entirety from the Vaccinations Order, notwithstanding that there were compelling reasons to include that group of workers and that it would leave "care and support worker" undefined.

[25] The respondents acknowledge that as the Order has now been revoked, it is no longer an option for the Minister to remake the decision in the Amendment Order. The respondents also acknowledge that the Court plays an essential role in reviewing delegated legislation and decision-making under such delegated legislation and refer to relevant decisions where the Court has done so in relation to COVID-19.[5] The respondents say that while the Court's review is "limited due to the concession made by" them in saying that the Minister's decision was not available due to the insufficient evidence before him, the respondents are not opposed to that error being formally recognised by the Court, given the judicial scrutiny the Vaccinations Order has had.

[26] Accordingly, the respondents support the First and Second Declarations being made. They support the First Declaration because it recognises that the Minister had insufficient information before him. They support the Second Declaration because interpreting "care and support workers" to exclude Family Carers such as the applicants is consistent with the approach adopted by the Employment Court in *CSN v Royal District Nursing Service New Zealand Ltd*[6] and was the position adopted by the Crown after that judgment was released. The respondents say the First Declaration recognises the error that has been made in the decision-making process, as conceded in the respondents' statement of defence.

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5 *GF v Minister for COVID-19 Response* [2021] NZHC 2526, [2021] NZLR 1 and *Four Aviation Security Service Employees v Minister for COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26.

6 *CSN v Royal District Nursing Service New Zealand Ltd*, above n 3.

[27] With respect to the Second Declaration, the respondents say that to interpret the definition of "care and support worker" as amended by the Amendment Order to exclude Family Carers would be consistent with the Employment Court decision in *CSN v Royal District Nursing Service New Zealand Ltd* and the position adopted by the Crown since that decision and would be consistent with the presumption of validity, under which secondary legislation should, where possible, be interpreted to maintain its validity.

Analysis

[28] As the Supreme Court said in *Ririnui v Landcorp Farming Ltd*:[7]

> Judicial review is a supervisory jurisdiction which enables the courts to ensure that public powers are exercised lawfully. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, the prerogative or any other source. The courts acknowledge limits, however. These limits are reflected primarily in the notions that the case must involve the exercise of a public power, that even if the court has jurisdiction, the exercise of power must be one that is appropriate for review and that relief is, in any event, discretionary.

[29] As the Supreme Court also said, where there is some form of reviewable error, as the parties agree there is here, the Court will generally find it appropriate to grant relief.[8]

[30] The fact the parties agree on the relief sought and on one basis for why that relief should be granted weighs in favour of the relief being granted. In that respect, it is relevant that, in *Peters v Speaker of the House of Representatives*, the High Court granted declarations principally on the basis that the parties had consented to the declarations sought.[9]

[31] However, it remains the case that it is the Court that grants relief and the Court that is responsible for any declaration granted. It follows that the Court must be satisfied that any declarations sought are legally correct and are appropriate in the circumstances.

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7 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [1] per Elias CJ and Arnold J.

8 At [112] per Elias CJ and Arnold J.

9 *Peters v Speaker of the House of Representatives* [2022] NZHC 2718.

Should the First Declaration be made?

[32] The respondents accept that, at the time the Amendment Order was made, there was no public health advice before the Minister advising why the public health position had changed since the original definition of "care and support worker" was included in the Vaccinations Order.

[33] It is not clear from the Joint Memorandum whether that absence of public health advice meant that the Minister did not have the mandatory information required by s 9(1)(a) of the Act when making orders under s 11. If that was the case, the making of the Amendment Order in the absence of such mandatory information would mean the Minister failed to act in accordance with the requirements of the Act. If so, the decision would have been an error of law, which is a well-established ground of review in itself.[10]

[34] However, I approach the question on the basis that, irrespective of whether the Minister had the mandatory information required under s 9(1)(a), the Minister did not have adequate information to make an informed decision, as is common ground between the parties.

[35] As Cooke J observed in *CREEDNZ Inc v Governor-General*, there can be matters so obviously material to a decision that anything short of direct consideration of them by the decision-maker will not be in accordance with the intention of the empowering legislation.[11] That approach was adopted by the Court of Appeal in *Air Nelson Ltd v Minister of Transport*, where the Court accepted that the failure to provide a "fair, accurate and adequate report" meant that the Minister's decision was flawed and was made without taking into account relevant considerations.[12]

[36] In the present case, and as is clear from the agreed facts in the Joint Memorandum, the Minister made a deliberate decision not to include Family Carers

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10 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136; *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181 per Richardson P, Henry and Keith JJ; *Tannadyce Investments v Commission of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [30] per Elias CJ and McGrath J.

11 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.

12 *Air Nelson Ltd v Minister of Transport*, above n 4, at [53] and [56].

in the definition of care and support workers when that category of persons was included in the Vaccinations Order on 25 October 2021. The advice to Cabinet at that time was that the then current health measures "may be adequate" for family arrangements. Less than two weeks later, on 3 November 2021, the Minister was advised to amend the definition of "care and support worker" with the apparent intention of including in the definition carers in family arrangements. It was obviously material to the Minister's decision that there should be some public health advice about what had changed. There was no such advice.

[37] On the basis of the analyses in *CREEDNZ* and *Air Nelson Ltd*, I agree that, in the absence of such advice, the Minister's decision was flawed and was made without regard to relevant considerations.

[38] As discussed with Ms Miller at the hearing, I do not accept that I have any basis for concluding that the Minister made the Amendment Order for an improper purpose or that the Amendment Order was irrational.

[39] As stated at [15.1] of the Joint Memorandum, the advice to the Minister when making the Amendment Order was that the inclusion of Family Carers in the definition of care and support workers "supported the move towards having a workforce that [was] vaccinated against COVID-19", as well as to promote consistency with the Government's response to the Family Carers' litigation, which was that Family Carers should be treated the same as other carers.

[40] It is plain that the objective of having a work force vaccinated against COVID-19 was consistent with the purpose of the Act, which includes supporting a public health response that limits the outbreak and spread of COVID-19. That the Order might have another related purpose does not make the purpose of the Order improper. Even less does it make it irrational, particularly when, as Ms Miller accepted, Family Carers go out into the community where they are exposed to the risk of COVID-19 infection.

[41] There is no evidential basis in the Legal Framework and Background as stated in the Joint Memorandum for the Court to make any finding about whether the

Minister did or did not have regard to whether the Amendment Order limited or was a justified limit on NZBORA rights and freedoms. I agree that the Minister was required by s 9(1)(ba) of the Act and by NZBORA itself to consider that question.[13] But in the absence of evidence or an agreed position on that question, I can take that issue no further. The absence of evidence in the limited context of this application for agreed relief cannot, of itself, constitute a basis for concluding that the Minister failed to have regard to NZBORA considerations. Nor is there any evidence that the applicants objected to being vaccinated on religious grounds such as those specifically recognised in *Yardley v Minister of Workplace Relations and Safety*.[14]

[42] For the reasons given above, I am satisfied that, in making the Amendment Order, the Minister failed to have regard to relevant considerations with the consequence that his decision to make the Amendment Order was flawed and, therefore, invalid. It follows that I am satisfied that the First Declaration is legally correct.

[43] Although the Vaccinations Order has been revoked, I accept there is value in making the Declaration and that the Declaration is not moot. While the Government has accepted that the Amendment Order was not properly made and is already taking steps to recompense those who lost income as a result of the Amendment Order, it is useful to make clear the legal position regarding the validity of the Amendment Order, particularly in circumstances where reimbursement may require the cooperation of a number of external agencies and organisations.

[44] I am also conscious that the Family Carers have been engaged in a lengthy and difficult process to secure recognition of their right to be paid for the services they provide and that this declaration will serve to validate their decision to challenge the making of the Amendment Order.

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13 See discussion in *Four Aviation Security Service Employees v Minister for COVID-19 Response*, above n 5, at [40].

14 *Yardley v Minister of Workplace Relations and Safety*, above n 1 at [57]. Cooke J recognised that the Order in question in that decision limited the right to manifest religion only for those who declined to be vaccinated because the vaccine had been tested on cells derived from a human foetus, which was contrary to their religious beliefs.

Should the Second Declaration be made?

[45] I have much more difficulty with the Second Declaration.

[46] There are two possible bases on which the Court might make that declaration.

[47] The first is that the Amendment Order was invalid ab initio so that the amendment it made to the definition of "care and support worker" was never effective. In that case, the definition of "care and support worker" remained as originally included in the Vaccinations Order and did not extend to a person providing care and support to a family member in that family member's home or place of residence.

[48] The second is that, as a matter of construction, the definition of "care and support worker", as amended by the Amendment Order, did not include a person providing care and support to a family member in that family member's home or place of residence, despite the language of the amended definition.

[49] The first basis would be contrary to well-established principles of administrative law in New Zealand as the law has developed since the Court of Appeal's decision in *Reid v Rowley*, as discussed in *Martin v Ryan* and confirmed by the Supreme Court in *Ortman v United States of America*.[15]

[50] As the Supreme Court reaffirmed in *Ortman*, a decision of an administrative decision-maker is treated as valid unless and until it is set aside by a court of competent jurisdiction. In accordance with that position, my declaration as to the invalidity of the Amendment Order takes effect from the date of this judgment. I see no reason to depart from that established position, particularly when the Vaccinations Order has been revoked and particularly when the Government is taking steps to reimburse those who lost income as a result of the Amendment Order.

[51] It would not be legally correct, therefore, for me to make a declaration as to the scope of the Vaccinations Order based on the invalidity of the Amendment Order in the period 6 November 2021 to 26 September 2022.

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[15] *Reid v Rowley* [1977] 2 NZLR 472 (CA) at 483 per Cooke J; *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 236; *Ortman v United States if America* [2020] NZSC 120, [2020] 1 NZLR 475 at [535].

[52] The second basis would require me to conclude that, on a proper interpretation of the Vaccinations Order, as amended by the Amendment Order, Family Carers were not included within the Vaccinations Order even though, on the face of the amended definition of "care and support worker", Family Carers came within the definition.

[53] That was the conclusion reached by the Employment Court in *CSN v Royal District Nursing Service New Zealand Ltd.* In that decision, the Employment Court Judge held that, because the inclusion of Family Carers in the definition of "care and support worker" would mean that such workers, if unvaccinated, would be unpaid for the services they provided to disabled family members, that resulted in an absurdity and could never have been intended.[16]

[54] Since that decision, information has come to light which, the applicants and the respondents agree, establishes that it had indeed been the Minister's intention to include Family Carers in the definition of "care and support worker". In the light of that information, and irrespective of the decision in *CSN v Royal District Nursing Service New Zealand Ltd*, it would not be appropriate for the Court to make a declaration based on a presumed lack of intention on the part of the Minister to include Family Carers in the definition of "care and support worker" when the evidence establishes that that had indeed been the Minister's intention.

[55] I do not consider the presumption of validity has any application in these circumstances. Considerations such as promoting administrative efficiency and achieving outcomes agreed by the parties are no basis for making a declaration that would be inconsistent with the plain language of the Vaccinations Order. Nor is the declaration necessary to provide a pathway for the applicant to obtain damages, as Ms Bell acknowledged at the hearing.

[56] In summary, I see no appropriate basis for making the Second Declaration.

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16 *CSN v Royal District Nursing Service New Zealand Ltd,* above n 3, at [62] – [63].

Result and relief

[57] For all the above reasons, I agree to make the First Declaration and decline to make the Second Declaration.

[58] Accordingly, I make the following declaration:

> The decision of the Minister for COVID-19 Response to amend the definition of "care and support worker" in the COVID-19 Public Health Response (Vaccinations) Order 2021 (commencing 11:59 pm on 6 November 2021) to include persons providing care and support services to a family member in that family member's home or place of residence was invalid because it was not a decision that was available to the Minister on the basis of the information that was before him at the time

[59] The Joint Memorandum says nothing about costs. If the applicants seek costs they should file and serve a memorandum (no more than five pages plus a schedule) within 15 working days, which can be responded to by the respondents (no more than five pages plus a schedule) within 10 working days.

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G J van Bohemen J