Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

CHRISTINE FLEMING v ATTORNEY-GENERAL AND OTHER
(SC 42/2024)

PETER HUMPHREYS v ATTORNEY-GENERAL AND OTHER
(SC 44/2024)

[2025] NZSC 188

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

This case concerns the employment status of two parents who care for adult disabled family members in their family homes. Within this context, the judgment considers the tests to be met under the definition of "homeworker" in the Employment Relations Act 2000 (the ERA) constituting an employment relationship, and the meaning of "work" in the context of a homeworker working overnight in the home.

Background

Part 4A of the New Zealand Public Health and Disability Act 2000 was introduced to provide for the public funding of disability support services. This enabled family members who provided those support services to receive payment for their care of their disabled family members. The enactment of pt 4A was in response to the decision in *Ministry of Health v Atkinson*[1] in which the Court of Appeal found that it was discriminatory not to pay family carers when non-family carers were paid for providing the same care. Funded Family Care was the Ministry's policy adopted under pt 4A.

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1 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

From 2013 to 2020 funding was available for disabled persons to employ their family carer under the Funded Family Care scheme — which was operated by the Ministry of Health | Manatū Hauora (the Ministry). Following the repeal of pt 4A, funding was provided under the Individualised Funding scheme.

The appellants, Christine Fleming and Peter Humphreys, provide full-time care for their respective adult disabled children, Justin and Sian.[2] Both Justin and Sian require full-time care and supervision.

Over the relevant period, Ms Fleming received a benefit and stayed at home to care for Justin. After becoming aware of the Funded Family Care scheme in 2018 Ms Fleming applied for funding under that scheme. The scheme provided for funding for a maximum of 40 hours a week with provision for an extension. Ms Fleming would have accepted funding based on the 40 hours figure but was offered, initially, 15.5 hours and, later, 22 hours. She declined the offers primarily because they were insufficient. Since 2021, Ms Fleming has been funded under the Individualised Funding scheme.

Mr Humphreys' care of Sian was funded under the Funded Family Care scheme from 2014 to 2020, after which he received funding under the Individualised Funding scheme.

Ms Fleming and Mr Humphreys each brought proceedings in the Employment Court claiming they were "homeworkers" and employees of the Ministry. The definition of "employees" in the ERA includes a homeworker — someone "engaged, employed, or contracted" by another person to do work for that person in a residential building. Employees have various legal protections including entitlements to minimum wage and holiday pay.

Lower courts

The Employment Court found that both Ms Fleming and Mr Humphreys had been engaged as homeworkers by, and were employees of, the Ministry.

The Court of Appeal overturned the Employment Court's decision in relation to Ms Fleming, concluding she had not been an employee of the Ministry.

The Court of Appeal confirmed Mr Humphreys had been engaged by the Ministry as a homeworker during the period he was receiving funding under Funded Family Care. That scheme required an employment agreement so, where Sian did not have the capacity to enter into such an agreement, the Court accepted the Ministry was the employer. The Court overturned the Employment Court's decision that Mr Humphreys was an employee of the Ministry when funded under the Individualised Funding scheme.

On 4 October 2024, the Supreme Court granted leave to appeal from the decision of the Court of Appeal.

In relation to Ms Fleming's appeal, the approved questions were whether the Court of Appeal was correct: (i) to determine that Ms Fleming was not "engaged, employed or contracted" as a

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[2] We refer to Justin and Sian by their first names as was the approach taken in the written submissions of both appellants and the second respondents.

"homeworker" under the ERA, and; (ii) as to the test for "work" when work is conducted by homeworkers overnight in their home. In relation to Mr Humphreys' appeal, the approved question was whether the Court of Appeal was correct to find that Mr Humphreys was not "engaged, employed or contracted" as a "homeworker" under the ERA when receiving funding under the Individualised Funding scheme.

Leave to intervene was granted to Aotearoa Disability Law Incorporated and Te Kāhui Tika Tangata | Human Rights Commission.

Supreme Court decision

The Supreme Court has unanimously allowed Ms Fleming and Mr Humphreys' appeals.

Ms Fleming

In relation to Ms Fleming, the Supreme Court addressed the correct approach to the definition of a "homeworker" which was introduced to provide protection for vulnerable persons working from home. Reflecting both the text and purpose of the provision, the real nature of the relationship will be relevant in determining whether an individual is "engaged". A combination of events may be evidence that a homeworker has been engaged, and something less than formal selection of the homeworker may comprise engagement (at [77]–[78], [86] and [89]). But there must be an awareness of the circumstances that establish engagement and the approach should not be so broad as to be oppressive or unreasonable. The Court explained that the approach taken was consistent with that of the majority of the Supreme Court in *Lowe v Director-General of Health*,[3] and with the Convention on the Rights of Persons with Disabilities (at [74]–[76], [79] and [82]).

Applying this construction to Ms Fleming in the present case, the Supreme Court concluded that the Ministry's offer of Funded Family Care was wrongly calculated and unreasonable, if not unlawful, due to the number of hours offered where it was accepted that Justin required care and supervision 24 hours a day, seven days a week. The approach adopted by the Ministry to the calculation of hours was also inconsistent with the Court of Appeal's decision in *Chamberlain v Minister of Health*.[4] By making such an offer, the Ministry effectively compelled Ms Fleming to continue working, but as a volunteer. Ms Fleming's conduct in seeking her entitlements under Funded Family Care and challenging the Ministry's offer was sufficient for the Ministry to have appreciated its responsibility — constituting an "event" for the purposes of her engagement as required in *Lowe* (at [104]).

Viewing the real nature of the arrangements objectively and in context, the combination of relevant factors meant Ms Fleming was engaged as a homeworker by the Ministry. These factors included the Ministry's awareness of Ms Fleming's care for Justin; that, without Ms Fleming's care, the Ministry would have had some obligations for Justin's care; and that the Funded Family Care policy documents did not exclude Ms Fleming from her rights under the ERA (at [105]–[110]).

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3 *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691.
4 *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771.

Mr Humphreys

In relation to Mr Humphreys, the Supreme Court considered whether Mr Humphreys ceased to be a homeworker when his funding transitioned from payments under the Funded Family Care scheme to the Individualised Funding scheme. Under Individualised Funding, the services of family carers could be purchased using the funding provided. Disabled people who received this funding were encouraged to have an agent to manage the purchase of these services.

The Supreme Court, in concluding that Mr Humphreys had not ceased to be a homeworker engaged by the Ministry, emphasised that where Individualised Funding proceeded based on still requiring some agency on Sian's part, she did not have the capacity to appoint an agent to manage her care, nor could Mr Humphreys make the relevant decisions on Sian's behalf. The Court also considered that, for Mr Humphreys and Sian, the transition to Individualised Funding was a continuation of the status quo. This was supported by the documentation Mr Humphreys and Sian received from the Ministry in relation to this transition (at [124]–[129] and [132]). There was accordingly no difference for Mr Humphreys and Sian between their positions under Funded Family Care and Individualised Funding.

The meaning of "work"

Finally, the Supreme Court considered the meaning of "work" in relation to Ms Fleming's claim for entitlement to lost wages. The Court explained these issues also arise in relation to Mr Humphreys but, as Mr Humphreys has only sought a declaration as to his employment status at this stage, this assessment will come later for him (at [135]). Under the Minimum Wage Act 1983, homeworkers are entitled to the minimum wage for their "work". The Supreme Court found the assessment of "work" as undertaken by a homeworker can be determined in light of the factors identified in *Idea Services v Dickson*[5] — being the constraints placed on the employees' freedom, the nature and extent of responsibilities placed on the employee, and the benefit to the employer (at [143]). The Court considered that, due to the constraints upon them, their responsibilities, and the benefit of their care to the Ministry as their employer, Ms Fleming and Mr Humphreys are working when caring for Justin and Sian, at least for some of that time (at [160]). The calculation of the precise hours that have been worked raises important underlying policy considerations including affordability. While the State has, through Funded Family Care, accepted responsibilities to care for those in Justin and Sian's position, that responsibility is not open-ended. Some proportionality between State and family responsibility is necessary, and a pooling of resources to ensure appropriate standards of care — as Ms Fleming and Mr Humphreys have accepted. Where the balance lies in a particular case will involve a factual inquiry (at [152]).

The Court remitted calculation of Ms Fleming's lost wages and holiday pay to the Employment Court, and made some observations to assist in resolving the matter. These were that, as Justin requires 24–7 care, it would be unattractive on these facts to suggest that Ms Fleming could be working anything less than a 40-hour week. This reflects the 40-hour

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

maximum provided for in the Funded Family Care policy documents and, albeit in a rough way, addresses the need to strike a balance between state and family responsibility in the care of disabled persons (at [164]–[165]).

Contact person:
Sue Leaupepe, Supreme Court Registrar (04) 914 3613