In the Supreme Court Of New Zealand
I te Kōti Mana Nui o Aotearoa

SC44/2024

Between	**PETER HUMPHREYS**
	Appellant
And	**ATTORNEY-GENERAL**
	First Respondent
And	**SIAN JIMENEZ HUMPHREYS**
	Second Respondent

CROWN'S SYNOPSIS OF ARGUMENT

28 February 2025

SIMPSON GRIERSON
Sally McKechnie / Bronwyn Heenan /
Tim Bremner / Louise Goodwin
T: +64-4-499 4599
sally.mckechnie@simpsongrierson.com
PO Box 2402 Wellington

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1 Introduction and summary

1.1 This appeal concerns the issue of whether a family carer – the appellant, Mr Humphreys – was engaged as a homeworker by the Ministry of Health (**MOH**) under s 5 of the Employment Relations Act 2000 (**ERA**) when receiving funding under the MOH's Individualised Funding (**IF**) scheme.

1.2 These submissions also address the question of the correct test for "work" when work is conducted by homeworkers overnight in their own homes.

1.3 Mr Humphreys is the father of Sian Humphreys, an adult with a physical and intellectual disability called Angelman syndrome, who has been assessed as having very high needs. Ms Humphreys lives with, and is cared for by, her father and her mother, Maria Jimenez. Mr Humphreys presently cares for Ms Humphreys full-time.

1.4 Ms Humphreys has received government funding for this care through Family Funded Care (**FFC**) (between April 2014 and August 2020) and IF (since August 2020). Both funding schemes contemplate family carers being employed by the disabled person. The Crown acknowledges that in this case, Ms Humphreys cannot be Mr Humphreys' employer for want of intellectual capacity (absent this relationship being imposed by statute). However, that Ms Humphreys could not employ Mr Humphreys does not mean that MOH must have.

1.5 In December 2021, the Employment Court found that Mr Humphreys had been engaged under both FFC and IF by the MOH as a homeworker, making him an employee of MOH.[1]

1.6 That finding was reversed in relation to IF by the Court of Appeal in April 2024, which found that Mr Humphreys' engagement with the MOH under IF occurred solely in his role as Ms Humphreys' nominated agent under that scheme, and did not relate to his work as Ms Humphreys' carer. Therefore, he was not a homeworker under s 5 of the ERA during this period.[2]

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1 *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 ELRNZ 668 at [83] and [88].
2 *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 245 (***CA Judgment***) at [258].

1.7 The Crown submits the Court of Appeal was correct to find that Mr Humphreys was not engaged or contracted by MOH under IF, with IF providing a funding structure which enabled family carers to be engaged, employed or contracted by the disabled person or their nominated agent. The appeal should be dismissed on this basis.

1.8 The Crown submits the Court of Appeal was also correct to conclude that the test for what is "work" in *Idea Services v Dickson* is inapt to the circumstances of the appellants (if homeworkers). The test proceeds on the basis of identifying constraints and responsibilities placed on an employee by an employer, and the benefit to the employer from that work. The greater the degree to which each successive factor applies, the more likely the activity constitutes work.[3] The nature of the care the appellants provide to their disabled family members in their own homes is not amenable to such an analysis given the absence of constraints and responsibilities placed on them by MOH.

2 Background

2.1 MOH had a policy of not funding family carers prior to 2013, which was held to be discriminatory by the Court of Appeal in *Atkinson*.[4]

2.2 Since that decision, a variety of avenues have existed to enable resident family members (**family carers**) to be funded for the care of adult disabled persons: under FFC (between 2013 and 2020), and since 2020, through IF or through employment by a Home and Community Support Services (**HCSS**) provider.

Overarching funding policies

2.3 It is important to begin with the policies which underpin the funding mechanisms in issue, and which have enabled Mr Humphreys to be paid as a family carer since 2014 when caring for Ms Humphreys.

3 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [7]-[8], [10].
4 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

2.4 First, the Tier Two Home and Community Support Services (**HCSS**) Service Specification outlines Crown-funded disability support services (**DSS**),[5] including Personal Care and Household Management (**PC and HM**):[6]

> **6.6.1 Household Management**
>
> Services which assist a Person with a disability to maintain, organise and control their household/home environment, enabling them to continue living within their environment.
>
> **6.6.2 Personal Care**
>
> Assistance with activities of daily living that enables a Person with a disability to maintain their functional ability at an optimal level.

2.5 Second, the Service Specification: Needs Assessment Service Coordination (**NASC**) Services[7] outlines the processes followed by NASC organisations. NASC organisations are independent entities,[8] operating as agents under MOH policies and delegated statutory authority.[9]

2.6 To access funding for PC and HM supports (along with other supports in the disability sector), a disabled person must have a needs assessment administered by a NASC organisation.[10]

(a) A needs assessment involves the NASC identifying the needs of the disabled person, including how many hours of PC and HM per week are required to support a disabled person's unmet needs.[11]

(b) Following a needs assessment, there is a "service coordination" process which details how PC and HM support will be provided.[12]

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5 Responsibility for DSS funding transferred from MOH to Whaikaha – Ministry of Disabled People (**Whaikaha**) on 1 July 2022 (following the hearing and determination of Ms Fleming's claim at first instance), and from Whaikaha to MSD on 16 September 2024. Because these appeals relate to decisions made prior to transfer of responsibility for funding, these submissions refer to MOH only.

6 Tier Two Service Specification: Home and Community Support Services (July 2020). [[**306.1319**]]

7 [[**305.1166**]].

8 Affidavit of Philip Wysocki (31 May 2021) at [69]: "NASC organisations are independent entities contracted by MOH". [[**201.0201**]]

9 *Chamberlain v Minister of Health* [2017] NZCA 8, [2018] 2 NZLR 771 at [27]. At the time of the hearing, there were presently 11 NASC organisations in New Zealand: Affidavit of Philip Wysocki (31 May 2021) at [70]. [[**201.0201**]] NASC assessments are also undertaken as part of other funding decisions in the care sector, such as aged care.

10 Affidavit of Philip Wysocki (31 May 2021) at [69]. [[**201.0200**]] Note, a different approach is taken in the 'Enabling Good Lives' pilot: Affidavit of Philip Wysocki (31 May 2021) at [34]. [[**201.0190**]]

11 Affidavit of Philip Wysocki (31 May 2021) at [74]-[78]. [[**201.0202**]]

12 Affidavit of Philip Wysocki (31 May 2021) at [80]-[83]. [[**201.0203**]]

(c) There are options. Until September 2020, these included employing a family carer under FFC.[13] There were also other options and supports under PC and HM could be allocated (then and now) under a personalised budget such as IF or could be received as care by a carer employed by an HCSS provider.[14]

Funded Family Care

2.7 Between October 2013 and August 2020, funding for family carers was governed by Pt 4A of the New Zealand Public Health and Disability Act 2000 (**PHDA**).[15] For family carers to be paid under Pt 4A, a 'family care policy' was required,[16] which enabled the Crown to stipulate the circumstances in which carers were able to be paid. FFC was created as the family care policy under this framework.[17] FFC provided the sole avenue for family carers to receive funding under the PHDA while it was in place and had a number of restrictions, including that the family carer had to be approved by MOH.[18]

2.8 Part 4A of the PHDA was repealed, and FFC disestablished, in September 2020.[19] At the same time, existing policies for the funding of non-family carers – IF and employment by an HCSS provider – were amended to allow them to be used by family carers: IF.[20]

Individualised Funding

2.9 IF is a bulk funding scheme delivered through the IF Service Specification which aims to deliver DSS in a "flexible, responsive and needs based" way.[21]

13 Affidavit of Philip Wysocki (31 May 2021) at [83], [89]-[91]. [[**201.0203**]], [[**201.0205**]] And see cl 3 and 4 of the FFC Operational Policy (March 2016). [[**304.0832**]]
14 Affidavit of Philip Wysocki (31 May 2021) at [83], [92]-[95]. [[**201.0203**]], [[**201.0206**]]
15 *CA Judgment* at [14]-[19].
16 New Zealand Public Health and Disability Act 2000, ss 70A and 70C. Pt 4A (which included ss 70A-70G) was repealed effective 30 September 2020. The remainder of the New Zealand Public Health and Disability Act 2000 was repealed and replaced on 1 July 2022 by the Pae Ora (Healthy Futures) Act 2022. These submissions retain references to the PHDA, as the applicable legislation for the relevant periods.
17 This was implemented under a gazette notice pursuant to s 88 of the PHDA. See Family Funded Care Notice 2013 [[**303.0646**]].
18 Family Funded Care Notice 2013, cl 19(b) [[**303.0648**]].
19 New Zealand Public Health and Disability Amendment Act 2020, ss 2 and 4; and "Funded Family Care (Revocation) Amendment Notice 2020" (31 July 2020) [[**306.1345**]].
20 *CA Judgment* at [20].
21 IF Service Specification (1 July 2020) [[**306.1324**]].

2.10 A key difference with this model compared to FFC is that it is designed to give a high level of flexibility and control to the disabled person or their nominated agent to choose how funding for their care is allocated.[22] Within the funding envelope (determined by a NASC assessment), the disabled person or their agent have the autonomy to determine, among other things, the identity of the carer (or carers), the rates of pay and commensurate total hours of work.[23]

2.11 To access IF, a person must have a needs assessment conducted by a NASC organisation to determine the needs and resulting funding that will be available. This is then followed by a service coordination process, which determines how DSS, such as PC and HM, will be provided – i.e., whether IF or another scheme is selected.[24] A 'Host provider' will assist with setting up IF, but neither the Host provider nor MOH are required to approve the chosen carer, nor will they necessarily have any involvement with, or visibility of, the employment or contracting arrangements that are established for the provision of support or when these are changed from time to time.[25]

2.12 Carers are ordinarily paid under IF by submitting timesheets or invoices to the disabled person receiving IF or their agent, who submits those timesheets or invoices to their Host provider.[26] The Host provider pays for the care retrospectively, by either reimbursing the IF user or paying the carer directly.[27] The Host provider then invoices MOH, who reimburses the Host provider for the payment.[28] Invoicing to the MOH is done in bulk, and does not require details such as the identity or specific time entries of any carer.[29]

Funding received by Mr Humphreys

2.13 Mr Humphreys was funded to care for his daughter under FFC from 31 March 2014 until August 2020, when FFC was disestablished.[30]

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22 IF Service Specification (1 July 2020) at [6.1] [[**306.1326**]].
23 IF Service Specification (1 July 2020) at [6.1] [[**306.1326**]].
24 IF Service Specification at [7.1] and [7.2]. [[**306.1326**]].
25 Affidavit of Philip Wysocki (31 May 2021) at [92]-[93] [[**201.0206**]].
26 Affidavit of Philip Wysocki (31 May 2021) at [92] [[**201.0206**]]; and IF Service Specification (1 July 2020) at [8.2] [[**306.1328**]].
27 Affidavit of Philip Wysocki (31 May 2021) at [92] [[**201.0206**]]; and IF Service Specification (1 July 2020) at [8.2] [[**306.1328**]].
28 Affidavit of Philip Wysocki (31 May 2021) at [92] [[**201.0206**]]; and IF Service Specification (1 July 2020) at [8.2] [[**306.1328**]].
29 Affidavit of Philip Wysocki (31 May 2021) at [92] [[**201.0206**]].
30 Brief of evidence of Amanda Bleckmann (31 May 2021) at [8]. [[**201.0114**]]

2.14 From this point onwards, Mr Humphreys' care for Ms Humphreys was funded under IF. Under this framework, Mr Humphreys chose to be both Ms Humphreys' nominated agent, determining how the funding for Ms Humphreys' care would be allocated, and (at the time of the Employment Court hearing) her carer.[31]

2.15 Mr Humphreys chose this option aware the alternative option of employment by an HCSS provider was also available to him.[32]

3 Judgments below

3.1 The Employment Court found that Mr Humphreys had been engaged by MOH to do work for it in the course of its trade or business when caring for Ms Humphreys in a dwellinghouse.[33] Accordingly, Mr Humphreys was a homeworker (and therefore an employee) of MOH, as defined in s 5 of the ERA, under both the FFC and IF schemes, from April 2014 onwards.[34]

3.2 The Court of Appeal agreed that Mr Humphreys was a homeworker of MOH when he cared for his daughter during the FFC period. However, the Court found that Mr Humphreys was *not* a homeworker of MOH when he cared for Ms Humphreys during the IF period.

3.3 In finding that the IF arrangement did not meet the definition of 'homeworker', the Court placed weight on:

(a) the IF scheme being a "bulk-funding scheme" that enabled disabled persons to choose how they spent the funding;[35]

(b) the IF scheme envisaging support carers being engaged, employed or contracted by the disabled person, placing the terms of that engagement – including the selection of the carer(s), the hours and

31 Brief of evidence of Peter Humphreys (27 April 2021) at [39]. [[**201.0012**]] Having the same person as agent and employee is discouraged by MOH: Affidavit of Amanda Bleckmann (29 June 2021) at [3]-[8] [[**201.0178**]]. As far at the Crown is aware, Mr Humphreys is currently Ms Humphreys carer – however, this could be changed from time to time, without the approval or knowledge of MOH.
32 Notes of Evidence at 50(29)-51(15). [[**201.0088**]]
33 *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 ELRNZ 668 at [83], [84] and [87].
34 *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 ELRNZ 668 at [88].
35 *CA Judgment* at [255].

rates of pay – in the hands of the disabled person.[36] The MOH does not have any say in or control over these terms of engagement;[37]

(c) to the extent MOH engaged with Mr Humphreys under IF, that was confined to his role as Ms Humphreys' nominated agent, not as her carer;[38] and

(d) employment by an HCSS provider provided an alternative funding arrangement involving a genuine employment relationship should that be desired, which Mr Humphreys was aware of.[39]

4 Issue 1: Was Mr Humphreys a homeworker during the IF period?

4.1 Mr Humphreys contends the Court of Appeal erred in holding that he was not a homeworker during the IF period on the basis that the Court 's reasoning on the FFC period, in which Mr Humphreys was found to be a homeworker, should apply equally to the IF period.[40]

4.2 The Crown submits the Court of Appeal was correct to treat the FFC and IF periods differently; the schemes differ in material ways. Under FFC, MOH had to approve Mr Humphreys as Ms Humphreys carer and it was on this basis that the Court below found engagement (or contracting).[41] Under IF, carers are engaged by the disabled person or their agent, who set the terms of engagement.[42] There is no requirement that MOH approve the carer or the terms. Moreover, the identity of the carer(s) and their terms of engagement can be changed from time to time as a decision of the disabled person or their agent without recourse to or knowledge of MOH. Accordingly, there is no comparable event under IF that could result in the family carer being engaged by MOH.

36 *CA Judgment* at [20] and [257].
37 *CA Judgment* at [255].
38 *CA Judgment* at [258].
39 *CA Judgment* at [255]-[256].
40 Appellant's Written Synopsis SC 44/2024 (30 January 2025) (**Appellant's Submissions**) at [4].
41 *CA Judgment* at [243].
42 See generally Affidavit of Philip Wysocki (31 May 2021) at [92]-[94], [100]-[101]. [[**201.0206**]]

The 'homeworker' test – s 6(1)(b)(a) of the ERA

4.3 Section 6(1)(a) of the ERA defines 'employee' as meaning "any person of any age employed by an employer to do any work for hire or reward under a contract of service". 'Employee' is further defined in s 6(1)(b)(a) as including a 'homeworker', relevantly defined in s 5 to mean 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".

4.4 The Crown's submissions in the *Fleming* appeal address the homeworker definition at Part 4. The Crown relies on those submissions in the context of Mr Humphreys' appeal. It does not repeat them here, other than to note that it appears the Crown and Mr Humphreys agree the Court of Appeal was correct in its approach to interpreting the definition.[43] Namely, that "engaged, employed or contracted" is a composite phrase, requiring a contractual or quasi-contractual relationship under which there was "a sufficient level of consensus and certainty as to the work to be done and the terms on which it would be done."[44]

4.5 The parties diverge as to how that definition should be applied to Mr Humphreys' circumstances for the IF period. In approaching that exercise, the United Nations Convention on the Rights of Persons with Disabilities forms part of the relevant context for the reasons set out at [4.20]-[4.26] and [5.6]-[5.12] of the Crown's submissions in *Fleming*.

4.6 The Crown submits the Court of Appeal correctly applied this interpretation to the facts, and also supports the judgment on another ground – that family carers cannot be engaged by MOH under IF because it will not necessarily have knowledge of a carer's identity or hours of work until after the work has been completed, meaning there is insufficient consensus and certainty for engagement to occur.[45]

43 Appellant's Submissions at [53]-[55].

44 Though the Appellant's Submissions at [78] assert there is no need to fixate on an event or series of events when applying the definition (notwithstanding the earlier assertion at [77] that there were events sufficient to find engagement under IF). On this, compare the Crown's Synopsis of Argument SC 42/2024 (28 February 2025) at [4.11].

45 Notice of Intention to Support Judgment on Other Grounds (18 October 2024) at [5].

The appellant's position

4.7 Mr Humphreys contends the Court of Appeal erred in finding that he was not a homeworker under the IF scheme because, as the Court had found that Mr Humphreys *was* a homeworker under FFC, the same reasoning should apply to the IF period on the basis that:

(a) the IF arrangements were not materially different to those under FFC;[46]

(b) the IF scheme contemplated that longstanding homeworker relationships would continue, as they had under FFC;[47] and

(c) the existence of an alternative path to employment with a third party is not relevant to the application of the homeworker test.[48]

4.8 These grounds are addressed in turn.

Material differences between FFC and IF

4.9 Under FFC, the Crown (through the FFC Notice and pursuant to s 70D of the PHDA) stipulated the circumstances in which funding would be granted and carers would be paid. It set the rate and the maximum hours that would be paid. MOH were required to approve the family carer that would provide the disability support services.[49]

4.10 This approval requirement formed the event that the Court of Appeal considered constituted MOH engaging or contracting Mr Humphreys.[50]

4.11 In contrast, IF is a flexible funding scheme that provides greater autonomy to the disabled person or their agent to choose and control the support services they require, including the identity of the carer, hours of care and rates of pay

46 Appellant's Submissions at [76]-[77].
47 Appellant's Submissions at [67] and [72].
48 Appellant's Submissions at [66], [70] and [74].
49 New Zealand Public Health and Disability Act 2000, s 70C; and Family Funded Care Notice 2013, cl 19(b) [[**303.0648**]]. As noted at [25] of the Sypnosis of Submissions of Te Kāhui Tika Tangata | Human Rights Commission (7 February 2025), the United Nations Human Rights Council has described personalisation of support (such as occurs through IF) as being a "well-recognized strategy" (albeit research has identified some negative aspects in how this is implemented in some countries).
50 *CA Judgment* at [243].

(inside the funding envelope), without requiring MOH approval.[51] The details of the funding arrangement under IF are set out in the IF Service Specification.

4.12 The IF Service Specification makes explicitly clear that, under this scheme, the disabled person or their nominated agent[52] will be the employer of any carer engaged by them and funded by IF. For example:

(a) Clause 3.2.3 specifies that IF will be available for people who:[53]

> have had a discussion with the NASC to determine if [IF] is a suitable option for them and confirmed that the Person will be responsible for all contracting and employment responsibilities associated with purchase of the Support Services including the management of the quality of the care provided.

(b) Clause 4.2 lists the benefits that IF provides the funding recipient, including the ability to "*employ their own Support Provider*".[54]

(c) Clause 5 explains the services that will be available to the funding recipient from the Host provider. This includes the provision of advice and information to assist the funding recipient to manage *their own* support allocation.[55] Clause 5.2.1 also sets out additional services available to the funding recipient to purchase, which include:[56]

> The provision of a payroll mechanism allowing People to authorise Host Provider to make payments to employees. The provision of a payroll system will include management of sick leave / annual leave, ACC, Tax and Kiwisaver obligations *on behalf of the Person*.

4.13 As mentioned, carers are engaged by the disabled person or their agent on terms set by them. The identity of the carer(s) and their terms can be changed from time to time as a decision of the disabled person or their agent.[57] As there is no requirement for the MOH to approve the family carer (as there was under FFC), there is no comparable event under IF that could result in the family carer being engaged by MOH.

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51 IF Service Specification (1 July 2020), cl 6.1 [[**306.1326**]].
52 See discussion below at [4.14]-[4.20].
53 Emphasis added.
54 IF Service Specification (1 July 2020), cl 4.2.3 [[**306.1325**]].
55 IF Service Specification (1 July 2020), cl 5.1.1 [[**306.1325**]].
56 Emphasis added.
57 See generally Affidavit of Philip Wysocki (31 May 2021) at [92]-[94], [100]-[101]. [[**201.0206**]]

The issue of capacity

4.14 The appellant says that this arrangement cannot operate effectively in cases where the disabled person lacks "legal capacity", as the IF Service Specification is based on the assumption that the disabled person will have such capacity.[58] In making this argument, the appellant relies on cl 7.1 and 7.2 of the IF Service Specification.

4.15 The argument is based on an unduly narrow interpretation of the meaning of "Person", defined in the IF Service Specification defines "Person" as:[59]

> A person who meets the Ministry of Health's definition of disability, and is eligible for support services funded by the Disability Support Services Group. *This may also include the Person's nominated representative for the purposes of the Agreement.*

4.16 The IF Service Specification permits a Host provider to agree to funding on the basis that a nominated agent agrees to undertake the obligations that would otherwise be imported on the disabled person on their behalf.[60]

4.17 As noted by the Court of Appeal, the nominated representative / agent in this context is not limited to a person appointed by a principal with mental capacity,[61] but rather includes a person "able to make decisions on behalf of" the disabled person.[62] There can be no question in fact that Mr Humphreys, as Ms Humphreys' parent and guardian, is one such person.[63]

4.18 This approach is lawful, proportionate and appropriate. As a policy, it is open to MOH to approach the appointment of agents in this way. There is no statutory requirement for a PPPR order or more formal Court mediated process for appointment.

58 Appellant's Submissions at [61]-[63].
59 IF Service Specification (1 July 2020), Glossary [[**306.1337**]]. Emphasis added.
60 *CA Judgment* at [253].
61 That is, an agent appointed under "general law", which requires the principal to have capacity to contract: *CA Judgment* at [253].
62 *CA Judgment* at [253]; and IF Service Specification (1 July 2020), Glossary [[**306.1337**]].
63 Mr Humphreys has previously been appointed Ms Humphreys' guardian under the Protection of Personal and Property Rights Act 1988 (**PPPR**): Notes of Evidence at 48(1-4). [[**201.0086**]]. Mr Humphreys understood that order to have lapsed and did not renew it as he "didn't see any point" in doing so.

4.19 This non-legalistic policy approach is consistent with supported decision making.[64] Ms Humphreys is recognised as having legal capacity under the Convention on the Rights of Persons with Disabilities.[65] The State is obliged to take measures to provide access to support her in exercising that capacity.[66] In the context of setting the terms of the IF policy, the nominated agent role is a practical measure to ensure Ms Humphreys is supported to exercise her legal capacity. In turn, the agent is protected as they must first agree to the employment obligations they are taking on before they are appointed.

4.20 To the extent that the appellant claims IF is set up so that Mr Humphreys forms a relationship with the MOH through the Host provider,[67] this relationship is created as a result of Mr Humphreys assuming the role of Ms Humphreys' nominated agent to manage her support allocation under IF.[68] It does not result, as Mr Humphreys argues, from his role as Ms Humphreys' carer, which is distinct. Should Ms Humphreys' mother (or any other person) assume the role of carer to Ms Humphreys, there would clearly be no relationship between her and MOH (and therefore no possibility of engagement or contracting for the purposes of s 5 of the ERA) as it would be Mr Humphreys, as nominated agent, who would continue to hold the relationship with MOH for funding purposes.

Selection and knowledge of carer

4.21 Under IF, the identity of a carer will not necessarily be known by MOH or its agents until after the care has been provided.[69] Nor does MOH have any control over who the disabled person or their agent selects to provide the

64 Note *(a)* observations by the United Nations Committee on the Rights of Persons with Disabilities that substituted decision-making regimes (arguably inclusive of the PPPR) should be abolished and replaced with supported decision-making alternatives (see *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [66] and [101]) and *(b)* recent comments of this Court in *A, B and C v D and E Limited as Trustees of the Z Trust* [2024] NZSC 161 at [64], which left open the possibility that a fiduciary relationship persists between parents and their adult children where there is ongoing caregiving or decision-making responsibility.

65 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), Art 12(2)-(3). Ratified by New Zealand on 25 September 2008.

66 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), Art 12(2)-(3). Ratified by New Zealand on 25 September 2008.

67 Appellant's Submissions at [30].

68 *CA Judgment* at [258].

69 The Crown notes that this argument differs from the Court of Appeal's conclusion on this point, which considered the circumstances of this case differed to *Lowe* (where the MOH's knowledge of a carer's engagement was retrospective) because the Individual Service Plan created for a funding recipient at the outset of IF "contained details of the Support Workers and the services they would provide": *CA Judgment* at [260]. The Crown gave notice of its intention to support the judgment on this other ground on 18 October 2024.

care, what rate they pay for that care, and how many hours of work are paid for. There may be more than one carer, they can be paid different rates, and can be changed at the election of the disabled person or their agent. The only limit is the amount of funding allocated annually.[70]

4.22 Though an Individual Service Plan (**ISP**) which identifies the "support provider" must be completed when IF is allocated,[71] the funding recipient is able to change who provides the support services at any point, and may arrange short-term cover or contingency care arrangements as needed.[72] The impact of this in practice is that the "support provider" identified in the ISP is not determinative of who will be funded to provide care under IF after the funding is allocated. Such changes may occur without recourse to or the awareness of the Host provider (and therefore MOH). The Host's 'awareness' arises after the funding recipient submits a timesheet for the services that have been provided by the carer, which are then paid for retrospectively.[73] In these circumstances, there cannot be said to be the requisite degree of consensus and certainty as to the work to be done and the terms on which it would be done, let alone *who* will be doing the work, given the flexible nature of the IF scheme. In particular, the general terms identified in the ISP lack sufficient certainty to form the basis of engagement or contracting, given the ability of the funding recipient to vary these terms (including the identity of the carer) at any stage, without recourse to the Host or MOH.

No continuation of homeworker status from FFC to IF

4.23 The appellant argues that he was a homeworker of MOH under IF because that scheme contemplated that longstanding homeworker relationships would continue, as they had under FFC.[74] This is not the case.

4.24 Specifically, on 28 May 2020, MOH wrote to Ms Humphreys and the appellant to communicate that FFC would soon be disestablished.[75] The letter explained that going forward, family carer support *could* continue through one of two arrangements:

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70 See above at [4.2] and [4.13].
71 *CA Judgment* at [252].
72 Affidavit of Philip Wysocki (31 May 2021) at [94] [[**201.0206**]]. Compare *CA Judgment* at [259]-[260].
73 Affidavit of Philip Wysocki (31 May 2021) at [92] [[**201.0206**]].
74 Appellant's Submissions at [67].
75 Letter from MOH to FCC Recipient/Carer (28 May 2020) [[**306.1298**]].

(a) the family carer could be employed by a HCSS provider; or

(b) the disabled person or their agent could access IF, enabling them to directly engage family member(s) to provide support. The letter explained under this arrangement a Host provider would be available to provide support around managing *the funding recipient's* budget, employment and contracting arrangements.

4.25 The choice of arrangement was up to the disabled person or their agent to choose based on their circumstances.[76]

4.26 As found by the Court of Appeal, this letter demonstrated that if a disabled person or their agent opted to receive funding under IF, the spending of that funding, including whether and how that funding was used to engage a family carer, was a matter for the disabled person or their nominated agent.[77] This is a clear departure from the arrangement under FFC, where the Crown stipulated the circumstances in which family carers were able to be paid (including by requiring that the disabled person be the employer), which necessarily impacts the ability to import an employment relationship between the MOH and carers under IF. And, in any event, there was no presumption that IF would be allocated. Employment by an HCSS provider was also an option.

Relevance of HCSS employment option

4.27 The Court of Appeal considered it relevant that Mr Humphreys knew and understood that he could be employed by a HCSS provider in caring for Ms Humphreys as an alternative to the IF scheme.[78] Mr Humphreys contends that the Court of Appeal was wrong to take this into account, arguing that the existence of an alternative path to employment with a third party is not relevant to the question of whether someone is a homeworker under s 5 of the ERA.[79]

76 Letter from MOH to FCC Recipient/Carer (28 May 2020) [[**306.1298**]].
77 *CA Judgment* at [255].
78 *CA Judgment* at [255]-[257].
79 Appellant's Submissions at [66] and [70].

4.28 The existence of an alternative path to employment – particularly given that alternative was also funded by MOH but with a separate legal entity as the employer – is of clear relevance in circumstances. At the time Mr Humphreys made the decision to receive funding for Ms Humphreys' care under IF, he understood that the MOH did not consider itself to be his employer. He nonetheless pursued this funding option, despite having the opportunity to obtain the protections and benefits of an employment relationship with an HCSS provider.[80] In doing so, Mr Humphreys acknowledged that his decision was influenced by his intention to bring "a health and safety complaint" which he considered would be unfair to bring against an HCSS provider (that complaint instead crystallising in these proceedings seeking a declaration of employment status against MOH).[81] In these circumstances, it was appropriate for the Court of Appeal to take into account Mr Humphreys' knowledge and understanding of the options available to him, and his clear decision in relation to those options, in making a finding about the nature of the funding relationship he ultimately selected.

4.29 The availability of employment with an HCSS provider is also plainly relevant in the context where a disabled person does not have capacity to take on the responsibilities of an employer under the IF scheme. The existence of an alternative employment option for the family carer obviates any need to import an employment relationship between the carer and the MOH, in stark comparison to the arrangement under FFC, which provided the sole means of funding for family carers at the time.

4.30 It is therefore relevant that Mr Humphreys knew of and understood the two funding options presented to him and chose to become Ms Humphreys' nominated agent under IF, despite the complications that may create in that he would then also effectively become his own employer for the purposes of the care he provides to Ms Humphreys.[82]

80 *CA Judgment* at [255].
81 Notes of Evidence at 50(29)-51(15). [[**201.0088**]] See also *CA Judgment* at [256].
82 *CA Judgment* at [256].

Positions of other parties

4.31 Having responded to Mr Humphreys' arguments in support of the appeal, these submissions now turn to address additional arguments of Ms Humphreys' Litigation Guardian and Aotearoa Disability Law (**ADL**), that:

(a) MOH did not comply with the requirements of the ERA in relation to redundancy or restructuring;[83]

(b) the implication of the Court of Appeal's finding that Mr Humphreys was not employed by MOH under IF is that Mr Humphreys did not have an employer "*at all*" for that period, as a result of "*technicalities*" introduced by the MOH to the IF scheme;[84] and

(c) health and safety obligations favour a finding that Mr Humphreys was engaged by MOH.[85]

Relevance of redundancy / restructuring process requirements

4.32 Ms Humphreys' Litigation Guardian asserts that, as the Court of Appeal found that Mr Humphreys was a homeworker for the FFC period, he must have also been an employee under IF because the MOH did not comply with the requirements of the ERA in relation to redundancy or restructuring.[86]

4.33 The conclusion of arrangements under FFC and the creation of two new materially different options for the funding of family care[87] was clearly communicated by MOH to FFC recipients in advance of the funding changes being implemented.

4.34 In any event, the provisions of the ERA relied on (ss 60G, 60OI and 60OJ) as justifying a restructuring process are inapt.[88] Section 60G only applies to employees identified in Schedule 1A of the ERA, broadly relating to employees providing cleaning services, food catering services, caretaking, laundry

83 Submissions of Counsel for Second Respondents Justin Coote and Sian Humphreys (30 January 2025) (**Litigation Guardian's Submissions**) at [78]-[86].
84 Synopsis of Submissions for Aotearoa Disability Law (7 February 2025) (**ADL's Submissions**) at [15]. Original emphasis.
85 Litigation Guardian's Submissions at [89]-[92].
86 Litigation Guardian's Submissions at [78]-[86].
87 By expanding the eligibility criteria of existing funding schemes.
88 Litigation Guardian's Submissions at [79]-[80].

services (in specified sectors) and services in the security sector.[89] It could not apply here.[90] Sections 60OI and 60OJ only apply to "restructuring" as defined in s 60OI(1), meaning "contracting out" or "selling or transferring the employer's business (or part of it) to another person". "Contracting out" is defined in s 60C(2)[91] as meaning a situation where:

> (a) a person (**person A**) enters into an agreement with another person (**person B**) under which person B is to perform work as an independent contractor for person A; and
>
> (b) the employees of person A are actually performing, or employed to undertake, the work or some of the work before the agreement takes effect.

4.35 The disestablishment of FFC, and contemporaneous expansion of the eligibility criteria for employment by an HCSS provider or funding under IF to include family carers, was not captured by the s 60OI(1) definition of 'restructuring'. Sections 60OI and 60OJ are not applicable.

No employer?

4.36 ADL places some significance on the Court of Appeal's conclusions for the IF period as meaning no one employed Mr Humphreys "*at all*" for that period, as a result of "technicalities" introduced by MOH to the IF scheme (overlooking the "substance of the relationship").[92] There was no need for the Court of Appeal to find who Mr Humphreys employer was if not MOH.[93] This Court's decision in *Lowe v Director-General of Health* was to similar effect regarding the employment status (or rather, lack thereof) of Ms Lowe.[94]

4.37 Otherwise, ADL overstate the significance of 'technicalities' as influencing the Court of Appeal's conclusion. Rather, the Court of Appeal assessed the nature of the relationship, in context and substance, considering the IF scheme's policy requirements. That was consistent with the approach of this Court in *Lowe*.[95]

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89 See s 69A, which outlines the object of subpt 1 of Pt 6A of the ERA, in which s 60G appears.
90 Even if a restructuring or redundancy process was required, which is denied.
91 This definition applies in respect of subpt 3 of Pt 6A, in which ss 60OI and 60OJ appear, by virtue of s 60OI(3).
92 ADL's Submissions at [15]. Original emphasis.
93 And as noted above at [4.30], in circumstances where Mr Humphreys chose to be Ms Humphreys agent and carer, he is effectively self-employed.
94 [2017] NZSC 115, [2018] 1 NZLR 691.
95 See for instance [146] of *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691, where Elias CJ and Glazebrook J accepted that MOH was entitled to require that the conditions set

Health and safety

4.38 Ms Humphreys' Litigation Guardian also identifies health and safety obligations as a factor favouring engagement of Mr Humphreys by MOH.[96] He contends it is not possible for the Crown to require that a disabled person assume the responsibilities of an employer including health and safety in their own home. This is apparently on the basis that the definition of a person conducting a business or undertaking (**PCBU**) in the Health and Safety at Work Act 2015 (**HSWA**) excludes "an occupier of a home to the extent that the occupier employs or engages another person solely to do residential work."[97]

4.39 This misstates the effect of the PCBU definition. Where a disabled person with intellectual capacity uses IF (or any other funds) to employ a carer (whether or not a family carer), the disabled person is not subject to HSWA due to the carve out above. This does not prevent that person from being an employer in the usual sense. All usual responsibilities (absent those in HSWA) will apply.

4.40 It is also contended that MOH's successor, Whaikaha,[98] has "now accepted that it is a PCBU with health and safety responsibilities in relation to work done by family carers under IF."[99] This is not correct. A Whaikaha publication "How Whaikaha checks the quality of disability supports and safeguarding of disabled people" is cited in support of this proposition.[100] This document makes only passing reference to PCBU obligations, noting WorkSafe regulates people, providers and organisations that meet the definition of a PCBU.

4.41 In any event, that PCBU obligations are owed to a person is not a factor which indicates the existence of an employment relationship. PCBU obligations are exceedingly broad. They are owed to "workers", which includes employees, but also contractors, subcontractors, apprentices and volunteers (among others).[101] They are also owed to "other persons" who might be put at risk from work carried out as part of the conduct of the business or undertaking.[102]

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under the Carer Support scheme were met before payment was made/a contract was formed. That is, the terms, conditions and policy settings for funding were not mere 'technicalities' but rather informed an assessment of the substance of the relationship.

96 Litigation Guardian's Submissions at [89]-[92].
97 Health and Safety at Work Act 2015, s 17(1)(b)(iii).
98 As noted above at fn 5, responsibility for DSS now sits with MSD.
99 Litigation Guardian's Submissions at [91].
100 Litigation Guardian's Submissions at fn 140..
101 Health and Safety at Work Act 2015, ss 19 and 36(1).
102 Health and Safety at Work Act 2015, s 36(2).

5 Issue 2: Test for "work" by homeworkers overnight in their own home

5.1 These proceedings represent the first time a New Zealand court has been invited to consider the application (or otherwise) of *Idea Services v Dickson* to homeworkers.[103] These submissions address the position in respect of Ms Fleming and Mr Humphreys.

5.2 The Employment Court found that any assessment of remuneration payable to Ms Fleming and Mr Humphreys as homeworkers was to be based on application of the Court of Appeal's decision in *Idea Services v Dickson*.[104] This conclusion was overturned on appeal. The Court of Appeal determined that "the test in *Idea Services* cannot be relied on as applying to workers who both live and work at home".[105] The Crown respectfully agrees with that conclusion to the extent it applies to family carers.[106]

5.3 The test in *Idea Services* focuses on three factors. The greater the degree to which each factor applies, the more likely the activity constitutes work.[107] The factors are *(a)* constraints placed on the employee by the employer, *(b)* responsibilities of the employee and *(c)* benefit to the employer.[108]

5.4 Mr Dickson was employed by Idea Services Ltd as a community service worker under a contract of service. That is, he was an employee in the usual sense for the purposes of s 6(1)(a) of the ERA, subject to control and direction of his employer as contemplated by this Court in *Bryson v Three Foot Six Ltd*.[109]

5.5 Against that background, a test for what constitutes work applicable to employees *under contracts of service* focused on constraints and responsibilities placed on an employee (consistent with the control and

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103 So far as counsel is aware. The Employment Relations Authority appears to have been seized of an application for wages by a homeworker (*and* employee in the usual sense), but no determination appears to have occurred: *Dickson v Wesley Community Action Trust* [2007] NZERA 741; *Dickson v Wesley Community Action Trust* [2008] NZERA 483. Another case was settled and a challenge to the settlement agreement failed: *Maharaj v Wesley Wellington Mission Inc* [2016] NZEmpC 129.

104 *Fleming v Attorney-General* [2021] NZEmpC 77, (2021) 18 NZELR 67 at [98] and fn 48; *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 NZELR 668 at [101]-[119].

105 *CA Judgment* at [135(b)].

106 The Court of Appeal framed its conclusion more broadly, and in a way that might extend beyond family carers (and homeworkers generally) to capture employees in the usual sense (that is, persons employed pursuant to contracts of service and subject to control, supervision and direction of the sort contemplated by this Court in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721).

107 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [8].

108 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [7], [10].

109 [2005] NZSC 34, [2005] 3 NZLR 721.

direction exercised by the employer), respectfully, makes sense. But those factors are *not* material in ascertaining whether someone is a homeworker.[110] Indeed, in the present case the Employment Court declined to find either Ms Fleming or Mr Humphreys as having been employees under s 6(1)(a) with reference to the factors in *Bryson*.[111]

5.6 That there are different indicia for ascertaining whether a person is a homeworker or an employee in the usual sense, and that the tests differ as to the extent to which control and direction is a feature of the employment relationship in question, is a relevant consideration in assessing how to approach the "work" of a homeworker, as compared to the "work" of an employee under a contract of service. The *Idea Services* test was developed in respect of, and has only ever been applied to, employees within the latter category.[112] The Court of Appeal was correct to conclude that test cannot be relied on in Ms Fleming and Mr Humphreys' circumstances (if they are found to be homeworkers of MOH).[113]

Employee category is relevant

5.7 ADL submits the Court of Appeal erred on the basis that "there is no logical reason for a conclusion that the *Idea Services* test does not apply" here.[114] This is on the basis that "there are not different categories of employees"; if someone is a homeworker, then they are an employee for all statutory purposes and they have the same entitlement to be paid for work performed.[115]

5.8 As a development of the common law, it is submitted there is – in fact – no good reason why the test for what "work" is should not factor in how the

110 *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691 at [43] per Arnold and O'Regan JJ, and see [147] per Elias CJ and Glazebrook J.

111 *Fleming v Attorney-General* [2021] NZEmpC 77, (2021) 18 NZELR 67 at [87]-[93]; *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 NZELR 668 at [91]-[98].

112 For this reason, little turns on the contention at [104] of the Litigation Guardian's Submissions that Parliament should have differentiated the position of family carers in the minimum wage context. The legal position in this regard remained at large until the Employment Court's decisions in *Fleming* and *Humphreys* (and is yet to be resolved in the context of these proceedings).

113 Noting that while Mr Humphreys was found to be a homeworker for the FFC period, that relationship ceased when FFC was disestablished and there were statutory constraints on the funding available in any event: see *CA Judgment* at [263(h)] and [136]-[145], respectively.

114 ADL's Submissions at [19].

115 ADL's Submissions at [19].

employment relationship arose, where placement within various categories of 'employee' may depend:

(a) in the case of homeworkers, on the work being performed in a dwellinghouse and subject to little to no control or direction by the employer; and

(b) in the case of employees under contracts of service, on the putative employer exercising a sufficient degree of control and direction over the employee.

5.9 For these reasons, far from having "no good reason",[116] the Court of Appeal was entirely correct when it said that:[117]

> the position of a family carer who lives with a disabled person and provides full-time care during the day and intermittent care during the night, occupies a different position to those who must work, or be available to work, away from their own residence.

5.10 Put simply, an assessment of remuneration that involves considering constraints placed on an employee by their employer contemplates the employer exercising control, direction and active supervision over the employee. The ability to exercise such control "characterises a contract of service".[118] The appellants are not subject to such control, direction or supervision by MOH.[119]

5.11 In challenging the above conclusion, the second respondents' litigation guardian places some significance on the working from home trend that has emerged since the COVID-19 pandemic, saying the *Idea Services* test "has been flexible enough to accommodate the WFH revolution".[120] No cases decided after 2020 which involve considering hours worked by a person working from home are cited.[121] In any event, an employee under a contract

116 ADL's Submissions at [19].
117 *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 245 at [120].
118 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [10].
119 *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691 at [43]; *Fleming v Attorney-General* [2021] NZEmpC 77, [2021] ERNZ 279 at [90]; *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 NZELR 668 at [92]
120 Litigation Guardian's Submissions at [99].
121 Searches of the Westlaw, LexisNexis and NZLII databases do not return results for any cases which use the phrase "working from home" that cite *Idea Services v Dickson*.

of service who happens to work from home (whether intermittently or permanently) will undoubtedly be subject to considerably greater control and direction than Ms Fleming or Mr Humphreys (if they are homeworkers). In their case, it is notable that the Employment Court concluded (in relation to Mr Humphreys) that:[122]

> …while the Ministry exercises control, it is not detailed day-to-day supervisory control of Mr Humphreys' work. He decides what he is going to do to provide care for Sian, when and how he does it (and it is plain that he has, and continues to be, committed to doing it to a very high standard).

5.12 An employee in the usual sense who nevertheless works from home is likely to be in an entirely different position; while degrees of control and direction may vary, invariably this will involve more frequent contact than the three-yearly needs assessments for Ms Humphreys and Mr Coote. In this regard, the Court of Appeal was correct to conclude:[123]

> …Ms Fleming and Mr Humphreys are not subject to any active control or oversight and not constrained by the Crown's terms and conditions as regard what they did outside normal working hours.

Relevance of home ownership

5.13 Relatedly, ADL submits:[124]

> …the location of the work (inside or outside of the employee's residence) and the relationship of the worker to the location of work (for example, homeowner) or the person being cared for (for example, guardian) should not be relevant.

5.14 To the contrary, these factors are not only relevant but reinforce the need for a test other than that in *Idea Services*. The position may be illustrated with reference to the Employment Court's decision in *Law v Board of Trustees of Woodford House*[125] regarding constraints, and *Idea Services* regarding responsibilities.

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122 *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 NZELR 668 at [92]. These observations are even more apt to Ms Fleming's circumstances, as she was never paid DSS funding for her care of Mr Coote: see the Crown's Synopsis of Argument SC42/2024 (28 February 2024).

123 *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 245 at [120]. For completeness, it is noted that the Court of Appeal's statement is incorrect insofar as it implies Ms Fleming was ever subject to the Crown's terms and conditions, as she was never paid pursuant to FFC or IF (at the time the Employment Court heard and decided her claim).

124 ADL's Submissions at [22]. However, ADL does concede at [20] that such factors can be relevant under the *Idea Services* test.

125 [2014] NZEmpC 25, [2014] ERNZ 576.

5.15 The plaintiffs in *Woodford House* stayed in self-contained accommodation at the boarding hostels where they worked. The Employment Court concluded that the plaintiffs were working when undertaking sleepovers, and covered by s 6 of the Minimum Wage Act 1983, in part because they were subject to a range of formal and informal constraints. These included that the plaintiffs were:[126]

(a) Unable to leave the boarding house during the period of a sleepover.

(b) Not permitted to consume or be under the influence of alcohol or drugs.

(c) Required to comply with the school's internet use protocols for boarders.

(d) Not permitted to have visitors during sleepover periods.

(e) Required to speak in hushed voices on the phone and have the volume of their TVs "so low as to be almost inaudible" and not able to flush lavatories, due to the proximity of some of their accommodations to adjacent boarders.

5.16 The position in relation to family carers is different. This may be illustrated with reference to Mr Humphreys, given he (unlike Ms Fleming) was subject to MOH policies as a recipient of FFC and IF funding. MOH has not, would not, and (in all likelihood) could not put in place constraints on how Mr Humphreys goes about his business or lives in his home in a manner analogous to that in *Woodford House*.[127] Mr Humphreys is not prevented from leaving his home/workplace by the Crown.[128] Factors identified in *Woodford House,* such as those relating to the use of drugs or alcohol, having visitors, and not disturbing others in the house are all matters over which the Crown has no

126 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576 at [111]-[112]. See also the similar factors identified in *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [5], and summarised in the Litigation Guardian's Submissions at fn 156.

127 Compare also the factors identified in *Idea Services*, summarised at fn 156 of the Litigation Guardian's Submissions.

128 Notes of Evidence at 54(34)-55(13). [[**201.0092**]]

knowledge or control. This is characteristic of Mr Humphreys' care for Ms Humphreys occurring within their private, family home.

5.17 Regarding responsibilities, these were identified in *Idea Services* as including:[129]

(a) Responsibility for the safety and well-being of service users (including ensuring residents take medication, are not left alone, being constantly available, not being able to lock to the door of the room in which they sleep except for brief periods required to dress or undress – these shade into 'constraints' already discussed above).

(b) Consulting "a day book in the home which is an essential means of communication between community service workers and between Idea Services and staff".

(c) Ensuring routine and emergency evacuation procedures are current and known.

(d) Property security (including ensuring doors are locked, windows are closed, heaters are turned off, locking away service users' medication, securing appropriate areas of the home such as the kitchen and undertaking a daily fire check during the sleepover, which must be signed off).

5.18 ADL submits (taking property security as an example) that it is unclear why home ownership make "a difference in whether activities constituted work".[130] But the difference is clear. In *Idea Services*, Mr Dickson would not be responsible for property security at his place of employment *but for* that employment. By contrast, Mr Humphreys would remain responsible for the security of his own home irrespective of whether it was his workplace.

5.19 For these reasons, the Court of Appeal was correct to distinguish *Idea Services* on the basis that "many steps taken by a family carer might equally be viewed

129 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [5].
130 ADL's Submissions at [21] and fn 51.

as being taken in their capacity as guardian or homeowner",[131] rather than as 'work' as an employee.

Royal Mencap *is relevant*

5.20 Ms Fleming's submissions criticise the Court of Appeal for relying on the United Kingdom Supreme Court's decision in *Royal Mencap Society v Tomlinson-Blake*[132] as a basis for distinguishing *Idea Services* in the present case, as *Royal Mencap* was based on a different statutory scheme to that in New Zealand.[133]

5.21 The Court of Appeal's consideration of *Royal Mencap* in *Attorney-General v Fleming* must be understood in the context of the cases considered by that Court when it articulated the test in *Idea Services.* In *Idea Services,* the Court of Appeal cited a range of overseas cases which, though decided in relation to different statutory frameworks, were nevertheless illustrative of what the concept of 'work' entailed in the minimum wage area.[134] Of these cases, only one – *British Nursing Association v Inland Revenue*[135] - involved a worker who slept at home while on duty (being available to answer phone calls), which was regarded as work.[136]

5.22 The Employment Court in *Humphreys* distinguished *Royal Mencap*, as it:[137]

> …deals with a particular statutory/regulatory regime which differs from New Zealand's, and the way in which the common-law test for work that has been carefully developed by the Courts in this country, having regard to its own, unique, industrial relations landscape.

5.23 But as noted by the Court of Appeal in *Fleming*, that comment overlooks that *British Nursing* (also interpreting the United Kingdom's statutory/regulatory regime) informed the development of our test. Insofar as *British Nursing*

131 *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 245 at [120].
132 [2021] UKSC 8, [2022] 1 All ER 497.
133 Appellant's Submissions in Support of Appeal SC 42/2024 (31 January 2025) at [143].
134 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [17]-[23].
135 [2002] EWCA Civ 494, [2002] IRLR 480.
136 See extract quoted in *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 245 at [109]. For this reason, the Litigation Guardian's Submissions that note at [99] that many roles, such as security guards, simply require being available to work for periods of time may be dismissed. None of the roles described involve a worker being available to work while sleeping in their own home, nor have any cases applying *Idea Services* to such circumstances been identified.
137 *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 NZELR 668 at [119]. Contrast *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [22], where the Court of Appeal indicated the difference in legislative regime was of little moment.

contained "general statements" regarding the meaning of work relied on in *Idea Services*, it was appropriate to revisit whether that decision applied to homeworkers working overnight at home in light of *Royal Mencap's* own general statements as to the ordinary meaning of work, overturning those in *British Nursing*.[138] Those statements, which held that a worker who was asleep but 'available to work' at home was *not* working, are such that it can be doubted whether *Idea Services* applies to workers who both live and work in their own home (*British Nursing* being the only case relied on in *Idea Services* which identified this as work).[139]

Other arguments

5.24 Other factors identified as supporting application of *Idea Services* in the present context include Parliament's enactment of sleepovers legislation,[140] the Court of Appeal's decision in *Chamberlain v Minister of Health*,[141] and the availability provisions of the ERA.[142]

5.25 None of these appear relevant.

(a) The Sleepover Wages (Settlement) Act 2011 applied to employees, defined as a person employed to do any work for hire or reward *under a contract of service*.[143] That is, it applied only to employees under s 6(1)(a), but not to homeworkers.[144]

(b) *Chamberlain*[145] was a judicial review challenging the application of MOH policies in assessing the level of funding allocated under FFC. As the matter was decided in an entirely distinct legal context to the present employment proceedings, it does little to assist in

138 *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 245 at [110].
139 *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 245 at [119] and see generally [111]-[118].
140 Appellant's Submissions at [94]-[96], and see also Litigation Guardian's Submissions at [101]-[105].
141 Litigation Guardian's Submissions at [98] and [103]-[105].
142 Submissions of Counsel for Second Respondents (30 January 2025) at [114]-[116]. It is also noted for completeness that ADL's Submissions refer at [22] to the Equal Pay Act 1972. The Crown does not apprehend ADL to be submitting MOH discriminated against carers in setting rates or hours of payment available to family carers on basis of sex (see s 2AAC of the Equal Pay Act). Absent such a suggestion (which is not supported by evidence in any event), the Act has no direct relevance.
143 Sleepover Wages (Settlement) Act 2011, s 4.
144 And so the Court of Appeal was correct to conclude it was not relevant: *CA Judgment* at [102].
145 [2018] NZCA 8, [2018] 2 NZLR 771.

understanding the appropriateness or otherwise of the *Idea Services* test here.[146]

(c) If Ms Fleming or Mr Humphreys are MOH employees, in principle there does not appear to be any reason why an availability provision could not be a feature of their individual employment agreements. But that does not assist in resolving the question of what constitutes 'work' by them for minimum wage purposes.

6 Conclusion

6.1 For the reasons above, the respondent respectfully submits that the appeal should be dismissed. The Court of Appeal was right to conclude that:

(a) Mr Humphreys was not engaged by MOH under the IF scheme – IF providing a funding structure which saw family carers engaged, employed or contracted by the disabled person or their nominated agent; and

(b) *Idea Services* is inapt to an assessment of what constitutes "work" performed by family carers who are homeworkers.

6.2 The Crown does not seek costs for this appeal.

Dated 28 February 2025

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S V McKechnie / B A Heenan / T J Bremner / L J Goodwin
Counsel for the Attorney-General

146 As noted at [200] of the *CA Judgment*, *Chamberlain* was "concerned with the basis on which needs assessments were being conducted. It was not concerned with the nature of the relationship between disabled person and their family carer."

LIST OF AUTHORITIES TO BE CITED BY THE CROWN

Statutes

Employment Relations Act 2000

Health and Safety at Work Act 2015

New Zealand Public Health and Disability Act 2000

New Zealand Public Health and Disability Amendment Act 2020

Pae Ora (Healthy Futures) Act 2022

Protection of Personal and Property Rights Act 1988

Sleepover Wages (Settlement) Act 2011

Cases

New Zealand

A, B and C v D and E Limited as Trustees of the Z Trust [2024] NZSC 161

Attorney-General v Fleming [2024] NZCA 92, [2024] 2 NZLR 245

Bryson v Three Foot Six Ltd [2005] NZSC 34, [2005] 3 NZLR 721

Chamberlain v Minister of Health [2017] NZCA 8, [2018] 2 NZLR 771

Dickson v Wesley Community Action Trust [2007] NZERA 741

Dickson v Wesley Community Action Trust [2008] NZERA 483

Fleming v Attorney-General [2021] NZEmpC 77, [2021] ERNZ 279

Humphreys v Humphreys [2021] NZEmpC 217, (2021) 18 ELRNZ 668

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

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

Lowe v Director-General of Health [2017] NZSC 115, [2018] 1 NZLR 691

Maharaj v Wesley Wellington Mission Inc [2016] NZEmpC 129

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

TUV v Chief of New Zealand Defence Force [2022] NZSC 69, [2022] 1 NZLR 78

International

British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team) [2002] EWCA Civ 494, [2002] IRLR 480

Royal Mencap Society v Tomlinson-Blake [2021] UKSC 8, [2022] 1 All ER 497

International treaties

Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008)

CHRONOLOGY

DATE	DEVELOPMENT	REFERENCE
6/10/2006	Mr Humphreys was contracted by Disability Support Link to provide 10 hours care per week to Ms Humphreys. This continued until late into 2012.	[[**301.0010**]] [[**301.0012**]]
14/05/2012	Court of Appeal decides *Atkinson,* in which Mr Humphreys was a plaintiff.	[2012] NZCA 184, [2012] 3 NZLR 456
28/01/2013	Mr Humphreys commenced as an employee of Healthcare New Zealand to provide 11.5 hours of care per week to Ms Humphreys.	[[**301.0015**]]
21/05/2013	Part 4A of the PHDA comes into force.	[[**303.0652**]]
09/2013	FFC Operational Policy created by MOH.	[[**304.0825**]]
1/10/2013	FFC Notice 2013 takes effect.	[[**303.0647**]]
31/03/2014	Mr Humphreys employed under FFC to care for Ms Humphreys.	[[**201.0114**]]
03/2016	FFC Operational Policy updated.	[[**304.0825**]]
7/02/2018	Court of Appeal decides *Chamberlain*	[2018] NZCA 8, [2018] 2 NZLR 771
7/07/2019	Government announces intention to repeal Part 4A of the NZPHDA	[[**305.1147**]]
28/06/2019	Proceedings commenced in the Employment Relations Authority.	
2/06/2020	Policy transition away from FFC commences.	[[**201.0196**]]
3/08/2020	Mr Humphreys transitions to care for Ms Humphreys under IF.	[[**306.1344**]]
8/09/2020	Policy transition away from FFC is completed.	[[**201.0197**]]
29/09/2020	The FFC Notice is revoked and FFC ends	[[**306.1345**]]
30/09/2020	Part 4A of the NZPHDA is repealed.	[[**306.1346**]]
16/12/2019	Proceedings removed to the Employment Court.	[2019] NZERA 708
26/05/2021	The Employment Court delivers its judgment in *Fleming v Attorney-General.*	[2021] NZEmpC 77 [[**101.0162**]]
8/12/2021	The Employment Court delivers its judgment in *Humphreys v Humphreys.*	[2021] NZEmpC 217
9/04/2024	The Court of Appeal delivers its judgment in *Attorney-General v Fleming.*	[2024] NZCA 92