IN THE SUPREME COURT OF NEW ZEALAND
OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 42/2024

BETWEEN	**CHRISTINE FLEMING**
	Applicant
AND	**ATTORNEY-GENERAL**
	First Respondent
AND	**JUSTIN JAMES COOTE**
	Second Respondent

(continued over page)

SUBMISSIONS OF COUNSEL FOR SECOND RESPONDENTS
JUSTIN COOTE AND SIAN HUMPHREYS

Dated: 30 January 2025

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SC 44/2024

AND	**PETER HUMPHREYS**
	Applicant
AND	**ATTORNEY-GENERAL**
	Respondent

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SUBMISSIONS OF COUNSEL FOR SECOND RESPONDENTS

MAY IT PLEASE THE COURT:

Introduction

1. I was appointed the litigation guardian for the second respondent in *Fleming* (**Justin**) and *Humphreys* (**Sian**).[1] I have met them and satisfied myself that no-one cares more about these disabled persons than their family carers, the appellants Ms Fleming and Mr Humphreys. It is likely that any remedies they obtain from these proceedings will benefit Justin and Sian.[2]

2. I believe the three main issues that have driven the appellants to pursue this case to this Court, and which are relevant to the approved questions in this appeal, are:

    2.1 Equal recognition for family carers compared to other carers, and which work requires harder and longer hours than almost any other type of employment. The employment structure the Ministry created and requires focuses on purported choices for disabled persons who lack capacity, and gives little recognition to the reality faced by their family carer;

    2.2 Financial issues arising from the artificially low hours offered to family carers compared to their actual hours of work,[3] and which the Ministry of Health and its successors (referred to hereafter as the **Ministry**)[4] has been aware of for the last decade; and

    2.3 The lack of health and safety and genuine employment support offered within the employment structure created by the Ministry, including inadequate systems in place to provide cover for sick leave.[5] The most

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[1] I was previously also appointed as the litigation guardian for Marita and Johnny Robinson, and Shane Chamberlain, whose parents were parties to the *Atkinson* and *Chamberlain* cases respectively

[2] See for example Ms Fleming's evidence in Fleming Bundle at 201.0035 and 201.0036 regarding the improvements to Justin's living conditions if she received payment for her family carer hours of work.

[3] Ms Fleming's evidence in Fleming Bundle at 201.0026.

[4] Due to the number of restructures and divisions of responsibility for funding disability that have occurred during the relevant period I refer in these submissions to the Ministry of Health and its successors as "the Ministry", or "the State"

[5] See for example Mr Humphreys' evidence at [201.0080] and Artemis Report in Humphreys bundle at [304.0778 – 9]

important of these three issues from my perspective, as litigation guardian for my vulnerable clients, is the latter. The Ministry currently relies on family carers being available to work around the clock, without the genuine/practical employment systems that would usually be in place to ensure support for workers, who cannot simply call in sick when their mental of physical health is suffering.[6]

3. Resolution of all three of the main issues identified above requires that the Ministry ensure that genuine employer support is available for family carers to communicate with when they need help at short notice.

4. The Court's Minute 17 December 2024 urged counsel to liaise and avoid duplication in their submissions. I have read and would adopt the submissions for the appellants and interveners. The Judgments of Inglis CJ in *Fleming*, and Elias CJ and Glazebrook J in *Lowe* also cover most of the main points in the present case.[7] Accordingly on behalf of the second respondents I focus on discrete issues including the relevance of the elements of s6 including the "real nature" test, good faith bargaining and the requirement for a reasonable offer, the requirements for the restructuring process after 2020, health and safety and the meaning of work for homeworkers.

5. The correct way to analyse this case is through established principles of statutory interpretation in relation to the homeworker definition, and in the following sequence:

    5.1 First, this Court's purposive interpretation of the ERA[8] and the intent behind the homeworker definition.[9] The appellants as persons working full-time in a home are certainly within the class of persons contemplated by the definition;

    5.2 Second, whether the consent and "volunteer" criteria in s6(1)(b)(ii) and (c) apply. The appellants have advised the Ministry that they wish to be employees including the obligations that entails. Justin and Sian require

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[6] No practical support is provided for family carers to find relief workers when they need to take their leave entitlements. Families rely instead on whatever haphazard solutions they can find, such as Justin previously staying at the Gables rest home to give Ms Fleming some respite. Mostly however she simply does not take leave. Ms Fleming's evidence in Fleming bundle at [201.0012] and [201.0019], and [312.2500]

[7] *Lowe v Director-General of Health, Ministry of Health*, [2017] NZSC 115 at [139], [141 – 147], [152], [156 – 162] [and 174 – 177]]

[8] In *FMV v TZB* at [44], [151] and the submissions for Ms Fleming.

[9] Set out in *Lowe* at [5] and [6] and the submissions for Ms Fleming.

supervision for their health and safety, so the appellants are not providing any care hours as volunteers;

5.3 Third, pursuant to the homeworker definition in s5, whether "any person" has engaged, employed or contracted the appellants to do work "for that other person." The "real nature" tests are relevant for determining who the employer is, as stated by this Court in *Lowe*.[10] The question of who, if anyone, engaged the appellants involves detailed analysis of who benefits from the work, control and policy considerations.

6. First however I set out the most notable facts, and which also inform the above analysis.

NOTABLE FACTS – MINISTRY POSITION OVER THE LAST TWO DECADES

7. Mr Humphreys was the fifth respondent in the Ministry's unsuccessful appeal of *Atkinson.*[11] He had been paid by the Ministry (through various agents) as an independent contractor for some of his family carer hours since about 2006,[12] but with Mr Humphreys consistently bringing to the Crown's attention that he believed he was its employee and asking for employer support in resolving employment issues.[13] After *Atkinson* the Ministry wrote to Mr Humphreys agreeing to arrange employment for him until FFC was implemented.[14]

8. Despite what the Ministry says publicly it appears that its actual response to *Atkinson* was to still expect family carers to do unpaid work which it otherwise would have had to pay third party carers for, with the Ministry continuing to rely

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[10] *Lowe* at [13]7, [144]-[146].

[11] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, Authorities Bundle [AB] Tab 19

[12] Humphreys bundle at 301.002

[13] *Humphreys* Judgment at [14], and correspondence at [301.0006 – 301.0014]

[14] *Humphreys* Judgment at [16], and correspondence [301.0015]

on natural supports.[15] That was still the case in 2021 before Inglis CJ,[16] and in 2024 when the CA issued its Judgment in *Fleming.*[17]

9. The Ministry's non-statutory mechanism to avoid paying for natural supports was the "Support Allocation Template" (the **Template**), which is a spreadsheet created by the Ministry with formulas to input minutes for each eligible task of household care and personal management.[18] The Ministry requires its agent the NASC, pursuant to the "Support Package Allocation (**SPA**) Guide",[19] to first identify what care could be provided for free using natural supports, and then use the Template to calculate approved minutes per eligible task. The Template was almost entirely unchanged and continued to rely on natural supports to exclude hours of supervision, even after *Chamberlain* in 2018, *Fleming* in 2021,[20] and nor was any significant change to the Template noted by the CA when this case was before it in 2024.

10. Further Ministry practices not backed by statute, and through which the eligibility for FFC and number of hours payable to family carers were reduced, are illustrated in:

    10.1 The SPA Guide, which required "each NASC to adopt strategies" to ensure that "in practice there will be a distribution…right throughout the allocation range,"[21] meaning most people received far less than 40 hours per week to most family carers. As of 2016 it stated that the average allocation per week for high needs persons should be $600, or a maximum of $900;[22] and

    10.2 The NASC Guidance, which was not publicly available, and stated that NASCs were only to provide families with a Ministry created Q&A

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[15] Fleming bundle at 304.0860, Humphreys bundle 302.0424-425 and 303.0502 at 16a and 303.0503 at 18a, and Artemis Report at 304.0767 – 304.0768

[16] See Phil Wysocki's evidence in Humphreys at [201.0212] and Amanda Bleckmann's evidence at [201.0172] in Humphreys bundle confirming that MOH expected not to have to pay for supervision during the day

[17] At [11] the CA records that the basis for funding home care is still, despite *Atkinson*, *Chamberlain* and the Employment Court's Judgment in *Humphreys*, policies contained in Service Specifications which are based on identifying "needs for which there are already "natural supports" (which usually refers to help provided by family members or friends)."

[18] Humphreys Bundle at 304.0931

[19] Humphreys Bundle at 201.0156 at line 25.

[20] *Humphreys* Judgment, Humphreys Bundle, Tab 8, p 101.709 at [109]

[21] Humphreys Bundle at 302.0385 - 302.0387

[22] Humphreys Bundle at 304.0874

document if the person requested FFC. Any other questions could be addressed after the person had confirmed their intent to accept FFC and gone through the Host process.[23] It mandated to NASCs that FFC eligibility would require the existing family circumstance would be "significantly compromised" without it, and that the family carer was not working "more than 40 hours per week in total employment including their hours employed as a family carer."[24]

10.3 The Artemis report dated April 2015, which confirmed that after a couple of years of FFC only 191 eligible persons out of the projected 1600 were receiving FFC.[25] That expert report, which was commissioned by the Ministry, is the best summary of the reasons why most eligible persons did not receive FFC.[26]

11. The outcome of the above practices was that, despite FFC only being available to disabled persons with "high" or "very high needs", the average hours allocation was only 29.4, resulting in an average annual salary (before tax) of approximately $22,250."[27]

12. Even in the Employment Court in 2021 the Ministry still maintained that the FFC policy was seen by the Ministry as consistent with upholding Justin's personal dignity and personal autonomy, human rights and dignity.[28] In reality the main reasons for the Ministry choosing to impose a mandatory employment model on disabled persons and their family carers was cost savings for the Crown and avoiding the compliance risks of the Ministry being the employer.[29]

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[23] [305.0970]

[24] It also required NASCs to use dropdown boxes when declining an application including "Chosen family carer not considered suitable" or, if a person who has requested FFC subsequently declines it during the Host process, "Funding and/or allocation levels inadequate"

[25] Artemis Report April 2015 in Humphreys Bundle at 304.0751.

[26] Artemis Report at 304.0767 – 304.0769 and 304.0793

[27] Artemis Report at 304.0776

[28] *Fleming* Judgment in Fleming Bundle at 101.0167 at [14]

[29] As acknowledged by Mr Parkison for the Ministry in Fleming bundle at [202.0304-5]. See also Humphreys bundle [303.0502] Tab 25 para 16a, and 303.0503 at 18a. Following *Atkinson* the Ministry considered three options as set out in the Regulatory Impact Statement at Humphreys 303.0502 Tab 25 para 16a, and 303.0503 at 18a. Employing carers through one of the Ministry's contracted agents was discounted because "…the Government would have significantly less control over costs than the other options…" For an allowance "legislation would be needed to be clear that an employment relationship does not exist." Instead FFC was chosen for the reasons at [304.0694] Tab 25, under heading 4.2

13. Despite the Ministry having an ongoing relationship with Mrs Fleming and Justin through regular NASC assessments,[30] and them being within the 1600 persons estimated by the Ministry as being eligible for FFC,[31] it did not inform Ms Fleming of the existence of FFC. She only found out about it and applied for it in 2018.[32]

14. In the Employment Court in *Humphreys* the Ministry's position was that it could not be an employer, because it had no systems set up to manage family carers.[33] The reason for this state of affairs is that the Ministry appears to have chosen not to enforce the powers and responsibilities that it has, and which are effectively the same as those of many other employers. The Ministry certainly had those powers and responsibilities at all relevant times under its relevant policies, and which people and NASCs were required to accept in order to obtain payment.[34] There was a deliberate decision by the Ministry to obtain the benefits of an employment relationship, while avoiding the obligations of an employer.[35]

15. By the time of *Humphreys* in the CA the Ministry had still done very little to fulfil its duties as employer of Mr Humphreys. He had no employment agreement with the Ministry and did not know who to contact as his manager when he needed support. In that respect he was in no different position than Ms Fleming.

16. Family carers have successfully challenged the Ministry's practices and policies via discrimination claims in the Human Rights Review Tribunal,[36] via Judicial Review in the High Court,[37] and via these claims in the Employment Court. Rather than change the fundamental approach underlying its policies during this period, the Ministry has appealed each of these challenges, made small amendments to its policies and then argued that these represent a fresh new solution which resolves the continuing issues. In 2020 the Ministry decided it

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[30] Fleming bundle at [307.1497]-[307.1519] and [310.2124].

[31] Humphreys Bundle at 304.0751

[32] Ms Fleming's evidence Fleming Bundle at 201.0011 at para [48].

[33] [201.0083-201.0106]

[34] See for example FFC Operational Policy audit and monitoring lists at [304.0847 – 304.0851], IF Verification Standards referred to in [306.1365], Artemis Report [304.0782]. See also the monthly and annual visit by the NASC following FFC employment and reports to the Ministry's Quality Team at [305.0970]

[35] Humphreys 303.0502 Tab 25 para 16a, and 303.0503 at 18a. See 304.0694 Tab 25, under heading 4.2

[36] *Atkinson*

[37] *Chamberlain*

would continue paying those family carers who were receiving FFC, on the basis of the same assessment and hours allocations,[38] but under an Individualised Funding (**IF**) or Home Community Support Services (**HCSS**) policy from 2020 onwards.

ENGAGEMENT FOR PURPOSES OF *LOWE*

Appellants within the class contemplated by purposive interpretation of homeworker - application of the "real nature" test to the homeworker definition

17. Whether or not the appellants are ultimately found to have been engaged by the disabled person (as envisioned by Ministry policies), the NASC, or the Ministry itself, the appellants are clearly within the class contemplated by the definition of homeworker in the ERA.

18. This Court confirmed in *FMV v TZB* that the ERA must be interpreted in line with its purpose as fundamental human rights legislation.[39] This Court has also stated that the homeworker definition went further than the normal meaning of employee who has a contract for service, with the purpose of ensuring that employers cannot avoid the homeworker definition through technicalities.[40]

19. The CA in *Fleming* held that the Employment Court was wrong to consider the "real nature" test under section 6(2) of the ERA when deciding whether a person was a homeworker for purposes of s6(1)(b),[41] stating "where the Court is considering whether a person is a homeworker, the enquiry is much narrower, requiring the Court only to consider whether the definition in s 5 is satisfied." The CA did not determine Mr Cranney's argument that the real nature of the relationship approach was the common law position prior to the enactment of the ERA, and that s 6(2) and (3) only confirmed the application of the common law approach to s 6(1)(a).[42]

20. In *Lowe* Elias CJ and Glazebrook J effectively applied the common law, "real nature" and *Bryson v Three Foot Six*[43] tests to the homeworker definition.[44] The Court stated that "The label given to the payment (subsidy or allowance) is

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[38] 2020 letters for FFC transition in Fleming bundle at Tab 98 [309.1954], Tab 104 [309.1998] and Tab 105 [309.2013].

[39] *FMV v TZB* at [183].

[40] *Lowe* at [144].

[41] At [40].

[42] See [39]

[43] *Bryson v Three Foot Six Ltd* SC24/2004, [2005] NZSC 34 at [5], [31 - 33]

[44] Including the control test. See *Lowe* at [147]

irrelevant," citing this as being "consistent with the approach required by s 6(2) of the ERA."[45]

21. The case of *Prasad v LSG Sky Chefs*[46] has similarities with the "5 way partnership" employment model created by the Ministry for FFC and operated through agents it controls via contract.[47] In *Prasad* the Court also applied the *Bryson* tests including control and looking at the "real nature" to find that the controlling party which benefitted from the work was the true employer, rather than the labour-for-hire agency which was inserted as a middle-man. The Court stated that an employment relationship was more likely where:[48]

> "the documentation is non-existent or unclear, the work is of indefinite duration, is expected to be provided and is expected to be performed by the individual; a significant degree of supervision, control and direction is exercised by the host; and performance issues are dealt with by it."

22. The foregoing analysis in *Prasad* applies equally to the present cases: the Ministry is aware that the basis for its offer was impenetrable; the work is of indefinite duration; the work is expected to be performed by the appellants as natural supports identified by the NASC; the Ministry has power to monitor and audit the work; and the Ministry can place conditions on or withdraw payment for performance issues. The Ministry and appellants have the requisite mutuality of obligations to one another as employer and employee.[49] Ministry retained those powers under both FFC and IF as set out in the comparison table **attached** as Schedule 1.

Consent, volunteering and the Ministry's floodgates argument

23. The Ministry has argued that declaring the appellants are employees of the Ministry could have unintended consequences, such as making persons become employees when they do not wish to.[50] Inglis CJ dismissed this argument, referring to s6(1)(b)(ii) and (c) of the ERA and noting that each case

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[45] *Lowe* at [139]

[46] *Prasad v LSG Sky Chefs* [2017] NZEmplC 150, upheld by the CA in [2018] NZCA 256

[47] FFC Operational Policy in Fleming bundle at [306.1169 – 06.1173], SPA Guide at Humphreys Bundle [302.0385 - 302.0387] and Fleming Judgment in EC at [12]

[48] *Prasad v LSG Sky Chefs* at [92]

[49] *Prasad v LSG Sky Chefs* at [97]. See for example mutual obligations in FFC Operational Policy in Fleming bundle at [306.1169 – 06.1173], and Ministry IF policy "Service Specification (Individualised Funding) July 2020 DSS-IFA v 1.8" at [300.1324 to 306.1343], clause 8.1.4

[50] *Fleming* Judgment in EC at [94]

turned on its own facts.[51]

24. Applying the definition of an employee, including homeworker, requires consideration of s6(1)(b)(ii) and (c) of the ERA. An employee includes "a person intending to work," however a person will not be an employee if they do "not expect to be rewarded for their work." Thus if a family carer indicates that they do not seek to be rewarded for their work they will be a volunteer rather than an employee.[52]

25. The appellants have indicated that they wish to be employees including the obligations that entails.[53] In addition to their actual care work they are already subject to policies which require participation in work planning assessments and meetings, health and safety, and reporting including the submission of timesheets. However the appellants expect to be paid for their work and to receive support from their employer.

26. Conversely, if the Ministry is not entitled to discriminate against family carers by relying on natural supports and the social contract (which were rejected in *Atkinson* and *Chamberlain*) then the Ministry is effectively arguing that the unpaid work being done by the appellants must be as a volunteer. That argument cannot be sustained in light of caselaw interpretation on the section 6 meaning of volunteer for purposes of the ERA.[54]

Who is the work for?

27. In addition to a requirement for "engagement" by a person, the homeworker definition in Section 5 has a further element that the work must be "for that person."

28. The Ministry has accepted that, if the appellants are found to have been engaged, then the work done by the appellants would be in the course of its trade or business. [55] In *Cashman* it was held that the work was being done for the Ministry or DHB.[56] While that ratio was not disturbed in *Lowe,*[57] a different

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[51] *Fleming* Judgment in EC at [61] and [94]

[52] In *Courage v Attorney General* [2022] NZEmpc 77 the EC stated that "The fact that the same kind of work is usually performed for pay can be an indicator that it is economic in nature, and it also means that unfair competition with paid employees is likely."

[53] Ms Fleming's evidence at [201.0026], Mr Humphreys at [301.0006 – 301.0014] and *Humphreys* Judgment at [14]

[54] See for example *Brook v Macowan* [2014] NZ EmpC 79 at [18 – 21] and *Courage* above

[55] See also *Lowe* at [89] and footnote 165, and the CA Judgment in Fleming at [45]

[56] *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA) at [10 - 13].

outcome was reached on the different fact scenario where the existence or identity of the carer was not known to the Ministry. In the present cases the Ministry had to approve the appellants as the carers,[58] and under IF they have to submit timesheets for payment.[59] It follows that the work done by the appellants in this case is for the benefit of the Ministry.

29. On the basis of the Ministry's own policies, and also separately on the basis of the State's obligation, the EC also found that the appellants' work benefitted the Ministry.[60]

30. The CA did not expressly address the second element of the homeworker definition, being who the work was "for the benefit of". Instead it criticised Inglis CJ's reliance on any State obligation, and said that her "task was to identify the meaning of "engaged" in s5 and determine whether Ms Fleming's circumstances satisfied the test for engagement."[61]

31. I submit that Inglis CJ was correct to rely on the State's obligations under legislation and Convention on the Rights of Persons with Disabilities (**CRPD**), as well as the wording of the various policies released by the Ministry from time to time, as relevant to determining who the appellants' work was for and thus who engaged them.

State obligation to care for persons over 18 years

32. In the CA in *Atkinson* in 2012 the Ministry's unsuccessful defence was partially based on the proposition that there was a "social contract" which required family carers to primarily look after family members, rather than the State.[62] In rejecting that position the CA cited Article 19(a) and 23.5 of CRPD, which require that the State ensure the disabled person can live in their chosen residence, and that it "undertake every effort" to provide care within the wider family."[63]

33. In *Chamberlain* the CA addressed the reasons why it is beneficial for all parties to have profoundly intellectually disabled persons living at home with their

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[57] See *Lowe* at [16]

[58] Under both FFC and IF. See Ministry IF policy "Service Specification (Individualised Funding) July 2020 DSS-IFA v 1.8" at [300.1324 to 306.1343], clause 8.1.4

[59] IF Resident Carer policy clause 8.2 at [300.1324 to 306.1343]

[60] EC Judgments in *Fleming* at [40] and *Humphreys* at [74]

[61] *Fleming* Judgment in CA at [81]

[62] *Atkinson* Judgment at [168]

[63] Atkinson at [42]

parents as the family caregiver.[64] The CA accepted the evidence that the disabled person would be more sick in an institutional facility and that there are "inestimable benefits for [the disabled person] and the State" from the role of the family carer… [particularly where the disabled person] requires constant care for 24 hours a day, seven day a week."

34. The CA went on to summarise the effect of the State's obligations when interpreting the Ministry's household care and personal management policies:[65]

> "If the starting premise is that the person's best interests are served by continuing to live in the home environment, and if a service is necessary to support that situation, it must qualify as essential given the overarching purposes of the legislative regime."

35. As of 2022 despite the foregoing the Ministry was still effectively taking a similar position in the present cases to its position of a decade prior, which is that: it can continue to rely on natural supports provided for free; the availability of institutional care facilities or the welfare benefit, together with its limited offers of paid hours, met its obligations under CRPD; so all the State had to do was offer Ms Fleming 15 hours (or 22 after requests for review) of pay for her work, and if she declined that then the State had no further obligations.[66]

36. The Ministry's submissions were effectively echoed by the CA in *Fleming*, which stated that under CRPD "a person with disabilities does not become the responsibility of the State"[67], and relying on the fact that "Treaties such as the Convention are not directly enforceable in domestic law unless they are incorporated into New Zealand law."

37. The Court went on to say that "…the State is required to provide support mechanisms that would allow a disabled person (supported by their family) to live independently, and in a manner of their choosing. This is not the same as imposing on the State direct responsibility for the care of a disabled adult."[68]

38. However the State is empowered, via various statutes passed by Parliament, to make welfare decisions for persons who lack capacity. For example, section 6 of the PPPR Act gives the Court jurisdiction over any resident over 18 years of

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[64] *Chamberlain* at [18 – 19]

[65] *Chamberlain* at [82]

[66] Submissions in the CA for the Ministry as appellant at [5.29 – 5.32]

[67] At [82]

[68] Fleming Judgment in CA at [84]

age who lacks capacity.[69] Section 10 allows the Court to make highly specific and all-encompassing orders as to where a person shall reside, what their living arrangements will be and what treatments they must receive.

39. A further example is the Health and Disability Services (Safety) Act 2001, which gives the State the power to monitor, enter into and inspect any premises where it suspects that disability care services are being provided.[70] If the Director-General of Health believes the services are not being properly and safely administered the Director-General can issue a cessation notice requiring that the disability care services be modified or stopped.[71]

40. The effect of these broad and paternalistic statutory powers is that when a person lacks capacity the State can direct and control every aspect of their lives.

41. Trustees have a duty to consider exercising their powers at regular intervals,[72] and similar principles apply to Ministers in administrative law.[73] Where the State has such power to control the lives of incapacitated persons, and knows of persons who require such care, it has an obligation to consider exercising its powers for their benefit. There is little dispute on the evidence that the Ministry was aware of Justin and Sian's disability care needs and that this care was being provided by their family carers, at least from the time of their first NASC assessments.[74]

42. Even if the Ministry thought that Part 4A of NZPHDA meant it could rely on the "social contract " and natural supports for the care of disabled persons over 18, there was a deliberate decision by Parliament to repeal s70A(1) in 2020. From that date the Ministry can have been under no illusions that it was responsible to ensure the care of disabled persons lacking capacity who require full-time care. The extent of that responsibility was informed by the CA's interpretation in *Atkinson*, *Chamberlain* and the legislation and CRPD set out above.

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[69] Protection of Personal and Property Rights Act 1988, s6 & 10

[70] And which includes the services of family carers. See Health and Disability Services (Safety) Act 2001, s5

[71] Health and Disability Services (Safety) Act 2001, s 40

[72] Trusts Act 2019, s32.

[73] See for example *RM v. Scottish Ministers* [2012] UKSC 58 at [43 – 47] where Lord Reed stated "even where a statute confers a discretionary power, a failure to exercise the power will be unlawful if it is contrary to Parliament's intention"

[74] Judgments of EC in *Fleming* at [4 and 79], *Humphreys* Judgment at [14], and correspondence at [301.0006 – 301.0014]

43. The State did in fact recognise its duties to "ensure disabled people and their families are supported to live the lives they choose" in the Disability Support Services: Service Specification.[75] The statements by the Ministry in its own policies are clearly relevant to the question of whether it engaged the appellants.

44. Given the CA's earlier confirmation[76] that the State is required to provide support to enable a disabled person to live in a manner of their choosing, it is difficult to reconcile its conclusion in *Fleming* that the invalidity of the social contract excuse does not lead to the conclusion that family carers of disabled persons "are more likely to be engaged by the MOH as a homeworker for the purposes of s 5, in comparison to being funded by some other mechanism."[77]

45. It is accepted that the State's obligations to provide care for disabled persons and not to discriminate against family carers[78] are not conclusive as to whether the Ministry engaged the appellants. However the State's obligations and the benefit to the Ministry of knowing that those duties are being fulfilled by the appellants are a relevant factor which makes it more likely that it is the employer for purposes of the homeworker definition.

Court of Appeal reliance on the appellants' options and choices

46. At [67] the CA explained what it meant by "alternative means by which the necessary care could be funded, either by Ms Fleming maintaining her existing benefit (which she did) or having external carers (which could be funded under other funding schemes such as IF)."

47. That is not a sustainable analysis given the CA's confirmation that the State has an obligation to provide support to allow the disabled person to live at home [at 84], the right of a disabled person to choose their carer,[79] and the finding in *Atkinson* that treating family carers any differently than commercial carers is discrimination.

48. The existence of the welfare benefit, which is a flat rate and does not take into account whether the work required to care for the disabled person is minor or at the most severe end of the scale, does not satisfy the State's obligations under the CRPD, Te Tiriti and the other legislation referred to above.

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[75] As noted by the CA in *Chamberlain* at [56]

[76] Judgments of CA in *Fleming* at [84] and *Chamberlain* at [18 – 19 and 82]

[77] Judgment of CA in *Fleming* at [86]

[78] This was the effect of *Atkinson* as recognized by the CA in *Fleming*

[79] *Atkinson* at [42] referring to CRPD

49. Nearly one in five Māori report having a disability.[80] In Parliament when debating the Sleepover Wages (Settlement) Act 2011 the Honourable Te Ururoa Flavell set out the importance and relevance of Tikanga to the issue of family carers, particularly in relation to "Māori and Pasifika whānau who have a cultural obligation to care for their own" and are doing so without being paid.[81] He also noted that it was:

> "…entirely contradictory that on one hand we want to reduce reliance on the State and increase whānau self-development and independence, yet on the other hand we refuse to give them the resources they need to do the job."

50. The Ministry itself acknowledges that Māori and Pasifika families especially feel they have a duty to sacrifice third party work and instead care for disabled whanau at home.[82]

51. The conclusions of the Royal Commission of Inquiry into Abuse in Care released in July 2024[83] are also relevant in assessing the Ministry's position that the availability of institutional care is adequate to meet its obligations if a family carer does not accept an offer of limited home support by the Ministry.

52. The two home-based care options available to a family carer since 2020 are both based on employment (through a HCSS provider or the disabled person as with FFC), and are still based on the Ministry's Template and artificially low hours. They are not realistic options for the reasons set out in the evidence of Ms Carrigan[84] and Mr Humphreys,[85] addressed further below.

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[80] Artemis Report April 2015 at 304.0754

[81] Hansard Volume:676;Page:21471, 27 Mahu 2011, Sleepover Wages (Settlement) Bill — First Reading, https://www.parliament.nz/mi/pb/hansard-debates/rhr/document/49HansD_20110927_00001203/sleepover-wages-settlement-bill-first-reading

[82] The "National Pacific Disability Action Plan: Discussion", Whaikaha, July 2023 https://www.whaikaha.govt.nz/about-us/programmes-strategies-and-studies/programmes-and-strategies/national-pacific-disability-action-plan/pacific-community-talanoa-feedback-report/discussion

"Whai mātauranga in relational and inclusive disability practice", Oranga Tamariki Guidance 2022, https://practice.orangatamariki.govt.nz/our-work/disability/practice-when-working-with-disabled-people/whai-matauranga-in-relational-and-inclusive-disability-practice/

[83] Royal Commission of Inquiry into Abuse in Care report July 2024 at [1] and [23]: https://www.abuseincare.org.nz/reports/whanaketia/preliminaries/executive-summary

[84] *Fleming* bundle at [201.0143]

[85] *Humphreys* bundle at [201.0011]

53. Even if a family carer needs to place their disabled family member in an institutional care facility there are limited options.[86] Successive governments over the last 30 years have pursued a policy of closing of disability facilities in favour community and home-based care.[87] Families rely instead on whatever haphazard solutions they can find, such as Justin staying at the Gables aged persons rest home to give Ms Fleming some respite.[88]

Cost of residential care versus paying homeworkers properly

54. This is not a case about all disabled persons, many of whom enjoy their status as employers under the IF system. This case is about the small percentage of persons who are severely intellectually disabled and thus do not have the legal capacity to be an employer.[89]

55. The Ministry has argued that it is entitled to choose how much to fund family carers and how to manage that funding within its budgets. Inglis CJ addressed this by stating that Parliament had not seen fit to include those as relevant to the definition of homeworker.[90] The Ministry's decisions cannot override the ERA and must be consistent with the Ministry's own published policies.

56. At the beginning of FFC the Government budgeted $24 million for it, however by 2020 when it ended the Ministry had spent only $14 million.[91] The Employment Court in *Humphreys* directed the Ministry to put before the Court information comparing the likely cost of caring for Sian in an institutional facility. The Ministry's memorandum 9 September 2021 estimated the cost at around

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[86] For example there appears to be no such facility available near Gisborne

[87] Per Ministry funded research paper "The impact of deinstitutionalisation on the families of the Kimberley Centre residents", 2008 at pg 3 https://www.donaldbeasley.org.nz/assets/publications/families/The-impact-of-deinstitutionalisation-on-the-families-of-the-Kimberley-Centre-Residents.pdf See also Nancy Swarbrick, 'Care and carers - The politics of care', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/care-and-carers/page-5

[88] Ms Fleming's evidence in Fleming bundle at [201.0012] and [201.0019]

[89] Ms Fleming described this 3 percent or so as needing a "minibus" because they were left behind when disabled persons with capacity took off in the "bus" created by the disability strategy to empower the people to make their own arrangements. See Ms Fleming's evidence at [201.0028 – 201.0029]. See also Artemis Report April 2015, [304.0755]. In *Atkinson* at [5] it was stated that the Ministry provided services in relation to around 30,000 disabled persons in total

[90] *Humphreys* Judgment in EC at [112]

[91] [202.0406 – 0407]

$160,051.41 per annum.[92] However on 18 December 2024 the Ministry addressed Cabinet in relation to budget blow-outs in disabled care facilities as a result of individualised funding rates for each disabled person, and recommended that going forward a flat rate of $900 per day [being $328,500 per annum] be paid for the care of each disabled person in care facilities.[93] It is stated that this would cover 95% of people in care facilities.

57. The Artemis Report stated that "the maximum annual salary (before tax) of a FFC funded family carer at the minimum wage is $30,680.[94] However even the figure given by the Ministry is similar to the cost of actually paying family carers for every hour of work they provide while awake including supervision.[95]

58. In December 2024 the Ministry released the **attached** assessments of the cost of care for Justin to stay at home with Ms Fleming (using the SPA Tool), or to be looked after in a residential care facility (using its "ICAR(e)" tool). The SPA Tool outcome of 90 hours is what Ms Fleming currently receives. The ICAR(e) tool outcome showed he would need 123.5 hours per week of paid care in a residential facility, including 14 hours of sleepover time.[96]

59. The outcome of the Ministry's attempts to limit hours offered to Ms Fleming in 2018 was a maximum of 22 hours. Despite there having been little significant change in Justin's care needs or Ms Fleming's hours of work, she currently receives 90 hours of pay from the Ministry.[97] Clearly there was no valid budget constraint that could justify an assessment which departs from the fact that Ms Fleming provides supervision care around the clock.

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[92][101.0033] and [101.0037] Albeit this estimate was based on much lower pay rates prior to the implementation of the Support Workers Pay Equity Settlement Act 2017, and likely does not include the cost of the buildings themselves

[93] Ministry Cabinet paper 18 December 2024 **attached** marked **[4.001]** www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/cabinet-papers/2024/improve-sustainability-of-disability-support-services/paper-action-to-improve-the-sustainability-of-disability-support-services.pdf

[94] Artemis Report at [304.0776]

[95] At $25.50 per hour, which was the top rate following Pay Equity in 2020, a family carer working for 126 hours per week would have received $167,076 per annum before tax

[96] Ministry Icar(e) assessment of Justin **attached** marked **[4.002]**. This figure is also based on Justin living in a group home with 3 or 4 other disabled persons

[97] [312.2500]

OFFER AND ACCEPTANCE ANALYSIS

60. The homeworker definition does not require that the traditional requirements of a contract be fulfilled. However the CA relied on engagement being a "quasi-contractual" concept and held that Ms Fleming was not a homeworker because she refused to sign the Ministry's offer in 2018. The CA also chose the date of Mr Humphreys' acceptance of FFC as the date for his employment. For the following reasons Ms Fleming was employed for purposes of the ERA even on a "quasi-contractual" analysis.

Good faith bargaining requirements in relation to impenetrable policies

61. The CA held that Mr Humphreys was employed by the Ministry when he applied for FFC.[98] The CA also held that when Ms Fleming applied for FFC in 2018 the Ministry made an offer of employment to Ms Fleming, but she rejected it.[99]

62. The CA effectively upheld the Ministry's argument that it had no obligations whatsoever to Ms Fleming because when she found out about and applied for FFC in 2018 she rejected the hours offered. However the Ministry was aware that Ms Fleming was providing necessary care services to Justin in 2013 when the Ministry made an offer of FFC to eligible persons.[100] The CA expressly rejected the Crown's argument (in relation to Mr Humphreys' case) that the Ministry could not have selected or engaged a family carer, because it only had retrospective knowledge of who had actually done the caring for each particular weekly pay period once the weekly or fortnightly timesheets or pay plan were submitted.[101]

63. In relation to Ms Fleming, the same analysis ought to apply. The EC having heard the evidence concluded as a matter of fact that the Ministry knew who the primary carer was, and would be informed or had the means to find out when a respite worker had been engaged for a particular pay period.[102]

64. The CA erred by failing to give any or due weight to the purpose and effect of sections 60 and 60A of the ERA. They effectively provide that a prospective

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[98] *Fleming* CA Judgment at [226 - 227]

[99] *Fleming* CA Judgment at [68]

[100] A unilateral *Carbolic Smokeball* offer pursuant to the reasoning of Young J in *Lowe* at [81 and 142]

[101] *Fleming* CA Judgment at [237 - 238]

[102] *Christine Fleming v The Attorney-General* [2021] NZEmpC 77 at [23]. See also FFC Operational Policy audit and monitoring lists at [304.0847 – 304.0851], Verification Standards referred to in [306.1365], Artemis Report [304.0782]

employer has obligations to be proactive in providing information and an opportunity to get advice on the proposed terms of an individual employment agreement and/or a collective employment agreement where the work is covered by an industry body.

65. The Ministry and Ms Fleming must have been negotiating the terms of an individual employment agreement during the FFC process. The work of family carers is also the subject of collective agreements in the industry.[103] As a "prospective employer" the MOH was required pursuant to s60 and 60A of the ERA to notify the family carer when negotiating the original offers, or negotiating for employment of the family carer with a potential new employer after 2020.

66. In 2012 the CA in *Atkinson*, in the context of policies under the NZPHDA, emphasised the need for the authorisation for the policy to be sufficiently specific and publicly accessible.[104] Despite this by 2015 the CA in *Chamberlain* was still expressing concerns about the rule of law arising from the nebulous definition of a "family care policy."[105]

67. The Ministry was aware that its policies and their implications were "impenetrable" but did little to communicate with Ms Fleming when negotiating FFC. The Ministry's offers to Ms Fleming[106] must be viewed in light of its non-compliance with s68 of the ERA, and the power of the Court under s69 to remedy that breach by determining the terms of employment.[107]

Interpretation/implication of reasonableness for offer, and acceptance by Ms Fleming in fact

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[103] For example the PSA Home and Community Support Workers - Collective Employment Agreement, the Care and Support Workers Pay Equity Settlement Agreement 2017, https://etu.nz/wp-content/uploads/2017/08/Care-and-Support-Workers-Pay-Equity-Settlement-Agreement-1.pdf That agreement records [at footnote 27] that "There are approximately 55,000 Employees employed under several collective agreements." The rates in the agreement were in fact applied to family carers once FFC was repealed, but they were not provided with information about the collective agreement

[104] *Atkinson* at [182]

[105] *Chamberlain* at [43]. That included certain practices "whether or not reduced to writing", and purported to accord a public servant power to define the terms of such an unwritten practice retrospectively.

[106] A unilateral offer in 2013, and a bilateral negotiation in 2018

[107] The Court's power under section 69 of the ERA is limited only by a requirement to first direct the parties to attend mediation under section 164

68. Where a statute delegates powers to a public servant, principles of administrative law apply to their decisions. Courts can either interpret the statute to require that the power not be exercised unreasonably,[108] or find that an unreasonable use of the power is ultra vires.[109]

69. In the present case, the exercise of the delegated power granted to the Minister by Section 70D(3)(b) of NZPHDA to set conditions on payment ought to be interpreted as allowing the Minister to set "reasonable conditions." If that were not the case then the Minister could set irrelevant conditions, or conditions which were inconsistent with its own policies, or in breach of the ERA.[110]

70. The offer of between 15 and 22 hours was based on its Template, which had no statutory basis and was inconsistent with the Ministry's own policy statements and the meaning of work hours for purposes of employment law.[111] Ms Fleming could not reasonably have been expected to understand the relevant policies, or the implications of signing up as both employer/employee as has now become clearer from the CA decision in *Humphreys*.

71. In the above circumstances where Ms Fleming was entitled to payment by the State, but the amount of the offer was unlawful (as a breach of the State's obligations, employment law and ultra vires) and she had not been provided a reasonable opportunity to understand the issues in good faith bargaining, the refusal to sign the Ministry's hours calculation should not be held against Ms Fleming.

72. There is no real difference between a family carer signing an unlawful offer on behalf of the disabled person on the basis that they intended to sue the Ministry

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[108] In *Discount Brands Ltd v Northcote Mainstreet Inc*. [2004] 3 NZLR 619 at [50] Hammond J stated that New Zealand courts have moved to adopt a 'hard-look doctrine' or 'super-Wednesbury' doctrine, whereby the depth of review is 'altered to (at least) a less deferential "reasonableness" inquiry' where important interests are involved. See also *Wolf v Minister of Immigration* [2004] NZAR 414 at [47]

[109] The High Court of Australia has held that a disproportionate exercise of an administrative discretion might be characterised as irrational and unreasonable on the basis that it 'exceeds what, on any view, is necessary for the purpose it serves', per French CJ in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [30]

[110] The CA in *Fleming* upheld the EC's Judgment rejecting the Ministery's argument that Part 4A excluded the Employment Court's jurisdiction or consideration of compliance with the ERA. See *Humphreys* at [39 and 50 – 54]

[111] Under the ERA, Minimum Wage Act and caselaw as addressed further below

(*Humphreys*), and a family carer agreeing to all of the terms except the unlawful number of hours offered and then suing the Ministry (*Fleming*).

73. In 2018 Ms Fleming applied for IF Respite.[112] Her application was accepted and, when no other carers were available, she received those payments from the Ministry to care for Justin.[113]

74. At the same time Ms Fleming also applied for FFC in 2018. As required by the FFC process she indicated that she would accept its terms and wanted to go ahead. It was only when the allocation of 15 hours was presented to Ms Fleming that she declined to sign an Individual Service Plan on behalf of Justin. A signature or lack thereof is not determinative in employment matters, but especially so in these cases where the signatures were either to be made by or on behalf of persons who lacked capacity. The CA erred by relying on Sian's "purported acceptance" to differentiate her and Mr Humphreys' position from that of Justin and Ms Fleming.[114]

75. Ms Fleming's acceptance of the FFC terms was sufficient for the parties to commence their employment relationship, even if they were still in dispute over the number of hours that she would work. That is especially so in the employment context and where there is machinery in place to determine such issues while the parties relationship continues in good faith.[115]

76. It is common in employment for the Authority or EC to determine fair terms of employment where the parties cannot agree.[116] There are no limits on the remedies available for unfair bargaining under s69, other than a requirement for the parties to mediate their differences in good faith before the Authority varied terms.[117]

IF PERIOD FROM MID-2020 ONWARDS

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[112] *Fleming* bundle at [307.1468]. This document is illustrative of the employment relationship between the Ministry and Ms Fleming not changing between 2018 and 2020 under the almost identical IF Resident Carer policy

[113] Ms Fleming's evidence at [201.0024 – 201.0025]

[114] Fleming CA Judgment at [227]

[115] The NASC assessment could determine the number of hours actually worked. It was only when the Template was applied that it produced an absurd outcome

[116] For example in enforcing the obligation of a party to bargain in good faith when negotiating for a new collective agreement

[117] ERA s164. The Authority or Court are required by s188 to consider directing the parties to attend mediation in good faith before their dispute will be heard by the Authority, and usually do

77. The CA accepted that as at mid-2020 Mr Humphreys was an employee of the Ministry of Health. However, simply because there was another option available through an HCSS provider as the employer, that meant that Mr Humphreys' employment somehow came to an end.[118] The CA did not explain exactly how this transition or termination occurred for purposes of employment law. The Ministry failed to follow the requirements of employment law, there was no valid consent by Mr Humphreys when being moved onto IF and no fair and reasonable alternative option.

Restructuring/redundancy process requirements

78. The starting point is that where an employer has an employee, they cannot terminate that employee except on limited grounds of redundancy or transfer to a new employer following a detailed formal restructuring proposal and consultation process.[119]

79. Section 69OJ and 69OI of the ERA require that every employment agreement contain an employee protection provision, and which must include the process that the employer will follow in negotiating with a new employer and the matters relating to the affected employees' employment. Alternatively, the Ministry was obliged to take steps to protect employees' rights in accordance with whatever contractual arrangements it reached between the Ministry and HCSS providers. There is no evidence as to what steps taken by the Ministry to comply with its restructuring obligations.

80. Section 69G of the ERA provides that where an employee will be affected by restructuring an employer must provide the employee with information sufficient for the employees to make an informed decision, and an opportunity to exercise their right to make an election. There are prescribed forms of information which must be provided, including the nature and scope of the restructuring and notices regarding disclosure of employee information.

81. The Ministry of Health did not comply with the above ERA sections, or the basic requirements of a valid restructuring process as commonly upheld by the

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[118] *Fleming* Judgment in CA at [247-258]

[119] See for example *Fleming* Judgment in EC at [30] citing *Rasch v Wellington City Council* [1994] 1 ERNZ 367 (EmpC) at 383, where it was held "Such contracts are not assignable; an employee without his or her fully informed consent cannot be put by one employer into the service of another"

Employment Court in every other case including consultation and an opportunity to have feedback considered.[120]

82. The Ministry's consultation obligations in 2020 were heightened in the present cases by the existence of these ongoing cases.[121] By 2019 these proceedings had been filed alleging that the Ministry was the employer rather than the disabled person, and expecting it to comply with employer obligations.[122]

83. Instead, the Ministry of Health simply sent a letter to Sian and other disabled persons receiving FFC telling them that FFC was coming to an end and they had to choose one of two options to continue receiving payment for their work.[123] The options were effectively either:

(i) Effectively continuing with the same system they had operated under FFC, where the family carer was employed by the disabled person. Under that IF Resident Carer ("**IF**") system the family carer would receive $37.00 an hour;[124]

(ii) Or alternatively they could try to find a third party HCSS company (for example Geneva Healthcare) to seek employment with them, which would mean receiving $25.50 or less per hour.[125]

84. The Ministry's letter stated "you will be transitioned on your current allocation of support – there is no need for reassessment." Both of the options provided by the Ministry were still based on the NASC controls,[126] including the Template and other Ministry practices to produce an artificially low number of hours. None of the underlying details were provided to the disabled person or their

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[120] For example per *New Zealand Steel Ltd v Haddad* [2023] NZEmpc 57 genuine consultation is required, and predetermined decisions without proper employee engagement can give rise to an unjustified dismissal claim. See also *Jinkinson v Oceana Gold (NZ) Ltd* (No 2) [2010] NZEMPC 102 CRC 4/08 at [32-43] and [146].

[121] [101.001]

[122] Mr Humphreys' claim was filed in 2019

[123] The first letter stated that existing FFC carers could "continue" under IF. See Ms Carrigan's evidence in Fleming bundle at [201.0142] at [81] and letters in Humphreys bundle at [306.1296] and 306.1298]

[124] This rate was supposed to include the cost of training and payroll functions.

[125] As of 2020 the top rate under Schedule 2 of the Support Workers (Pay Equity) Settlements Act 2017 was $25.50

[126] See Ministry IF policy Service Specification (Individualised Funding) July 2020 at [300.1324 to 306.1343], [201.0142] at [81] and letters in Humphreys bundle at [306.1296] and 306.1298]

family carers,[127] and who would not have understood the continued use of the Template or implications of signing up as both employer/employee (as has now become clearer from the CA decision in *Humphreys*). The structure set up by the Ministry and the terms it produced were no less "impenetrable" to resident family carers in 2020 than it had been when noted as such by the courts in *Atkinson* and *Chamberlain*.

85. The CA in *Fleming* stated that Mr Humphreys was "selected" as Sian's agent [by the Ministry] on the basis he would manage the funds and provide the care, but it should have been clear to Mr Humphreys that his "engagement" [by the Ministry] was as Sian's agent "not more".

86. Given the split coram in *Lowe* and Mr Humphreys' ongoing proceeding seeking a declaration that the Ministry was his employer (and which confirmed he was right), it was reasonable for Mr Humphreys to believe that if he chose the IF option then the Ministry would remain his employer. At the very least given the lack of information provided to Mr Humphreys it was not correct for the CA to say that "must have known" he would only be left without a true employer if he chose IF.[128]

HCSS providers

87. The only thing that would have been clear to Mr Humphreys is that if he chose to transfer to the HCSS option in 2020 then he would receive a much lower pay rate, but without adequate independent employer support to justify the difference in pay. In practice the HCSS provider largely clips the ticket on the Ministry's existing system, and does not actually provide the support usually required of a true employer. For example:

    87.1 A HCSS provider does not offer payment for hours actually worked. Instead it simply applies the Ministry's existing Template hours of payment;[129]

    87.2 If Mr Humphreys needs to call in sick there is usually no other replacement carer available or provided by the HCSS provider;[130]

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[127] EC Judgment in *Fleming* at [101.0084]

[128] CA Judgment in *Fleming* at [256]

[129] [201.0142] at [81] and letters in Humphreys bundle at [306.1296] and 306.1298], IF Service Specification at [300.1324 to 306.1343]

[130] See for example Ms Fleming's evidence at [201.0024], [201.0012] and [201.0019], and Mr Humphreys' evidence at [201.0080] and Artemis Report in Humphreys bundle at [304.0778 – 9]

87.3 The HCSS provider remains uninvolved in health and safety within the home.[131] The HCSS providers have effectively adopted the approach of the Ministry in accordance with the Service Specifications by assuming that the hours dictated by the Ministry are sufficient to address health and safety issues. When Mr Humphreys raised health and safety issues relating to bathroom arrangements for Sian the issue was forwarded by the NASC to the Ministry to deal with as the decision-maker and funder;

87.4 The way that the issues of breaktime,[132] and public holidays[133] and other employment entitlements operate in practice for resident family carers under the HCSS model is no different than under the IF Resident Carer model – there is effectively no real system in place.[134]

88. It is difficult to find a HCSS employer, for the reasons given in evidence in *Humphreys* .[135] The only real option would have been for Mr Humphreys to hide his intention to immediately sue whichever HCSS provider accepted him as an employee, pointing out all of the above flaws in the system and the lack of support provided.[136] The EC stated that "effectively, [the appellant] felt he had no choice".[137] Unsurprisingly very few persons signed up to be an employee under the HCSS scheme.

Ministry responsibility for health and safety issues

89. The Ministry's position under FFC, and IF until 2023, initially sought to avoid any responsibility for health and safety by making the disabled person be the employer of the family carer. However the Health and Safety at Work Act 2015 (**HSWA**) defines "worker" very broadly to include a homeworker,[138] but expressly excludes from the definition of a PCBU "an occupier of a home to the extent that the occupier employs or engages another person solely to do residential work".[139]

90. It is not therefore possible for the Crown to require that the disabled person assume the responsibilities of an employer including health and safety in their

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[131] *Humphreys* bundle at [201.0011]

[132] Amanda Bleckmann evidence at [201.0154]

[133] See for example queries to the Ministry about public holidays at [310.2253]

[134] Amanda Bleckmann evidence at [201.0154]

[135] [201.0079 and 201.0087 – 201.0089]

[136] *Fleming* bundle at [201.0143] and *Humphreys* bundle at [201.0011]

[137] EC Judgment in *Humphreys* at [30]

[138] Health and Safety at Work Act 2015 Section 19

[139] Health and Safety at Work Act 2015 Section 17

home. Yet every work site must however have a PCBU, being any person who has organisational control of the conditions of a work site. Section 36 requires a PCBU to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU.

91. Importantly the Ministry's successor Whaikaha has now accepted that it is a PCBU with health and safety responsibilities in relation to work done by family carers under IF.[140] This points towards the Ministry being the employer of the appellants, and belies the Ministry's arguments that it does not have the organisational capability to be an employer and to address issues arising from homes being a workplace.

92. Long ago the Ministry was put on notice by Mr Humphreys and Ms Fleming that its ongoing approach of ignoring its health and safety obligations is putting the appellants at risk including via accidents, burnout and mental health issues.[141]

THE TEST FOR "WORK" IN RELATION TO HOMEWORKERS

93. The test in *Idea Services* is sufficiently broad to assess the facts of each family carer and homeworker case. There is no certain outcome in relation to sleepover hours, as there are factors for and against the time spent by homeworkers while in bed being considered work. A critical factor based on existing caselaw may be whether there are serious health and safety issues ongoing during each relevant period, which mean that the homeworker must be ready to arrange medical care at short notice.

94. The CA's statement at [120] also appears to bring into question whether supervision work done by family carers and/or other homeworkers during the day amounts to work. The CA's statement ought first be clarified to ensure it does not make future litigation necessary for family carers and to remove any reliance on it before the Authority in future homeworker cases.

Meaning of work during the day and the Work From Home (WFH) trend

95. In recent years employers have increasingly been directing their employees to WFH in order to save on overheads. If employers believed that they could pay

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[140] "How Whaikaha checks the quality of disability supports and safeguarding of disabled people (Quality and safeguarding framework)", Whaikaha July 2024, How-Whaikaha-ensures-the-quality-of-disability-supports-quality-framework.docx

[141] See picture of Sian's injury at 301.00003, Mr Humphreys explaining the need for a bathroom modification at 201.0061 Tab 10 and his lack of sick leave at [201.0080]. See also Ms Fleming's warnings to this effect in the NASC assessments at [307.1501]

employees less while they are required to be more flexible in their availability, simply because they are at their home, employers will inevitably try to do that.

96. The CA has not addressed, or incorrectly approached, the issue of necessary supervision. If the CA is suggesting necessary supervision while the family carer is awake is not included in the definition of work, then that is an error of law inconsistent with *Idea Services, Atkinson*, *Chamberlain*, public policy and Parliament's intent when passing the Sleepover Wages (Settlement) Act 2011.

97. It is common ground (and expressly stated in the NASC assessments) that both Justin and Sian require supervision for health and safety purposes. Thus the appellants are not free to work another job during those hours. The Ministry's witnesses admitted[142] that the effect of the criteria set out in the NASC Guidance document was that if the family carer could work in alternative full-time employment, then they would not be eligible for FFC.

98. In *Chamberlain* the CA stated that, where a disabled person required constant care and can never be left unsupervised,[143] those services were necessary to enable the disabled person to remain in the home and thus "essential" for purposes of Ministry funding policies[144] The same facts and reasoning apply in the present cases.

99. Many employees are required to work in a role where no "hands-on" tasks need to be physically performed for periods of time, other than being reasonably alert enough to meet the employee's responsibility to monitor a prescribed task or risk that is important to their employer.[145] Most of the significant cases citing *Idea Services* occurred prior to 2020, yet the test in that case has been flexible enough to accommodate the WFH revolution that occurred when people were locked down in their homes due to Covid-19 restrictions.

100. In relation to total hours of work, in *Hill v Shand*[146] although the overnight hours of broken sleep were not found to be work, the Authority readily held that the employee was working approximately 16 hours per day from 7am until 11pm at night. The outcome of the Ministry's last assessment is that Mrs Fleming is now being paid a sum equal to a total of approximately 90 hours per week, meaning

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[142] Stuart Atkinson evidence at [202.0360 – 202.0362] and

[143] *Chamberlain* at [18 – 19]

[144] *Chamberlain* at [82]

[145] For example security guards, I.T technicians and persons who have to be ready to immediately greet V.I.P customers on arrival

[146] [2014] NZERA Christchurch 66

that some of her necessary work on tasks other than "household management and personal care" is being recognised.[147]

Sleepover work - policy background

101. At the same time that the Government was considering the issue of discrimination against family carers compared to commercial carers, it was also negotiating a settlement with disability carers and then passing the Sleepover Wages (Settlement) Act 2011 (the **Sleepover Act**).[148]

102. In May 2011 this Court granted leave to appeal in *Idea Services v Dickson* on approved grounds including whether sleepovers constitute "work".[149] The Sleepover Act was put before Parliament under urgency and passed in October 2011, rendering the appeal moot. During the Second Reading of the Sleepover Act Bill the Minister of Health spoke about the intention of the Bill being to create a framework to potentially resolve sleepover issues for other employees and employers funded by the Crown (in addition to those expressly covered by the Bill).[150]

103. The Ministry has at all relevant times since *Chamberlain* continued to rely on the Service Specifications,[151] which include Sleepover Care or Night Support. This is defined as "A Service where the Support Worker or Other Staff Member is required to sleep at the home of the Person in order to provide intermittent care throughout the night."[152] The Ministry's own policy thus confirms that in these circumstances a family carer is required to remain in the home throughout the night, and in a state of readiness to assist their charges.

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[147] [312.2500] potentially as a result of being involved in this litigation, rather than any overall change in Ministry policy.

[148] The Judgment in *Idea Services* was issued by the Employment Court in 2009, and upheld by the CA in 2011. The decision of the Human Rights Review Tribunal in *Atkinson* was issued in 2010 [*Atkinson v Ministry of Health* [2010] NZHRRT 1]. The CA upheld *Atkinson* in 2012 [2012] NZCA 184]

[149] *Idea Services Limited V Dickson* SC 25/2011

[150] Hansard 6 Oct 2011 [Volume:676;Page:21832], Sleepover Wages (Settlement) Bill — Second Reading, In Committee, Third Reading https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20111006_00000934/sleepover-wages-settlement-bill-second-reading-in

[151] As confirmed by the CA in Fleming at [12]

[152] At 6.6.3 of the Service Specifications, as quoted by the CA in Fleming at [12]

104. In *Chamberlain* the CA effectively stated that if supervision was essential for the disabled person's safety, then it did not fall within the category of natural supports which could be relied on by the Ministry unfunded.[153]

105. If the Government wished to it could differentiate the position of family carer sleepovers from other employees, just as it did temporarily with the Sleepover Act to give employers 3 years to make transition arrangements. The UK has legislated different treatment of sleepover work.[154] The fact that the New Zealand Parliament has not done so despite many opportunities,[155] and the existence of the Sleepover Care provisions in the Service Specifications, must mean that the existing test in *Idea Services* is sufficient to address family carers on a case by case basis.

The application of *Idea Services Ltd* test to family carers/homeworkers

106. The criteria set out in *Idea Services* are sufficiently flexible to cover sleepover time in family carer and homeworker cases. **Attached** is a schedule of sleepover cases and/or citing *Idea Services v Dickson*. The flexibility of those criteria was lauded by the CA and has been adequate to address all types of cases since then.

107. The outcome of the application of *Idea Services* criteria to each family carer case on their particular facts is not inevitable. For example there are many facts or factors set out in the EC Judgment in *Idea Services* and other sleepover cases which are distinguishable from the position of Ms Fleming and Mr Humphreys.[156]

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[153] *Chamberlain* at [82]

[154] The CA in *Fleming* did not engage with the reasoning of Inglis J in *Humphreys*, where she pointed out the different statutory context in New Zealand compared to England and distinguished *Royal Mencap*.

[155] For example when passing the Sleepover Act 2011, Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016, the Support Workers (Pay Equity) Settlements Act 2017, the repeal legislation for Part 4A of the NZPHDA in 2020, or the 44 versions of the ERA between 2011 and 2024 as a result of amendments

[156] (i) Mr Dickson required the permission of a supervisor before being allowed to leave the home; (ii) Mr Dickson was not allowed to consume or be affected by alcohol or other drugs; (iii) Mr Dickson was not allowed to have visitors without the prior permission of a manager; (iv) Mr Dickson was required at the start of each sleepover to consult a daybook in the home to communicate with his employer and ensure that routine and emergency evacuation procedures were current and known; (v) A daily fire check of the home was required to be completed during each sleepover and signed off by Mr Dickson; (vi) The collective agreement which applied to Mr Dickson provided that he may not be required to complete more than six sleepovers per fortnight

108. On the other hand there are constraints placed upon Ms Fleming and Mr Humphreys by their work as family carers, they have important responsibilities placed on them and there is a benefit to MOH and its successors in having the work of family carers performing their role.

109. The Ministry has submitted that there will be difficult cases in grey areas if caselaw on sleepover work time is applied to family carers. As set out in the Employment Court decisions of Her Honour Judge Inglis in *Fleming* and *Humphreys*, the ERA and Employment Court is well used to the pragmatic approach to this assessment task on the facts of each case.

110. By way of example, in *Leaupepetele v Wesley College Board of Trustees*[157] the Authority surveyed the case law on sleepovers and found that the applicant, who resided on the employer's grounds and had to deal with incidents and disturbances overnight, was working during that period. The Authority applied the pragmatic and untechnical approach mandated by section 157 of the ERA to calculate the unpaid wages owing.

111. By contrast, in the 2014 case of *Hill v Shand*[158] and the 2023 case of *Tindall v Winterset Proprietary Ltd*[159] the Authority found that the employees were not working while asleep, despite them living in their own separate homes (albeit on or adjacent to the employer's premises) and being awoken during the night to undertake employment duties.

112. In *Hill* the Authority stated that, unlike in *Idea Services v Dickson* and the *Sanderson v Woodford House* cases, the persons being cared for:

> "…were not vulnerable people for whose physical and emotional welfare Mr Hill had sole responsibility overnight. For example, Mr Hill was not in loco parentis. He had limited responsibility for the campers' welfare compared to a boarding school matron's or a residential care community service worker's responsibilities."

113. Similarly the Authority's reasoning in *Tindall* was that the guests' demands were "not in the category where that response relates to special needs of serious health or welfare." Notably in that case there were no written terms and

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without his consent; (vii) The collective agreement applying to Mr Dickson provided expressly for overtime to be worked and paid for at overtime rates.

[157] [2019] NZERA 400, Auckland

[158] [2014] NZERA Christchurch 66

[159] [2023] NZERA 608, Christchurch 18 October 2023

conditions of employment, but the Authority used its investigative mandate to find what terms were implied.

Alternative approach - on-call time overnight

114. If a family carer is found to not be working during the period that they are asleep in their own homes, though still responsible to assist when their charges wake, the family carer will almost certainly be found instead to be "on-call" during that period for purposes of the ERA. An availability provision is allowed by section 67E(5)(a) of the ERA if it would not be practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision. That test is likely met in the case of family carers.

115. Section 67E(6) of the ERA provides that where an employee is not working, but is required to be available to perform work, they must be paid "reasonable compensation." The amount of that compensation is to be determined between the parties. Traditionally employees have agreed to accept a lesser allowance for on-call hours compared to their usual hourly rate of pay. It will likely be in the parties' interests to reach agreement, as the cost of paying a third-party commercial carer for these overnight hours instead would be much higher, and the family carer would likely prefer not to have a third party arrive in the home overnight.

116. Failing agreement the amount of compensation for on-call hours can be determined on a quantum meruit basis.[160] In *Pretorious v Marra Construction (2004) Ltd*[161] and *Stewart v AFFCO New Zealand Ltd*[162]Judge Corkill surveyed the law and concluded that both the Authority and the Employment Court had jurisdiction to consider a quantum meruit claim it the work amounts to a benefit, which the Court can properly direct payment for under s 123(1)(c)(ii) of the ERA.

CONCLUSION

117. The answer to the approved questions is that:

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[160] Using the principles canvassed by Palmer J in *Electrix Ltd v The Fletcher Construction Company Ltd* [2020] NZHC 918

[161] [2016] NZEmpC 95, [2016] ERNZ 591 (at [78])

[162] [2022] NZEmpC 200, [2022] ERNZ 1013. Judge Corkill observed that the Supreme Court's judgment in *FMV v TZB* supported the approach at [82]

117.1 The CA erred in finding that Ms Fleming was not employed as a homeworker by the Ministry;

117.2 The CA erred in finding that Mr Humphreys and Ms Fleming were not employed as homeworkers by the Ministry after 2020;

117.3 The test for work in *Idea Services* can accommodate the circumstances of homeworker cases, including family carer cases.

DATED this 30th day of January 2025

L T Meys
Counsel for second respondents

Note: Counsel certifies pursuant to the clause 6(2) of the Practice Note dated 5 July 2023, that having made appropriate enquiries to ascertained whether this submission contains any suppressed information, to the best of Counsel's knowledge the submission is suitable for publication.

Schedule 1 – comparison of FFC and IF

	FFC	IF
Audit / Oversight powers	The Ministry retains the right to audit family carers' to ensure compliance with funding conditions, quality of care, eligibility requirements. 304.0847 (FFFC Operational Policy)	Ministry retains the ability to audit but responsibility is delegated to IF hosts. 306.1364 (Humphreys bundle)
Control over work conditions	10 How FFC payments are made: "It will not be the NASC's responsibility to administer the payments to the disabled person. That will be the Ministry's responsibility. The disabled person will be required to have a bank account into which the FFC payments will be made. 304.0845 11.2 The Ministry's responsibility for monitoring [304.0847-8] 12 Responsibilities of the Ministry include: h. stopping payments where the Ministry is notified and reasonably believes that requirements of the disability support services are not being met – 304.0849.	Same payments systems Access to IF may be denied, or subject to conditions. – p 306.1363 *Eligibility for IF is determined by local NASC – NASC is agent of MOH – NASC refers person to MOH contracts HCSS provider (ref to flowchart on p 301.001)* *MOH still determine funding caps, eligible services, and the framework within which care is provided. Ongoing control over key terms demonstrates retained employer-like influence.*
Accountability for non-compliance	Ministry may cease the funding – 304.0846	Ministry's Audit and Compliance team under IF – 306.1365

Schedule 2 - sleepover cases

1. *Idea Services Limited v Dickson* CA405/2010 [16 February 2011]
2. *NZ Professional Firefighters Union v NZ Fire Service Commission* [2011] NZEmpC 149
3. *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25
4. *Hill v Shand* [2014] NZERA Christchurch 66
5. *South Canterbury DHB v Sanderson* [2017] NZEmpC 127, EMPC 82/2017
6. *E Tu Inc v Mount Cook Airline Ltd* [2022] NZEmpC 48 EMPC 295/2019
7. *Labour Inspector v Smiths City Group Ltd* [2018] NZEmpC 43
8. *Christall v KLJ Ltd* [2019] NZERA 674 3030034
9. *Lukitau-Ngaamo v Nelson College* [2019] NZERA 484 3047314
10. *Kidd v Epsom Girls Grammar Board of Trustees* [2019] NZERA 183 3033191
11. *Attorney-General v Fleming* [2024] NZCA 92
12. *Ovation New Zealand Ltd v New Zealand Meat Workers & Related Trade Union Inc* [2019] NZCA 146
13. *Hay v Blind and Low Vision Education Network NZ* [2016] NZERA Auckland 138
14. *Leaupepetele v Wesley College Board of Trustees* [2019] NZERA 400