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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 42/2024
[2025] NZSC Trans 8

BETWEEN **CHRISTINE FLEMING**
Appellant

AND **ATTORNEY-GENERAL**
JUSTIN JAMES COOTE
Respondents

SC 44/2024

BETWEEN **PETER HUMPHREYS**
Appellant

AND **ATTORNEY-GENERAL**
SIAN JIMINEZ HUMPHREYS
Respondents

Hearing:	29-30 April 2025
Court:	Winkelmann CJ Ellen France J Williams J Kós J Miller J
Counsel:	P J Dale KC, M A Jeffries and M K Mahuika for the Appellant Fleming

P Cranney and E Griffin for the Appellant Humphreys
S V McKechnie, B A Heenan, T J Bremner and L J Goodwin for the Respondent Attorney-General
L T Meys for the Respondents Coote and Humphreys
S P Pope, K M Dunn and N Y Murray-Ragg for the Intervener Aotearoa Disability Law Incorporated
M S Timmins and P A Mitskevitch for the Intervener Te Kāhui Tika Tangata | Human Rights Commission

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CIVIL APPEAL

MR DALE KC:

Good morning your Honour. I appear for the appellant together with Mr Jeffries and Mr Mahuika.

WINKELMANN CJ:

Mōrena.

MR MEYS:

E ngā Kaiwhakawā. Meys tōku ingoa, tēnā koutou. I appear for the second respondents.

WINKELMANN CJ:

Tēnā koe Mr Meys.

MR CRANNEY:

If the Court pleases. My name is Cranney and I appear with Emily Griffin for the appellant in SC 44.

WINKELMANN CJ:

Tēnā korua Mr Cranney, Ms Griffin.

MS MCKECHNIE:

E ngā Kaiwhakawā, tēnā koutou. Ko McKechnie ahau. Kei kōnei mātou ko Heenan, ko Bremner, ko Goodwin, mō te Karauna.

WINKELMANN CJ:

Tēnā koutou.

MS POPE:

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Pope tōku ingoa. Kei kōnei mātou ko Ms Dunne, ko Ms Murray-Ragg, mō Aotearoa Disability Law Incorporated.

WINKELMANN CJ:

Tēnā koutou.

MR TIMMINS:

Tēnā ngā Kaiwhakawā. Ko Timmins, mō ko Mitskevitch, mō Te Kāhui Tika Tangata. Timmins and Mitskevitch for the Human Rights Commission.

WINKELMANN CJ:

Tēnā korua Mr Timmins and Ms Mitskevitch. Now don't stand up Mr Dale.

WILLIAMS J:

A positive start.

WINKELMANN CJ:

So we blindly accepted the suggestion I think of Mr Cranney, conveyed through Mr Dale, that we go appeal by appeal, but then we discovered, when we thought about it this morning, that it raised some questions. So we're going to ask Mr Cranney about how we conceptualised that plan of action being worked through, particularly in respect of Mr Meys and the intervenors.

MR CRANNEY:

Your Honours, I think that it would probably mean that Mr Meys would have to speak twice. But your Honours I will abide. I think we're going to get a fair hearing here over two days and whatever your Honours think is the best way to proceed with it.

WINKELMANN CJ:

I think that is fine, still going appeal by appeal, and the intervenors would speak then after Mr Meys in relation to the Fleming appeal, but not otherwise?

MR CRANNEY:

Yes, just once, yes your Honour.

WINKELMANN CJ:

Yes. I think that's suitable. And when Mr Meys speaks, you would just speak briefly in respect of the Humphreys appeal. You'd deal main – only particular issues arise there and I imagine there's not much really.

MR MEYS:

No Ma'am. The Fleming appeal didn't really go until 2020, and then when I speak to Humphreys it would be 2020 onwards perhaps. That may make sense?

WINKELMANN CJ:

Yes, okay. In terms of timing allocation we've got a lot of people to get through and Mr Dale, you may now stand. Have counsel discussed timing allocations?

MR DALE KC:

No we haven't your Honour but I thought, I optimistically would probably get through my part of the argument by 12.

WINKELMANN CJ:

So we've done some calculations and we think you have to be finished by morning tea.

MR DALE KC:

Yes, and I'm entirely in your Honour's hands then. These things always turn on the extent of the Courts' interventions.

WINKELMANN CJ:

So we're going to try and restrain our natural tendency to ask lots of questions and instead only ask those which are necessary. But what we propose Mr Dale is that we give you 15 minutes where we don't interrupt you, other than for minor points of clarification, just so you can give us an overview of your appeal. So we hand over to you now.

MR DALE KC:

Thank you your Honour. Can I just say by way of introduction that the appellant is present in court and Justin is in the back of the court as well, and will no doubt give you a friendly wave.

WINKELMANN CJ:

Kia ora.

MR DALE KC:

This is, of course, as you know an employment law case. I have been doing this for 10 years now with Ms Carrigan. If you see me jerk involuntarily at any stage it's because she's reigning me in once again. But she and I embarked upon the *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771 litigation thinking that if we got a good result that would be the end of this litigation, and that was because it seemed to us that there were inherent absurdities in the Crown's case in terms of allocation of hours, and that if the Court clarified the basis upon which funded family care would be made, that would be the end of it, and we went through the process with the High Court

and the Court of Appeal, and quite a comprehensive judgment of the Court of Appeal in favour of Mrs Moody and Mr Chamberlain.

After that case we settled with the Crown thinking there would be a change in its policies. There has been no change and central to my case, after I set the scene, is to take your Honours through the *Chamberlain* judgment because in my view it is an excellent road map as to how these problems can be resolved, and that includes in particular what can be included in funded family care and what cannot.

So I am going to begin against that backdrop with looking at the NASC report for Justin, and you find that at 307148 –

WINKELMANN CJ:

So this is your 15 minutes to give us an overview of your appeal. I mean that's for you as to how you spend it.

MR DALE KC:

Yes. The problem that confronts is set out squarely in the NASC, and the point of taking your Honours to that document is because it is obvious that 22 hours is not going to be sufficient. Justin is high needs, has limited road safety awareness, restricted insight into his safety needs, over-friendly, cannot be left alone, requires supervision.

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Now, the long and short of this litigation is that in spite of all of those disabilities, it is not enough and this is quoting from the cross-examination of Mr Wysocki: "It is not enough to be high needs, unable to care for himself, severely limited hearing impaired, speech impaired and all those things, it is still not enough to get him 40 hours ..." Answer: "Not based on the needs assessment."

No one has ever explained in this litigation how Ms Fleming might be expected to care for Justin on a full-time basis, getting an allocation of two and a quarter hours a day. It just does not work and that is the issue for this Court.

We have approached the case in the overview on the basis of employment law obligations, good faith obligations, Treaty obligations. All of them point to the same outcome, namely that the Crown has made an offer which could not be accepted and I think it's important to note, because of their reliance in the Court of Appeal on the contractual issues, that the Crown's offer was non-negotiable and I will take you to the passage in the evidence where that is stated.

There is no doubt that Ms Fleming has been providing services for Justin, caring for him since before 2013. The Crown was employing before 2013. *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, as you all know, was of course the turning point in terms of isolating the high level of discrimination that had occurred. Ms Fleming continued to provide services, to the knowledge of the Crown, right through that period. The Crown took no steps to notify Ms Fleming that she was eligible for FFC, remained entirely silent and indeed one of the documents in the bundle, to which I will take you, was to the effect that the Crown should not proffer advice on FFC unless asked.

Against that backdrop, eventually, after the *Chamberlain* case, Ms Fleming made an offer, right, made an approach is to put it more correctly, approached the Ministry of Health and sought an allocation and I have taken you to the passage where it was clear that she was never going to be granted anything that was remotely adequate.

On that basis, she then exercised her right of review, thinking that the review panel would be able to come to a sensible outcome. The review panel, as it turns out, wasn't even aware of *Chamberlain*, in spite of the importance of that decision, so the review failed.

So Ms Fleming, as a consequence, brought these proceedings to enforce the obligation to provide FFC funding on acceptable terms and that's the general background to this claim.

There is no doubt that she was and continues to provide those services. Without them, the only alternative and it is no alternative, was residential care. There is no choice. Residential care is generally not available and not available for Justin, so Ms Fleming had no choice but to continue to provide the services for the Crown.

KÓS J:
Why was it not available?

MR DALE KC:
Pardon?

KÓS J:
Why was it not available?

MR DALE KC:
Just from practical reasons.

KÓS J:
Right.

MR DALE KC:
Yes. In *Chamberlain*, as a matter of interest, we explored residential care as an alternative. Shane had had an unfortunate experience in residential care and it just wasn't open to him.

Generally speaking, there are three choices available: one is residential care which is I have just discussed; the second is to have external carers come and provide the services; the third and cheapest option is to have the parent provide

the care but, of course, in this case it's impossible to do that when the allocation hasn't been made.

No one has ever, ever sought to explain how two and a quarter hours a day is workable and common sense would tell you that it just isn't. For example, in the NASC, there is a demeaning process of measuring allocations in terms of things like "toilet time", so, "so many minutes a day", and then "so many minutes for showering". Somehow, there seems to be a gap between getting up in the morning, toileting, showering and then having lunch, where Shane is left to his own devices. There is no allocation for what should happen to him in that period and similarly later in the day.

So, it's an absurd situation and how it's got to this stage is extraordinary, but that's the Crown's position and the Crown says it is not obliged to provide anything beyond 22 hours. That remains its position, without explaining how that could possibly be workable.

Furthermore, the Crown has at various points in time and in the evidence raised fiscal constrains as one of the issues.

WILLIAMS J:
Well, can I just ask to look at that document on the screen, which has now just disappeared off the screen, it seems to total 80 hours?

KÓS J:
Where did you get 80?

MR DALE KC:
Yes, minutes, that's minutes.

WINKELMANN CJ:
Oh, that is minutes, right.

MR DALE KC:

Yes. But it's why this is even necessary is something of a mystery, when we're talking about a mother caring for high-needs disabled son and there are many other examples and where this kind of analysis is both artificial, impractical and offensive. I mean, anyway, you can see the breakdown, so you get to a total of 15 FFC hours, later increased to 22. My submission is the Crown's position is indefensible.

So I was talking a moment ago about fiscal constraints. The Crown has based its policy around fiscal issues and there was an allocation of about 23 million, there were 1,600 candidates that might take up FFC. As it turned out, there has been a very low uptake and the reason for that is because of the density and difficulty and unsatisfactory nature of the FFC process which you're being asked to address.

WINKELMANN CJ:

And so the people who don't have the uptake will generally be getting the – will generally be funded through the –

MR DALE KC:

Getting a benefit of some.

WINKELMANN CJ:

Benefit, which has got a caregiver supplement.

WILLIAMS J:

Is that the DLP, is it DLP?

MR DALE KC:

Noting all the way through then the – sorry, your Honour?

WILLIAMS J:

There are so many acronyms in this case, it's like reading the Tax Act. SLP, yes, sorry, SLP.

WINKELMANN CJ:

Supported living payment, yes.

MR DALE KC:

When I said I'd been doing this for 10 years, I confess to still not understanding all of the processes and interactions. There are definitions, for example, of personal care and household management scattered through the documents. I have chosen in my submission to follow the identified policy definitions that are discussed in *Chamberlain* but it is awfully confusing.

There are three reports, two of them in the bundle, one is called the Artemis report, another called the Sapere report and there's a third one, a 2024 report, not in the bundle, called the Wevers report. All of them are critical of the processes, the Wevers report less so because it's mostly to do with Ministry spending, but the first two reports record numerous examples of parents not understanding how they could sit down in a NASC assessment and get an outcome, as with Justin, of requiring 24/7 care and end up with a two and a quarter hours a day. How is that leap made?

People do not understand and so they walk away from it because it's unworkable, and the review process, as I have said, is completely redundant because it doesn't get you any better outcome, and so you have an unsatisfactory process, you have no uptake, the fiscal constraint argument falls away. What is required, instead, is some common sense and the application of principles of good faith and employment law.

In this case, it is clear that the only issue between Justin and the Ministry of Health is how many hours. This isn't a commercial case where you have to worry about the terms of the contract or the complexities of the kind that arose in the *Fletcher Challenge* case. It's simply a matter of the Crown having undertaken the statutory process of a NASC assessment, coming up with a solution which is totally unworkable and I mention, stress again, nobody from the Crown has ever said how this square peg will fit into a round hole. It just

doesn't work. You cannot care for a young man like Justin on two and a quarter hours a day.
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So that's the proposition that the Crown is defending and the evidence is it was never going to – if he was never going to get any other offer other than the limited personal care, household management definition narrowly construed.

So on the offer and acceptance issue, an argument that wasn't raised in the Court of Appeal, or in the Employment Court, turns on the *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) case and as to whether in the present case you could conclude that a contract has been formed. My argument on this, our argument is that if the definitions are correctly applied, the NASC process is followed, then the hours are identifiable and the contract terms all are agreed.

KÓS J:
Why are you putting your case so high? I mean the ERA talks about engagement.

MR DALE KC:
Absolutely and section –

KÓS J:
That may not be contracting in the conventional sense.

MR DALE KC:
Yes and the *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 case, of course, which is a comprehensive discussion on that issue, is right on point. I don't need to put it that high, but it just seemed to me a convenient pigeonhole for a contractual argument, given the narrowness of the issue, was there an offer and acceptance.

KÓS J:

I have a lot of trouble with that argument I must say. I find engagement rather easier.

MR DALE KC:

Yes, absolutely. Absolutely. There is also another common law strand to this, which is the standing by argument, which again is best dealt with under employment law principles, but it occurred to me when preparing for this hearing that the *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 case is a good example of standing by and getting a benefit, allowing a benefit to be achieved not intending to actually complete the contract. You'll recall that, I think your Honours will be familiar with that decision where (a) a lessor was negotiating a lease with a tenant and without intending to actually sign the lease the tenant went ahead under the landlords, with the landlord's knowledge and did a whole lot of work on the property, and then the landlord turned around and said, well I'm not signing a lease thank you very much, and the Australian HC said, well no, you can't do that, that's unconscionable. To stand by and allow the work to be done with no intention of paying, there's an element of that here.

It's, again, a little esoteric, and we don't really need to go there, but throughout this period, right from 2013 onwards, the Ministry of Health know that Ms Fleming is doing exactly what is needed. Providing the services, providing the care and supervision and all of the things that go with it for Justin. They know that. Because every year they have a NASC examination. I don't think you need it but I've got a schedule of all of the NASC examinations here but they're all –

WINKELMANN CJ:

Can I just you this question. Every – the NASC determination is for the purposes of this contract negotiation?

MR DALE KC:

Yes it is because the number of hours is the only element that is up for negotiation, and that is a matter of ascertaining what Justin's needs are, and

the document itself identifies those needs, and it says 24/7, so that's your starting point.

WINKELMANN CJ:

And what about quality control? Is there any aspect of quality control going on by the Ministry of Health?

MR DALE KC:

Well the NASC consultations are face-to-face and I'm not aware of any issue with that, any factual issue where that arose, but I'm sure were there any cause for concern on the part of the NASC officer as to the level of care that was being provided, it would be mentioned, because the Crown does have complete control over the funding process. But it's not an issue that arises on these facts.

WINKELMANN CJ:

Well it just seems relevant to me to exactly what the Crown is doing when they're coming in and interviewing Justin and his mum.

MR DALE KC:

Well the purpose is to ascertain the needs.

KÓS J:

Can I ask you this question? I'm just trying to understand the basis of your argument. Do you say that even before Ms Fleming engaged with the Crown, they had an obligation to fund? Or do you say the obligation comes from the engagement, which may or may not involve a contract.

MR DALE KC:

The business of the Ministry of Health was to provide disability support services originally under the New Zealand Public Health and Disability Act 2000, and latterly under Pae Ora (Healthy Futures) Act 2022, and yes it did have an obligation. The specific obligation in terms of Justin was because the Crown knew that she was, because there were NASC for several years starting from

1997, they knew that the work was being done. Work that they had to do, they had to pay for, but they didn't.

KÓS J:

They had to pay for because of what?

MR DALE KC:

Because they couldn't expect reasonably for it to be done for nothing.

KÓS J:

Right.

MR DALE KC:

And that's, the statutory obligation is to provide care and support for people like Justin.

KÓS J:

Well then your argument seems to me, unless, bearing in mind the Chief Justice's injunction I'll shut up after this observation, but your argument seems to be more a quantum merit argument than anything else. A pre-existing obligation to fund. The work is done, it is not paid for. That sounds to me like quantum merit.

MR DALE KC:

Yes, and I think I made reference to that doctrine in my submissions as being another possible avenue applied to these facts.

WINKELMANN CJ:

And *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691 refers to contractual, or requires contractual I think.

MR DALE KC:

Yes. But Ms Fleming was more than a mere volunteer, because the Crown knew that this is not an obligation that can be ignored. You can't just say well I'll not do it. Somebody has to care for Justin. Somebody has to be providing

24/7 services, and the NASC documents show that. But I think it's very important to remember the point your Honour Justice Kós has just made, that employment law principles are much broader than the ordinary contractual rules. Quasi-contract that's neatly under the processes described, the way the Employment Relations Act 2000 operates, in particular section 161 and 162. In my submission there is no doubt the Court can exercise those powers and can make a finding that the offer that was made by the Crown was unlawful. Unlawful and unworkable.

I also spent some time in the written submissions addressing the issue of good faith, in particular at section 5 of my written argument. Section 4, for example, of the Employment Relations Act describes: "The duty of good faith… is wider in scope than the implied mutual obligations of trust and confidence … and requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative…".

It's very difficult to see how the Crown could possibly suggest that those obligations have been met in this case.

I refer in the paragraph that follows, paragraph 46, to the equity and good conscience provision in the Act under section 189. I refer, as well, to the good employer features described in section 73. We've referred to the State Services Act 1988 and the Public Service Act 2020. All of these are statutory avenues for relief, and in none of them could the Crown say that it has discharged those obligations.

I refer at paragraph 48 to an interesting case in *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan* 2024 SCC 39 regarding, that's a case about providing policing services to indigenous people in Canada, and there there was a discussion about honour, the Crown's honour as being something different to good faith obligations. The Court there said in a commercial context negotiating on the basis of honour, the honour of the Crown, is a secondary consideration and good faith prevails. But generally speaking the Crown does

have a particular obligation to act in good faith and in my submission to protect the honour of the Crown. In this case, of course, the Crown are represented by an independent law firm. There are multi-litigant issues that sometimes arise. In this case, however, the Crown's position is unbending: it is 22 hours or nothing.

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As has already been observed, the statutory scheme of the Act relies on relationships, not contracts and I deal with that issue in section 6 of my written argument. Some of the breaches include concealing the existence of FFC and that is perhaps a little overstated. The real issue is that the Crown, Ministry of Health, told those that were administering this process not to discuss or reveal the existence of FFC unless asked. That by itself, in my submission, is a breach of the good faith obligation. There was a failure to advise Ms Fleming, in particular, of her entitlement and the misapplication of key definitions and the failure to recognise her work.

WINKELMANN CJ:

What might be said against you is the good faith obligations is not triggered until there is a relationship that is governed by the Act.

MR DALE KC:

Well, I thought section 4(1A)(b): "requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship ...". I can understand –

WINKELMANN CJ:

So but section 4(1): "The parties to an employment relationship specified in" –

MR DALE KC:

Yes, so I, was just going to say, I acknowledge there is some force in that.

WINKELMANN CJ:

Mr Cranney will no doubt know whether there's any law on that, but anyway, carry on, Mr Dale.

MR DALE KC:

I was going to come next to Convention on the Rights of Persons with Disabilities issues and which have been dealt with comprehensively by the interveners, but our submission in short is that when interpreting these policies and the approach generally, the Treaty obligations are of particular importance, as are Treaty obligations of Te Tiriti which my learned friend will address in his submissions.

The breach of good faith is addressed further in section 9 of my written submission where we point to the issue of there being: "... 'no agreement that could arise in these circumstances'." That, in our submission, strongly implies a level of fault to Ms Fleming because of her refusal to accept what was a lowball and obviously unacceptable offer.

WINKELMANN CJ:

So is Mr Mahuika making submissions today?

MR DALE KC:

Yes, he is, briefly at the end of it.

WINKELMANN CJ:

All right, so he's dealing with section – which part?

MR DALE KC:

Te Tiriti. He is dealing with the Treaty issues.

WINKELMANN CJ:

Okay.

MR DALE KC:

I note, and just in passing, that that's not an issue that has been part of the argument in the Courts below, but it seemed to me that given the importance of the Treaty on an interpretive basis, it must arise in every case, just the question of the extent to which it's helpful will vary from case to case. But this is so much a family law case, and family obligations and duties, that it seems to me entirely appropriate and my learned friend will make that point, I am sure, in his submissions.

So I have referred in section 9 to the offer, the final offer of 22 hours. It is arbitrary and not open for negotiation, it couldn't be workable and in my submission is an unlawful offer that should be struck down. The Ministry of Health paid no regard to the fact that this could not possibly work and no one, as I have said, is able to ever suggest how that might occur.

I dealt with the orthodox contractual analysis in section 10. I don't think I need to spend anymore time on it, given the comments to date.

But what I want to do now, against that broad outline, is to go to the *Chamberlain* decision and I'd like to take your Honours through that judgment just to illustrate where things have gone wrong. So that decision is in the bundle, I haven't got the – I'm using the Court of Appeal bundle. So if you can bring *Chamberlain* up.

WILLIAMS J:
At 25.

MR DALE KC:
Now, that judgment begins with a description of the very severe disabilities suffered by Shane and the first few pages describe a typical daily routine and the problems that he faced. Those same difficulties are in issue here.

The discussion on the funding process and how this works begins at paragraph 21 of that judgment: "The Ministry of Health is responsible for administering the provision of and payment for disability support services.

The Ministry engages Needs Assessment and Service Coordination (NASC) providers to conduct individualised needs assessments to determine funding eligibility and co-ordinate services to ensure support needs are met." There is no challenge, I think, to that general description of the Crown's obligations.

"[22] The Ministry contracts with the Taikura Trust, a charitable trust, to act as a NASC agency." Ms Hawea from Taikura gave evidence in court, in the Employment Court.

The Court then discussed the assessment that was made in Shane's case. At 23: "[He] was assessed originally as being entitled to only 11 hours of funding for his mother's [family] care services. Assessments are quantified by use of time-measurement tools allocated as hourly units for defined functions." And they gave some examples there of how that was achieved. "Family care is funded at the minimum wage ..." not in issue, so the only issue was the number of hours.

Mrs Moody, in that case, objected to the Taikura's assessment. As a consequence of her complaint and Ms Carrigan's intervention, there was a revision of hours up to 19 hours and then a further assessment, 17 hours for Mrs Moody's services, four hours for an external provider, an additional 30 days of carer support per year.

The issue therefore was how the Crown could get to that outcome and whether it was defensible. In that case, there was no argument advanced that Shane could be the employer and that that issue was simply not addressed any further once the Crown had conceded that he lacked capacity.

The Court of Appeal in *Chamberlain* then dealt with the statutory power for the funding decision and set out section 10 of the Act.

That section, starting at paragraph 31, the Court of Appeal addressed Treaty obligations and set out the Articles which it considered were appropriate and at 34 said: "One way in which New Zealand fulfils its international obligations is

through the funding and support provided by the Ministry of Health under the Act. As noted, the Act authorises the Minister to negotiate and enter into funding [arrangements] whereby the Crown pays people to provide specified services such as disability support. The primary statutory purpose is 'to provide for the public funding and provision of ... disability services' in order to pursue several objectives. The two most directly relevant objectives are: (a) 'the promotion of the inclusion and participation in society and independence of people with disabilities'..." and that means, for Shane, being able to live at home and to participate in society under the care and protection of his mother and, as I have said several times already, how that can be achieved in two and a quarter hours a day is unexplained.

The Court went on to say that the second objective was: "(b) 'the best care and support for those in need of services'." And the same observations apply.

"The Minister is to pursue those objectives 'to the extent that they are reasonably achievable within the funding provided'." And I have already explained that the funding is adequate because there has been a very low uptake and this is the cheapest option.

"Disability support services include goods, services and facilities 'provided to people with disabilities for their care and support or to promote their inclusion and participation in society, and independence'; or goods, services and facilities provided for incidental and related purposes."

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So those are very broad descriptions and shouldn't cause any difficulties when it comes to analysing what exactly it is that Shane and Ms Fleming need.

At paragraph 35 the Court went on to discuss the strategy adopted by the Ministry of Health and the objectives which were to obtain "the highest attainable standards of health and wellbeing for persons with disabilities". And recording: "We have choice and control over all the supports and services we receive, and information about these services is available to us in formats

that are accessible to us ... We are not secluded within services, and not segregated from or isolated within our communities. The importance of belonging to and participating in our community to reduce social isolation, and increase our overall wellbeing, is recognised and supported."

Again, quite broad but easy to apply when it comes to Justin's needs. The Court then referred to the section 88 notice, which was, the Court said: "… directed more to the person providing disability support services under a funding arrangement then to the person with disabilities. However, as we shall describe, in this case it has been used to set up a legal structure whereby Shane receives the funds and then pays them to his mother. Despite Shane's obvious incapacity to manage his affairs, Mrs Moody is effectively his subcontractor or employee. As Palmer J noted, Mrs Moody is unable to comprehend the Ministry's treatment of her as Shane's employee."

I just observe in passing by the way that you may wonder why we ever got to having an employment relationship in this context at all. I've never been able to see any particular reason why these artificial processes are applied to a relationship which simply required a payment of a sufficient allowance for Mrs Moody – for Ms Fleming rather –

WINKELMANN CJ:

Well one of your colleagues points out the documentary records suggests that it's because the Ministry of Health couldn't handle that many employees, didn't have the systems in place for it.

MR DALE KC:

They didn't need to make them employees. They simply needed to allocate a sufficient allowance for the amount of care that's required. In Justin's case, it's 24/7. The Crown might want to limit the extent of its exposure by saying we don't want to pay 24/7, but that's a matter for statutory intervention. But the process has to identify the needs and then to pay it. I don't see any element of that which actually requires employment obligations, nor did the –

WILLIAMS J:

Well the thing about employment obligations is it creates justiciability for you.

MR DALE KC:

It does.

WILLIAMS J:

If you don't have that what do you hang your hat on.

WINKELMANN CJ:

I mean that is your case here.

WILLIAMS J:

That's the point the Crown makes.

MR DALE KC:

Yes, I know, I understand entirely.

WINKELMANN CJ:

I'm finding your submissions confusing because your case is that they're employment relationships though.

MR DALE KC:

I know, I'm speaking in generalities there because I've, the tangle that I seemed to have got into in this process. But I'll take that no further. Returning –

WINKELMANN CJ:

The gravamen of your case is that this is a device to avoid employment relationships, but there is an employment relationship.

MR DALE KC:

Yes. So I'm going to move past discussion on Part 4 of the Act and the policy part because Part 4 is being repealed.

KÓS J:

The one thing that you can't get out of *Chamberlain* is an overriding statutory obligation to fund the poor and disabled. That's the problem, isn't it? I mean your argument really is an argument to that effect.

WINKELMANN CJ:

I note at paragraph 30, something you didn't take us to by, which I was caught by.

MR DALE KC:

Paragraph 30 of my submission?

WINKELMANN CJ:

No, of Justice Harrison's decision in *Chamberlain*.

MR DALE KC:

Yes.

WINKELMANN CJ:

Where the Court says: "The arguments advanced by both counsel before us share the underlying assumption that the Minister and his agents must exercise the s 10(2)(a) discretionary power where an application for funded family care is permitted by the eligibility criteria in the Policy or expressly authorised by another enactment."

MR DALE KC:

Yes, well the next – what I was going to take you to, because his Honour went on to say that the interpretation of the policy is decisive, is to go to paragraph 51 of the judgment and work through the analysis there. So the operational policy is discussed in paragraph 51. His Honour recorded that it: "… begins with the Ministry's recognition of 'the important role of families and whānau in providing care and support to their disabled family/whānau'. The Ministry therefore 'provides funding to contracted disability services to support families in this role'. The Operational Policy then sets out how disability support services are to be assessed by incorporating the documents which predate the

extension of funding to family carers: 'Funded Family Care incorporates the Ministry's needs assessments policy and practices into the Ministry's Part 4A policy.' At the stage of service coordination it may be identified that "some or all of the disabled person's needs are best supported through an allocation of HCSS'."

Paragraph 52: "In our judgment two factors are directly material. One is the express inclusion of HCSS categories within the Operational Policy formally adopted under s 70D(1)(a). The other is the definition of the Policy under s 70B(1), which includes any practice followed by the Crown before Part 4A commenced. The NASC and HCSS policies are plainly components of the complete Policy. In our view, Palmer J erred in confining his construction of the legal instrument to the Notice and the Operational Policy."

Then his Honour went on to note that: "The Operational Policy explains that: HCSS supports a disabled person to live in their home and take part in and community life. The HCSS service may include *personal care* such as assistance with showering and consuming of food or assistance with *night support* in some cases. It can also include *household management* such as cooking and cleaning as well as some supports for the person to access community activities in certain circumstances. Both counsel agree we should take into account documents which specify HCSS. However, they should be construed in the light of the Operational Policy such that the full range of HCSS is incorporated into the Policy to the potential benefit of an eligible person with disabilities and their family carer."

His Honour then went on to discuss the service specifications, and in particular tier 1, which is in the bundle, and the services described under the heading "Disability Support Services" and moving to the second paragraph: "With this vision in mind, [disability support services] aims to enhance disabled people's *quality of life* and enable their *community participation* and maximum independence. *This is achieved by creating linkages that allow people's needs to be addressed holistically, in an environment most appropriate to them.*"

WINKELMANN CJ:

What paragraph are you at there Mr Dale?

MR DALE KC:

Paragraph 56 your Honour, and it's the second, at line 30. So you'll see here the policy which we say is relevant is: "The vision of [disability support services] is to ensure '*Disabled people and their families are supported to live the lives they choose*'." And that, of course, is not possible for two and a quarter hours today. I won't read the next paragraph but –

WINKELMANN CJ:

This is not a judicial review.

MR DALE KC:

No it's not.

WINKELMANN CJ:

And so when the Crown stands up they're going to be talking about whether or not this is a relationship governed by the Employment Relations Act, and they're going to be taking us to section 6 and *Lowe*.

MR DALE KC:

Well section –

WINKELMANN CJ:

Well you take us to what you want to in *Chamberlain*. What I'm just saying is it's, you know, you've got a limited amount of time so.

MR DALE KC:

Yes. Well what I was going to take you next to is paragraph 58, because there are the two key definitions. Everything so far as the Crown is concerned turns on the interpretation of those phrases because it says that's all we will provide, and what the Court went on to say in *Chamberlain* is that was a wrong approach, that the – I can probably move quickly to paragraph 65. Now this as

you've said, rightly said, it was a judicial review hearing, but nevertheless the analysis to find the scope of the employment obligations.

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At paragraph 68 his Honour said that: "Our approach leads us to a different conclusion from that favoured by Palmer J. We depart from his construction of the relevant provisions of the Tier Two Service Specifications in the light of the relevant statutory and Convention provisions." – meaning the CRPD – "The Judge faced the difficulty, as do we, that the older HCSS specifications take no express account of Part 4A extension of funding to family members living in the home with and caring for a person with disabilities. However, we disagree with his view that examples of discrete tasks found "inaccessibly" elsewhere in older documents dating back to 2002 are the preferred guide to the interpretation of the Policy, especially when the examples specified in the older documents were expressly non-exhaustive. The specifications have moved beyond discrete examples and instead explain why the state provides funding under the categories of personal care, household management and sleepover" –

WINKELMANN CJ:

So is your point that Ms Fleming is providing services that fit within the policy?

MR DALE KC:

Yes. And what happened in the course of the hearing is I was using examples to explain why –

WINKELMANN CJ:

Which hearing, *Chamberlain*, or this one?

MR DALE KC:

In *Chamberlain*.

WINKELMANN CJ:

Yes.

MR DALE KC:

Why the approach of the Ministry was too narrow and I used as an example night supports when there's an accident in the course of the evening and Mum has to get up and clean up and so forth, which was in the *Chamberlain* case a regular occurrence.

WINKELMANN CJ:

And your point is, that she's providing services that fit within the policy, not just within those 22 hours but within the entire time that she's at least awake and caring for Justin?

MR DALE KC:

Yes.

ELLEN FRANCE J:

But are you relying on *Chamberlain* for something more than simply – or not simply – but as support for your argument that the two and a quarter hours is inadequate?

MR DALE KC:

Yes and that you cannot exclude supervision.

ELLEN FRANCE J:

Right, so it relates to the number of hours, rather than going to the contractual relationship or otherwise, engagement relationship per se?

MR DALE KC:

Yes, because the only issue between the parties was the number of hours.

WINKELMANN CJ:

But in the argument here, Mr Dale, are you saying it supports your argument that these, your quantum meruit type argument, that these are all services that would be properly provided under this policy?

MR DALE KC:

Yes and that's the essence of what the Court of Appeal in *Chamberlain* said. Just for example, at the top of page 793, after referring to categories of services which it was said by the Ministry were not eligible, the Court said, Justice Harrison said: "... but our main point is that general supervision to ensure safety in the home environment or the provision of incidental care throughout the day ... does not fall within these exclusions. [80] Other relevant documents support the more expansive construction which we favour. The NASC Guideline – an annotated version of the Operational Policy to assist NASC agencies updated in August 2015 – provides a 'principles based' approach when consider 'the approval of high cost support packages for disabled people who want to remain in the own homes in the community'." And then they refer to a background document and the level of support that is required.

So what the Court of Appeal went on to say is that a broad approach is required and at 82 posed this question: "The question of whether general supervision and intermittent care falls within the former category of eligibility is answered by asking whether that service is essential to maintaining the person with disabilities' mental and physical health in the home environment. 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. It would include night-time attendances where such services are provided."

And at 84: "It is uncontested that Mrs Moody performs intermittent but recurring services for her son which require her constant presence. Shane falls within the category of people with disabilities described by Ms Atkinson as requiring an intense level of oversight. In that sense, Mrs Moody's service meets Ms Atkinson's requirements of sleepover care as a separate aspect of HCSS where personal care needs intermittently arise; ...".

So, what I say is that analysis supports the inclusion of supervision within services. It falls within the category where funding should be provided.

The Crown's response to that judgment and that statement of principle and guidance as to how the obligations should be interpreted was that effectively it was ignored.

As I said earlier, when Ms Fleming made her application and got knocked back and was given only 22 hours, she applied to review the decision and the review panel did not know of the existence of the *Fleming* judgment.

WINKELMANN CJ:
What statutory provision is the right of review under?

MR DALE KC:
Pardon, Ma'am?

WINKELMANN CJ:
What statutory provision is the right of review under? You may not know.

MR DALE KC:
No, I don't know the answer to that, because there was a discussion, Ms Carrigan in her evidence discussed it at length, and she's the one that pointed out that when she dealt with the review panel on Mr Fleming's behalf that she learned that they had no knowledge of the *Fleming* [*sic*] decision. In one of the other cases –

KÓS J:
Chamberlain.

WINKELMANN CJ:
Yes, he mentions…

MR DALE KC:
– that's awaiting the judgment in this Court in Christchurch, in the ERA, a Ministry of Health official gave evidence in that court and again had no idea about *Chamberlain*, even though we were in court arguing about the application

of *Chamberlain* principles and this kind of issue, Ministry of Health ignorant of it.

KÓS J:

But all this suggests, that what we should be dealing with is a judicial review of this principle, which you say is largely established by *Chamberlain*. I am just struggling with your attempt to shoehorn this into an employment relationship, let alone any kind of contract.

MR DALE KC:

Well, again, I rely on the broad description of employment law under the section 161 and 162. This was an employment relationship in the sense that the services were already being provided, the work was being done, there was an engagement as to the terms for payment and this is relevant to the Crown's good faith obligations in dealing with the application and our case is that the Crown did not deal with the question of supervision and the number of hours in a lawful manner. Had it done so, we wouldn't be here.

Ms Fleming said: "I'll take 40 hours." There would almost certainly have been no litigation at all had the Crown fulfilled that obligation. Why did it not offer 40 hours?

WILLIAMS J:

I think the point is that you don't need an employment case to establish that point. Judicial review would have done it for you and banging your fist on the table and saying "can someone please apply *Chamberlain* to these facts" would have got you there on your argument.

MR DALE KC:

Well, Ms Carrigan, who launched this proceeding, unsurprisingly, you may think, took the view that judicial review hadn't got anyone anywhere when it came to moving forward because there are a number of these cases in the pipeline, all of them require resolution and all of them turn on the correct approach to the employment relationship and the Crown fulfilling its obligations.

Chamberlain didn't change anything. It just did not make a difference. You may think that rather extraordinary.

WILLIAMS J:

There are procedures to –

MR DALE KC:

Sorry?

WILLIAMS J:

There are procedures to correct that.

MR DALE KC:

Yes and they were pursued and that's a fact of it is that Ms Carrigan did all that she could to extract a concession from the Crown. She wrote voluminous emails, all pointing to the Crown's obligations in *Chamberlain*, asking for recognition of the judgment, asking had it been applied? Why hadn't it been applied? Endless amount of emails to that effect and, generally speaking, it achieved it nothing and so the question then was posed, well, what's the best way to get relief and if there's an employment relationship, as I submit is the case, the ERA was the place to do it and we got a judgment from the Employment Court which was, in my submission, sensible and balanced and provided a way forward.

The only difference between the parties is one thing, it's the hours, and all of this analysis is why the Crown is utterly and completely wrong in the way it approached Ms Fleming's application for funding.

WINKELMANN CJ:

So were you going to take us to the statutory provisions and *Lowe* or are we going to leave Mr Cranney to deal with that kind of argument, and Mr Meys?

MR DALE KC:

We devoted a lot of work to *Lowe* in the written submissions, much more so than I think is actually necessary, because I just don't think it has any application to the present case. But it is going to be dealt with by my learned friends, by Mr Jeffries in particular, but –

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WINKELMANN CJ:

So Mr Jeffries is addressing us on that?

MR DALE KC:

Yes.

WINKELMANN CJ:

So do you think that's time to hand over to him, because we've got Mr Jeffries and Mr Mahuika, or have you got more to say? I'm not trying to cut you short Mr Dale.

MR DALE KC:

No, I think I've made my points. I haven't taken you to all of the references that I had in mind.

WINKELMANN CJ:

We're pretty much at the end of *Chamberlain*, aren't we?

MR DALE KC:

Yes, yes, and I was just, perhaps conclude with the reference to the result provision in paragraph 88: "The Minister is directed to reassess the first appellant's application for funding in a manner consistent with the purposes of the Act and content of the Policy as set out in this judgment. In particular, the Minister must make appropriate allowance for Mrs Moody's provision of personal care services to meet Shane's immediate intermittent needs as they arise at any hour of the day." That's the outcome –

KÓS J:

So what happened?

MR DALE KC:

Well we had a negotiation and we had a settlement and the expectation that there would be changes to the policy. That's what happened. It was a senior member of the Ministry of Health met with Ms Carrigan and I, and we didn't want more litigation because it's not good for anybody, and we settled on a structure and a payment, and expected that there would be a change, and there hasn't been. I know I've laboured that point but in my submission it's simply extraordinary that the Crown should have ignored what is a pretty clear direction from the Court of Appeal on how to deal with these issues generally, so when Ms Fleming steps up to the plate the assumption was that she would get a proper allocation, but she didn't, and so the decision was made by Ms Carrigan to pursue the employment remedies, and my submission those remedies are available for the reasons I've canvassed, and the Crown is in breach of its obligations to act in good faith.

How it can defend its decision not to increase the allocations for people like Ms Fleming is extraordinary. It's a very unusual situation, and I wouldn't like to think that we failed because of the procedural distinction between judicial review and employment. This was an employment relationship. She is doing the work. She was engaged and directly, especially in 2018, and she asked to be paid, and the Crown failed. Just has failed in its obligations.

WINKELMANN CJ:

Thank you Mr Dale.

MR DALE KC:

Thank you your Honour.

MR JEFFRIES:

Tīhei mauri ora. E ngā mana, e ngā reo, e rau rangatira ma, e ngā Kaiwhakawā mō te kīngi Kōti tēnā koutou, tēnā koutou, tēnā koutou katoa. The engagement of Ms Fleming did not happen in a vacuum and my friend has spent some time

on the policies of FFC in particular as they relate to payment of Ms Fleming. Ms Fleming's case is quite simple. What are the Ministry of Health's obligations to her under employment law? Now the MOH policy that has been discussed, and their practices which have been discussed, impact family carers but those impacts and those policies have never been analysed through a lens of employment law. They've been analysed in *Atkinson* through a lens of human rights law. Found to be in breach of that law. They've analysed through the lens of judicial review, as your Honours have noted a few times, and they were found to be unreasonable decisions, *Chamberlain*. But now we have circumstances where you can see the feeling that the Ministry's practices and policies have confused. They have changed over time, and that's been acknowledged by the cases in *Atkinson*, where they said there was firstly, no policy to pay family carers, and yet it was acknowledged in *Atkinson* that the Ministry of Health did indeed pay family carers, 400 of them, to the point where Justice Asher in his judgment in relation to *Atkinson*, said, basically he wasn't sure if there was a policy or wasn't a policy because there was a published policy not to pay family carers, and yet they paid family carers.

So the flip-flopping of the Ministry of Health is evident from as early as 2010, and there was no clear policy then until after *Atkinson*, and that's when the FFC policy was developed, and that policy lived until 2020 when it was repealed – when the FFC law that supported FFC was repealed, that is called Part 4A, and in 2018 when Ms Fleming applied for FFC, she was met with the support allocation of 15.5 and then 22 hours, and when FFC ended in 2021 Ms Fleming and Justin applied for family care funding again, and Ms Fleming's work was at that time assessed as being for 50 hours with a further 40 hours for respite care.

Now we've got everything from 15 hours to 90 hours emitting from the Ministry of Health in relation to Ms Fleming's work. The real question is what are the Ministry of Health's obligations to Ms Fleming, as I said, under employment law. The panel has rightly asked, where is the obligation to pay, and the obligation is in section 3(1)(a) of the New Zealand Public Health and Disability Act, which requires the Ministry of Health has a statutory duty to provide personal health

and disability support services to achieve the best care for Justin. It's job is also under section 3(1)(d): "To facilitate access to, and the dissemination of information to deliver, appropriate, effective… disability support services."

So the business of the Ministry of Health is to deliver disability support services. It's its business. It is its statutory requirement. It is also the way the Ministry of Health conducted its business up until 2012, it directly hired people, and that is, there's an example of that, of it doing so in the evidence. For 28 years, from 1997 to date, the Ministry of Health has relied on, checked, and approved Ms Fleming's work.

WINKELMANN CJ:

So can you just help us with that, because I asked Mr Dale but he didn't really, I think, did not know the answer about what exactly when you say "checked her work". So what's the basis for that?

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MR JEFFRIES:

So the, in the case on appeal at 310.2149, there are copies of the assessments of Justin, Justin's needs assessments, which were conducted in1997 through to 2017. So, that's a 20-year period and in-between those very well-documented needs assessments there were annual telephone assessments as well, contact assessments they're known as.

So there's a record there of a very deep engagement. Each of those assessments that are documented in the bundle resulted from the Ministry of Health regularly meeting in person with Ms Fleming and communicating in-between times by phone, letters and emails.

In accord with its business, the Ministry reviewed Justin's needs and the adequacy of the work that Ms Fleming was doing to meet those needs. Her work is defined as "disability support services" which is the work that the Ministry must provide under section 3 and other sections within the New Zealand Health and Disability Act.

WILLIAMS J:

It doesn't say how much though?

MR JEFFRIES:

No, it doesn't say how much.

WILLIAMS J:

You need the policy to get you to *Chamberlain*, without it *Chamberlain* wouldn't have worked, would it?

MR JEFFRIES:

Interestingly, the policy is a little bit of a red herring. Air New Zealand could have a policy –

WILLIAMS J:

Not according to Mr Dale.

MR JEFFRIES:

Well, I think Mr Dale's main point was if the policy was fairly applied it would have done the trick, but it was an inadequate policy. If Air New Zealand had a policy that said "we'll only pay cabin staff half time" they'd still have a policy.

WINKELMANN CJ:

It's not a red herring, is it? On Mr Dale's case, this is a policy, sets out what the Ministry has agreed as a matter of policy it will pay for and on Mr Dale's analysis Ms Fleming was providing those domestic services and that measures in with what you're now saying?

MR JEFFRIES:

Well, yes, Ma'am, that is Mr Dale is saying that Ms Fleming's services fit within the ambit of the policy.

WINKELMANN CJ:

Yes.

MR JEFFRIES:

They were personal care and household management and all sleepover services.

WINKELMANN CJ:

As should have been interpreted through *Chamberlain*?

MR JEFFRIES:

Yes Ma'am, that's correct.

KÓS J:

And the point about *Chamberlain* is, as they say at paragraph 88, what has to be provided is an "appropriate allowance".

MR JEFFRIES:

Yes.

KÓS J:

So there's an adequacy, a reasonableness overlay to this.

MR JEFFRIES:

Yes, your Honour, that's correct and that was the judicial review lens.

WINKELMANN CJ:

Well, we're not talking about judicial review, we're talking about this.

MR JEFFRIES:

No, we're not. The employment lens, however, looks at the work and employment law the test is what are the employer obligations to Ms Fleming and what is the work that she is doing? The fact that her work fits within the policy is helpful, it shows we're in range, but the policy was applied in manner that resulted in her being underpaid or under-offered to be paid.

WINKELMANN CJ:

So your critical evidence of engagement is then, just to sum up your submissions on this point, is the existence of the policy which says “yes, we’ll be paying for this, this is what we’ll pay for”, then this engagement over 28 years where the Ministry of Health is engaging with Ms Fleming, identifying and support Justin needs, checking whether the work she is doing is covering that.

MR JEFFRIES:

Yes, Ma'am. Yes, that is the submission, that there was more than adequate to meet the tests of engagement over those years when the Ministry, in conducting its business, was both assessing what Justin needed to do in light of the Ministry’s obligation under statute to provide and achieve the best care, that’s in the section, for Justin, and it is not a large leap to suggest, therefore, that for 20-plus years the Ministry has actively engaged with Ms Fleming to understand what Justin’s daily needs are and disability support service needs are.

WINKELMANN CJ:

And to ensure they’re provided.

MR JEFFRIES:

And ensure she’s providing them and if she’s not providing them then they would need to provide them, because that's their business and their statutory obligation.

So the changes, the various changes and what I’m suggesting to this Court is that that occurred from 1997 and the Employment Court found exactly that. The Employment Court said that all of these assessments amounted to knowledge and I think there was a reason why the Employment Court focused a little bit on knowledge, but the actions that then transpired, there’s another piece of the puzzle, and that is that for Ms Fleming to do her work and do what all of those assessments show is full-time work, requiring 24/7 care, to achieve that in all of those years up until 2018, the Ministry of Health provided respite funding and that respite funding was an acknowledgement that Ms Fleming was in the full-time service of providing disability support services to Justin and the

respite funding was to give her a break, but it did not pay her for her work, so it was in effect an acknowledgement that she was doing that work, they knew it, they facilitated it. They funded breaks from her work, but not the work itself.

The MOH policies as they changed from pre-2010, through the 2013 to 2015, and now post 2020, they're all different policy iterations, largely of paying family carers in one way or another. The question is not so much, I feel, your Honours, that it's not so much whether Ms Fleming fits within the policy, which she clearly does, she fits all of the criteria under the policy for payment, she is a family carer, resident, and she provides disability support services to a high-needs person named Justin Coote. The real question is, therefore, does the policy comply with employment law? Not does her work comply with the policy, which it does.

WINKELMANN CJ:

I don't think that is the real question.

MR JEFFRIES:

That does the policy –

WINKELMANN CJ:

In this appeal, comply with employment law? No, that's not the question, is it, Mr Jeffries? Because –

WILLIAMS J:

It is if this is an employment case?

WINKELMANN CJ:

Not whether, the question, the policy, it's the policy as applied.

MR JEFFRIES:

As applied, I stand corrected, yes.

WILLIAMS J:

Well, I mean, you're technically correct, aren't you, in your opening salvo which was the policy is irrelevant because actually the entitlements of the carer, if this relationship is an employment one, is set by employment law not by the policy law.

MR JEFFRIES:

Which was my not-so-useful analogy with a corporate provider having an employment policy. I mean, the FFC policy is a policy, it's just a policy.

WINKELMANN CJ:

But there's a problem with that, isn't there a problem with that, which is what the Employment Court has held, which is section 70 of the Act which says you can't be paid other than under the policy? So the policy is highly relevant.

MR JEFFRIES:

That is highly relevant from 2013 to 2020 when the –

WINKELMANN CJ:

When it's repealed.

MR JEFFRIES:

When the shield in 4A, Part 4A existed. But that section, Part 4A, does not say you cannot be paid, it says you can be paid if permitted by a policy and the argument which we provide and which was not covered in the Employment Court, as it wasn't a remedies hearing, was that Ms Fleming always was permitted to be paid by the Ministry of Health under its policy through its exceptions provisions and that was, in fact, what the Court of Appeal held to be the case for Mr Humphreys.

So, the Court of Appeal relied on the exception provisions to pay Mr Humphreys, to acknowledge Mr Humphreys should be paid and could be paid.

WINKELMANN CJ:

So just looking at the time, Mr Jeffries.

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MR JEFFRIES:

Yes. The tests for engaged. *Lowe* was a case where the carer was a respite carer.

WINKELMANN CJ:

She was not a family member.

MR JEFFRIES:

Was not a family carer and was not a full-time carer. In the *Lowe* case the relationship was far more indirect. *Lowe* is an indirect attempt to extend employment under homeworkers to a person one removed which is why, as the Chief Judge of the Employment Court said, the facts are just so vastly different here. In *Lowe* the person would have been similar to a person that perhaps Ms Fleming might engage for an hour or two to come into the home if she had to go for a medical appointment, or the like. That is a vastly, vastly different relationship and engagement than the case before your Honours where there's a clear 20-plus year direct year in, year out relationship, contact assessments, reviews, funding to facilitate the work to continue. So the two cases are vastly different and the tests, therefore, in *Lowe* could be discussed, and I'd be very happy to answer questions or to discuss those, but they need not be.

WINKELMANN CJ:

I think Mr Meys and Mr Cranney deal with it anyway.

MR JEFFRIES:

Yes. One of the key areas for Ms Fleming is obviously the amount of work she does, and as noted the amount of work that she does has been artificially suppressed by the FFC policy documents and approach. So when one is looking at the work that she is doing, once again, it's not so much the policy, as your Honours have said, it is what did MOH do, what did they offer to her, and in that case the Court of Appeal penalised Ms Fleming by saying she did not

accept the offer, that was the only difference between her and Mr Humphreys, and she did not accept the offer because the offer was not made lawfully to her under employment law. It was not made in good faith.

WINKELMANN CJ:

Or in compliance with the policy as it should have been interpreted as opposed to *Chamberlain*?

MR JEFFRIES:

Or even the policies itself, but certainly not with the requirements of good faith that apply from the Employment Relations Act, which include good faith at the time of bargaining, and I know that item came up earlier, and section 4(4)(ba) is the relevant section that says that good faith obligations apply during bargaining.

Now Ms Fleming would say she was engaged well before that, through all of those assessment processes, *Lowe* has distinguished her fact situation is vastly different, she was engaged.

WINKELMANN CJ:

I mean no one, I don't know that anyone has mentioned this, but is evidence of engagement that they're actually the people who are offering the terms of engagement? So it's the Ministry of Health who are setting the terms. They're saying, this is what we'll pay you. It's not Justin, obviously, because of the artifice.

MR JEFFRIES:

Yes.

WINKELMANN CJ:

Isn't that highly material? They're saying this is what we'll pay you, so that's a good indicator, isn't it, that they're engaging her.

MR JEFFRIES:

Indeed. In 2018 when she first found out about FFC and applied for it, one has to also consider the period up until 2018, which was 21 years where she was not aware of FFC, evidence has been provided to show why that is, or contributed to that, and also to the fact that part of the statutory mandate in section 3 of the Public Health and Disability Act is that the Ministry of Health isn't just to provide and fund, but also to disseminate adequate information, which they did not do. She attended each of those assessments, 1997, they're all in the evidence, and in not one of them, there was one soon after 2013 when FFC came in, FFC's not mentioned. There was one in 2015, I think there was another one in 2017, I could be wrong on the dates, but there were a number of assessments through that period when the FFC policy had been formalised and existed.

She only applied under FFC in 2018, and that's when, as your Honour correctly states, the take it or leave it offer was made, which did not comply with the policy itself but certainly did not comply with any quantification of her work for the purposes of the Employment Relations Act, and hence the engagement could have happened earlier, from 1997, at any of those times and in the Employment Court it was determined on the evidence that engagement certainly happened in those earlier periods.

Obviously there's statute of limitations and other issues that Ms Fleming has to confront in terms of being paid for her work, but she was systematically denied payment, or information about payment, from 1997 until 2021 when she applied under the last iteration of the family care policy, which was under IF, which does require some comment but your Honours may not wish me to.

WINKELMANN CJ:

Yeas, well you're pretty much out of time, aren't you Mr Jeffries, especially since we've got to hear from Mr Mahuika, and everyone, Mr Dale's expanded timeframe.

MR JEFFRIES:

Are there any questions your Honour?

WINKELMANN CJ:

Well you've probably got three minutes, but you're not going to be able to do anything in less than three minutes. Well yes, there is a question. So under the FFC, who is responsible for all the ACC levying and all that sort of thing?

MR JEFFRIES:

Under FFC, that was – under the FFC policy that was to be done by the employer and –

WINKELMANN CJ:

So Justin.

MR JEFFRIES:

That was Justin's, that would have been Justin's role, which he could not –

WINKELMANN CJ:

And in practice who, what's, how does the Ministry of Health run that?

MR JEFFRIES:

The Ministry of Health runs that by appointing a couple of different agents in the process of setting up FFC. One was the NASC who did the assessment, and the other was what's called an IF host, or in those cases family funded care host, another agent contracted by the Government, by the Ministry of Health. The latter would set up and help the family set up a bank account for the employer, disabled person, in our case Justin, and ensure there was a bank account for the employee –

WINKELMANN CJ:

Yes, and they do PAYE which is a statutory responsibility?

MR JEFFRIES:

And they would then engage a third party employment funding, employment payroll system, and run the money through some accounts. You know, from a tax perspective one could look at it and say, that's an interesting structure

set-up to create a small corporate entity for disabled people to pay a family care worker, and that choice was made in implementing the policy. The policy did not have to be employment. It did not have to have those structures, nor those deeming provisions. But that was the camel that MOH chose to fabricate. It's a bespoke, it was a bespoke structure which, in Justin's case where there is no legal capacity, it was a device. For disabled persons who do have capacity, legal capacity, it was a highly assistive device.

WINKELMANN CJ:

So there will be some people that – it's important to remember isn't it, there will be some people for whom it might be quite a meaningful thing to be able to employ their own people and run that relationship.

MR JEFFRIES:

Absolutely, and that's a fundamental tenet of the disability law, is to provide people with the choice, flexibility, and control, to have the agency where it's possible, to determine their living conditions, and assisted living conditions in the community. But in this case the forced structure was just one of the failings in relation to Ms Fleming. The other, of course, was offering to pay her less than half of what she actually does.

WINKELMANN CJ:

Thank you Mr Jeffries, and when we come back, Mr Mahuika you won't be more than 15 minutes, will you?

MR MAHUIKA:

I can be as long as you want me to be Ma'am.

WINKELMANN CJ:

Right, we'll take the adjournment now.

MS MCKECHNIE:

If the Court are able to indicate their expectations and preferences for the rest of the day in terms of how long you wish people to speak and in what order so we can plan?

WINKELMANN CJ:

It would have been helpful to us if counsel had discussed it. We're not normally keepers of the diary, we expect counsel to discuss it, but have a chat about it, we'll take our morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MR MAHUIKA:

Tēnā koe Ma'am. Tēnā koutou e ngā Kaiwhakawā o Te Kōti Mana Nui otirā tēnā tātou e te Kōti. Ma'am, there has been some conferring during the break. I have got 10 minutes. Then the counsel for the second respondent will have 30 minutes, the interveners 20 minutes.

WINKELMANN CJ:

I'm just going to note this so I can make sure people do it. Ten minutes for you, once you start speaking.

MR MAHUIKA:

Yes, I'm taking it this doesn't count.

WINKELMANN CJ:

How much for the interveners?

MR MAHUIKA:

Well no, then the second respondent.

WINKELMANN CJ:

Yes, Mr Meys.

MR MAHUIKA:

Yes, will be 30 minutes, and then 20 minutes each for the interveners. That will take us hopefully to lunch time. The intention is to confer further after lunch, but the aim will be for the Crown to make their submissions on Ms Fleming's appeal, leaving a little time at the end for my friend to reply, and then that will conclude that appeal by the end of the day. That's the intention and that's what we'll do.

WINKELMANN CJ:

All right, thank you.

MR MAHUIKA:

So thank you Ma'am. I'm very much in the Court's hands as to what you might wish to hear from in relation to this topic. I did really have two points that I wished to make, and I'll make them relatively quickly I hope, and inside the 10 minutes easily. My understanding of this appeal is that it involves the definition of "homeworker" so whether or not Ms Fleming is a homeworker. As Justice Kós indicated before the interval, to be a homeworker you don't need to be contracted. It's sufficient that you're engaged.

So the question then becomes whether because of the nature of the arrangements and the relationship that exists between the Ministry and Ms Fleming, is she engaged and therefore a homeworker for the purposes of the ERA and as a consequence of that, entitled to all of the protections and the performance by the Ministry of the obligations towards her as if she is an employee under that Act.

The first question is then, how is the Treaty of Waitangi and questions of tikanga relevant, and it's relevant for two reasons in my submission in terms of the exercise of construction and interpretation we're involved with here. I mean first of all its explicitly referenced in the Public Health and Disability Act and also in the Pae Ora (Healthy Futures) legislation, they both make specific reference to the Treaty of Waitangi. They are in the nature of the type of provision that was dealt with by this Court in, for example, *Trans-Tasman Resources Ltd v*

Taranaki-Whanganui Conservation Board [2021] NZSC 127, [2021] 1 NZLR 801 where it's declaratory of how the Crown will perform its obligation, but it is indicative of a broader acceptance by the Crown that Treaty principles and Treaty obligations would apply in the context of the exercise of the Ministry of its obligations under that Act.

Then it's also relevant in the sense that, in our submission, a fundamental aspect of tikanga Māori and therefore something which is implied by virtue of those Treaty principles is, you know, notions of whanaungatanga. We describe it in terms of rights and obligations to provide care for somebody who is in need of care within the family unit. There's no issue here as to there being an extended view of whānau in this context because it's a mother and son and it meets any definition of "whanaungatanga" and familial relationship that we might be looking at in the context of this piece of legislation.

So it is relevant in thinking about how that relationship ought to be instructed, and it's not the sole basis upon which the appeal is brought. It does provide an *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 type of situation, a further lens through which you might look at and assess the nature of the relationship that is created between the Ministry and Ms Fleming.

So whether or not the Ministry is, in effect, in substance engaging her and it becomes relevant because it thinks about what are you trying to facilitate through these arrangements. You're trying to facilitate care within the familial unit. Creating an employment relationship is a better relationship to be relying upon than having to judicially review every time you need to deal with issues that arise about levels of funding, all of those other types of things that can arise in a funding relationship such as the one that exists here, dealing with Justin's care.

WILLIAMS J:

Wouldn't tikanga suggest that the relationship is not transactional?

MR MAHUIKA:

It certainly would, but I'm not trying to refer to it in a transactional way.

WILLIAMS J:

No.

MR MAHUIKA:

But what the ERA does it is provides a mechanism through which the Ministry, which has responsibility for the provision of services to disabled people, deals with the provider of those services.

WILLIAMS J:

One of the difficulties in this case is in a sense the transactionalisation of social relationships and whether that's simply a necessary mechanism for the law to do what the law needs to do in this context, but you're pointing up tikanga lights that particular problem.

MR MAHUIKA:

I wouldn't – I think there are two parts to my answer. First of all I agree that you wouldn't wish to look at this from an entirely transactional point of view, and tikanga would not require us to do the dance that we're doing in order to ensure that Justin receives an appropriate amount of care from his mother, and that the Crown meets its obligations under the various health and disability regimes that exist. So that, as a statement, that's entirely fair. However, because of the nature of the regime, the complicated funding that exists, the difficulties that a parent providing care to a child that requires that care encounters, you're forced to look for mechanisms in the law through which the Ministry of Health can be held to account, and through which that relationship can exist in a way where there are appropriate requirements on the Ministry when it comes to dealing with the carer, and that carer has recourse to a set of comprehensive rules and obligations that then regulate that relationship. Otherwise you are left to judicial review which is a much less developed and nimble mechanism for describing and dealing with that relationship.

WINKELMANN CJ:

Would tikanga in traditional societies is that the family group looks after its own, but we no longer live in a traditional society where economically that's achievable and someone, there is a funding requirement for Justin's mum to be able to be there and look after him.

MR MAHUIKA:

Yes.

WINKELMANN CJ:

So the issue that we're questioning here is whether it's true in essence of what this policy and statute provide is that the Ministry of Health is employing Justin's mum, or Justin is employing Justin's mum, and both of those constructs are quite artificial in a family sense, aren't they?

MR MAHUIKA:

Yes, they certainly are Ma'am, but as I said in answer to his Honour Justice Williams' question, a necessary pathway that Ms Fleming is pursuing in order to ensure that that relationship is on terms that are appropriate, that she has the protections that an employer would have, and ultimately your question is, we talk about employee. In the case of a homeworker it's sufficient that you're engaged. It doesn't require a contract of employment. So how should you construct that relationship, how should you look at it. I'm suggesting that if you look at it through a treaty or a tikanga lens then you look at it in a way that facilitates the best outcome ultimately for Justin, and that is his mother caring for him and being in a position where she can do so because as your Honour has noted, if you're not adequately funded then that inhibits your ability to provide that care.

WINKELMANN CJ:

And to ensure that she is not exploited.

MR MAHUIKA:

Yes, exactly Ma'am, and that's where employment protections become extremely relevant because employment law specifically seeks to avoid those types of situations.

KÓS J:

Don't you have to start here at the backdrop? The backdrop is the statute and the combination of *Atkinson* and *Chamberlain* say that the Crown has obligations to fund, and there are three possibilities. One is the Crown funds it by direct funding. One is it deals with it by employment, employs someone to do it. The third possibility is the Crown is in default of its obligations, and that might be the situation here. If the Crown is in default of its obligations it may simply be it has to wear the consequences that it has employed the person who is compelled to volunteer to fill the gap to meet the Crown's obligations and that person was Ms Fleming.

MR MAHUIKA:

Yes, and that is the essence of the argument being made here sir. When you think about the notion of engagement, and I think it's to your Honour the Chief Justice's questions prior to the break, if you look at the nature of the relationship in its totality, the funding comes from the Ministry, the Ministry sets the terms, it undertakes regular assessments of the nature of the need and the care being provided.

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There are all the features there that the Ministry is, although Justin is treated as the employer in that situation, that the Ministry is, in fact, the party that's engaging because the Ministry also funds and has the obligation to fund and so it's arguably the Treaty lens is not even necessary in this context, but it does add a further lens because it is a particular feature of Māori communities, for example, that care ought to be provided within the home, if it's possible to do that. There is a right for Justin to receive that care from his family. There is a right on the part of his mother to provide and also an obligation for her as his mother to provide it. But that's not the – it's not necessary to look at it through

that lens but it does provide another lens which supports the interpretation of homeworker and what it means to be engaged that Ms Fleming argues for.

So I am aware that I am up against time pressure now.

WINKELMANN CJ:
Yes.

MR MAHUIKA:
So I'll have two minutes, two comments I was going to make.

WINKELMANN CJ:
Okay.

MR MAHUIKA:
First of all, there is the question about the application of the CRPD. My submission would be, in terms of the Treaty and Treaty principles, if the CRPD is relevant the Treaty is absolutely relevant. They deal with very similar concepts and subject matter. The Treaty is probably more relevant because it is specific to New Zealand's circumstance and context and there is any amount of law that supports its relevance in interpretative types of exercises such as this.

Secondly, I wish to deal very briefly with *Cooper v Pinney* [2024] NZSC 181, [2024] 1 NZLR 935, which my friends for the Crown rely on. In my respectful submission that is a very different circumstance. That dealt with the application of the Property (Relationships) Act 1976. The PRA doesn't have any specific Treaty-related provision.

The circumstances of that case were quite different. That was dealing with whether trust property was to be treated as relationship property for the purposes of the PRA. The property in question was a farm that had been in the family of the husband for a number of generations. There was a very good argument and I think it arose during the course of argument as to whether or

not tikanga might actually take it outside of the relationship property context. So there are all sorts of reasons why evidence and why the Court was right to question whether or not it actually had a bearing in that situation.

This is a different situation. There are specific Treaty obligations on the part of the Crown under the two Acts that I have mentioned. There is undoubtedly a whanaungatanga connection and relationship here at play. That must have a bearing on the approach that is taken to interpretation and in terms of the notion of whanaungatanga it is, I think, uncontroversial that it would apply in this sort of context and we quote in our submissions the decision of the Court of Appeal in *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 and I am aware that your Honour and your Honour Justice France were Judges in that particular hearing, where the Court was prepared to give judicial notice to the importance of the concept of whanaungatanga. In my respectful submission, it is uncontroversial and *Cooper v Pinney* is an entirely different set of circumstances and should have no bearing on the Court's approach in this instance.

Ma'am, unless there are any further questions, those are my submissions.

WINKELMANN CJ:
Thank you, Mr Mahuika.

MR MAHUIKA:
Thank you Ma'am.

MR MEYS:
Your Honours, I did email through an outline of an oral argument this morning to Mr Marr, Mr Registrar, there are copies over there.

WINKELMANN CJ:
Yes, I think we have that.

MR MEYS:

But it strikes me the best use of this 30 minutes might be to answer the 10 questions that, according to my notes, you asked Mr Dale this morning.

KÓS J:
Only 10?

WILLIAMS J:
Having promised not to.

WINKELMANN CJ:
No, we didn't promise not to ask any questions. Ten sounds like a good number to me.

MR MEYS:
And they bleed into my oral outline in that the first, one of the early questions is, "is employment law needed here, is it appropriate between the Ministry and the family carers?" And Justice Williams pointed out justiciability. Her Honour Chief Judge Inglis ran the Ministry through the "how would a personal grievance work in practice?" It simply wouldn't unless the Ministry is the employer and the family carer is the employee.

The other reasons why it's appropriate and important that employment relationship is the finding of your Honours in this case, by way of an update, sort of the position faced by Ms Fleming, she feels that she has no real choice but to look after Justin all day, every day, all year, without a break. The everyday family carers such as Ms Fleming, they wake up sick, a normal job they could call in sick. In the current position, in this case, there is no system in place for that. They have to continue to work sick and if there was an emergency, what would happen? There are really dangerous health and safety issues involved.

WINKELMANN CJ:

That's if Justin is the employer. Or what's the situation you're saying here? That her present situation, and present situation assuming what legal framework?

MR MEYS:

Well, under FFC Justin was the employer so obviously it applies in that situation, but also on the Crown's case they effectively don't address what the alternative is. They say it all falls down, there is no employment by the Ministry, but they don't say what then the answer is. Which is that there is no system in place.

So an employment relationship finding, as was found in the Employment Court and the Court of Appeal in respect of Mr Humphreys, is very important that it is maintained in this Court and it is highly appropriate.

Justice Kós asked "why is residential care not then an available option or a good option if a family carer declines the offer of minimal funding?" Well, there are many parts of the country where there are no respite facilities, residential care facilities available, remote parts of the country.

Ms Fleming advises me that in very recent months, the last couple of months, she's been told when she asked the Ministry, they say: "Well, there's one in Bucklands Beach," which if you know Auckland, she resides in Massey, it's probably an hour with traffic to drive there to enjoy her three hours or five hours of respite, and then just wait around and then pick up Justin and drive back again. And that's in the Central Auckland, so imagine the East Cape or something.

Another reason why family carers feel that they can't rely on putting their family member into a residential care facility, bad experiences, inappropriate care. Because of the scarcity of care there's an inappropriate reliance on rest homes. So Justin, for a number of years, the only place Ms Fleming could find for him was the Gables Rest Home but even they now refuse to take Justin, so now she's left with no other options.

KÓS J:

Just to back up a point there, Crimes Act 1961 is clear that parental obligation to provide for the necessities of life of a child ends at 18. At that point, a cruel parent could simply leave a child at the street corner. Parents, of course, don't do that. They don't do that because they love their children, but at that point they are effectively taking over what is a mixed obligation, one driven by love on their part and one driven by obligation on the Crown's part.

MR MEYS:

Whanaungatanga. But if your Honour's correct, the earlier statement that the starting point in all this is *Atkinson*, if *Atkinson* is to have any meaning at all it is that if third-party carers are entitled to be paid by the Ministry and family carers can't be discriminated against, they have to be placed in the same position, then they are also entitled to be paid by the Ministry and how. And the third-party carers, there's no dispute that they are, at the time of *Atkinson*, they were being paid by the Ministry, they were being paid by ADHB, by DSS, Disability Link, and so Ms Fleming in 2012, '13 was also doing the exact same work and *Atkinson* is the whole reason why Part 4A was passed, to try to avoid that position that would have inevitably been found against the Ministry that would be an employer.

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The next question, your Honour, you were troubled with the "contracted" argument and you found "engaged" easier, Justice Kós. Well, 2018 was both events. It was an event of being contracted, sorry, an event of being engaged at least, but clearly it fits within the parameters of contracted also and the reason I say that is that the case of *Kidd v Cowan* [2020] NZCA 681, the Court of Appeal decision upholding the Employment Court and it was cited by Chief Judge Inglis in *Fleming v Attorney-General* [2021] NZEmpC 77, (2021) 18 NZELR 67.

WINKELMANN CJ:

Inglis.

MR MEYS:

Inglis, sorry.

WINKELMANN CJ:

That's all right.

MR MEYS:

That case, there were no terms at all, there was never any discussion or agreement of reference to employment, no terms were discussed or agreed, this was a friend living on a farm and he was found to have been providing services, in fact, and a quantum meruit approach was essentially taken –

WINKELMANN CJ:

And that's because he was effectively being managed like he was an employee.

MR MEYS:

Yes. And but it wasn't just quantum meruit, it was found to be an employment relationship and bleeds into your Honour Justice Winkelmann's next question, "what were the powers of monitoring and quality control by the Ministry?" Well, the Ministry of Health's operational policy for FFC expressly sets out, which is by the way at 304.0825, if you read it and you've ever looked at an employment agreement before, you'll be struck by how similar it is. It contains, it together with the FFC notice, contain all of the terms that are required for an employment agreement, employment contact, and that is effectively what the outcome of the Employment Court case was, with one exception. The only difference was that instead of a five-way partnership where the disabled person was the employer, that was the operational policy and FFC notice were read consistent with a purposive interpretation of employment law, that it must be actually the Ministry was the employer.

WINKELMANN CJ:

So what I was really asking about, is the Ministry of Health, so they haven't concluded a contract with Ms Fleming, but they have over the years continually done assessments and they've had full assessments in person, contacts,

email – contact, phone calls and emails, why are they doing all of that? Is that simply for respite, because it was done for years when there was no issue of contracting?

MR MEYS:

Well, I think there are two reasons. First, is that in no matter what the Ministry says in its arguments in this case, it does recognise that it has obligations to fund family carers and it has been doing so in practice since at least 2006 on the evidence.

The second reason is that in the Ministry's operational policy for FFC, you look at chapter 11, page 19 of that policy and the Ministry's responsibility for monitoring and the role and duties of each party, an exhaustive list saying you must complete all of the reporting requirements, the Ministry has the right to monitor you, the Ministry has the right to audit you at any time –

WINKELMANN CJ:

But that's people in a relationship, contractual relationship with them.

MR MEYS:

Well, the issue of what the effect was, that the judicial review issue, it's not about this being a judicial review, the question for your Honours is was the offer in 2018 by the Ministry, was the amount of the number of hours offered, was that lawful?

WINKELMANN CJ:

Yes. The question I'm asking though is, or the question I asked Mr Jeffries and Mr Dale, there seems to be an awful lot of contact between the Ministry and Ms Fleming which is not just focused on negotiating the contract of employment between Justin on their analysis and Ms Fleming. It seems to be they're really, they're looking at his care, checking it's okay, working out what he needs. Well, part of that will be for respite care so they can place him in case of respite, but it seems more than that. Is there evidence on this?

MR MEYS:

Yes, so there were contemporaneous but separate processes. So in 2018 –

WINKELMANN CJ:

No, evidence about why it was done?

MR MEYS:

Well, yes, the, as Mr Jeffries referred to, the New Zealand Public Health and Disability Act and now the Pae Ora requires that the Ministry provide disability support services under its strategy and when a person requests an NASC assessment, that is then putting up their hand for help, for assistance from the Ministry. So it's not just that it doesn't happen automatically, the point I make in my submissions about volunteers and consent, many people have disabled children in New Zealand that don't ask for help but those – and they're not deemed to be employees – but persons who contact the Ministry, request a NASC assessment, the NASC comes to assess what the needs are and explain what the options are for that to be provided and the two contemporaneous systems in 2018, one was respite care under IF, Ms Fleming applied for IF respite care and she was contracted – and she was accepted and contracted by the Ministry, the document that the Court of Appeal didn't refer to 307.1465, and then separately at the same time she applied for FFC which is funding for herself to do the work, to do part of the work, and that contract was all but concluded, all the terms were in place, the certainty required of the work, certainty required of the terms, the only problem was that one of the conditions of the offer were unlawful and that is the condition that she is challenging, the 15-hour offer, 22-hour offer. Does that answer your Honour's question?

WINKELMANN CJ:

I think so.

WILLIAMS J:

Can you give me that document reference again please?

MR MEYS:

Yes, 307.1465 – 1465.

WINKELMANN CJ:

Well, it answers it in part, but Mr Jeffries referred to her having had engagement since a much earlier point in time, 20-something years, he said, back into the 1990s.

MR MEYS:

Yes, there are two potential arguments available, or three in terms of timing: it can be since Justin turned 18 in 1999, had his first NASC assessment; it can be 2013 when the FFC notice came into effect, unilateral offer; or it can be 2018. Those are the three key gates. Now, in-between 2013 and 2018, there were actually a couple of further NASC assessments where mysteriously the NASC did not inform Ms Fleming that FFC existed and was available, amazingly.

WINKELMANN CJ:

So you're going to address that, aren't you, the significance of that, your submissions address whether or not they should have, what it means that they didn't tell her about its availability?

MR MEYS:

Yes, well, I think my – clearly they should have and I think that it's most relevant if you look at number 4 in my oral outline which is the good faith bargaining obligations under the Act. The Crown, in their submissions, have said the only good faith obligations in the Employment Relations Act is section 4(4)(a), that's not correct, and they say that the definitions in those sections technically exclude pre-employment prospective employment negotiations.

If you go to section 60 of the Act, that is section 60 to section 63A, a Part that had different definitions. The Part says in this Part the following definitions apply and employee in that, in those Part, refers to prospective employees. There is express reference to prospective employees, obligations of disclosure by the employer, before the parties include an employment agreement or

relationship and clearly one of those sections says in determining what the obligations of the employer are to a prospective employee the minimum is that they need to have the following things: all the information that's relevant, an opportunity to seek independent legal advice, et cetera.

1220

But in addition, it says to those minimum obligations, the Court when determining what the extent of the obligations are will have regard to the parties' bargaining power, equality of bargaining power, and in my submissions it's quite obvious that the Ministry and its agents' conduct between 2013, a couple of NASC assessments 2016, and then finally in 2018, did not comply with those bargaining obligations because Ms Fleming, and even when she had an advocate Ms Carrigan who is an expert, they couldn't understand how the offer was calculated. They tried their best to challenge it.

The effects of a breach of good faith bargaining obligations in Part 6 is at section 69 of the Act, which says that the parties are required to mediate any issues in dispute under Part 6 which must include prospective employment, bargaining for an employment agreement before you ever conclude an agreement.

KÓS J:

So your argument is that there is engagement here in an employment relationship, but what about those people who didn't engage because they didn't appreciate the position?

MR MEYS:

Well, the strong –

KÓS J:

I mean, where does your argument end here?

MR MEYS:

You're quite correct. Clearly the strongest point of the argument is 2018. By that point, it's irrefutable that the Ministry knew Ms Fleming was providing the exact same services as Mr Humphreys. Mr Humphreys was found to be an employee, how is she not?

Incidentally, the Court of Appeal accepted the – or rejected the Crown's argument that it could not know who was providing the services until afterwards. The Court of Appeal agreed with the Employment Court in this case that that's not correct on the facts or in law.

But so 2013, 2016, there is a series of events which could amount to engagement. There'll be only a few small number of cases relating, with the limitation period already covers that period 2013 onwards, so it's not going to make a big difference. It's only, you know, three, four years of back-pay wages. So it's open to your Honours to find that it occurred in 2013, as William Young J found in *Lowe*, or 2018 which is the point that I'm pressing, the minimum point at which engagement occurred.

The Crown, as your Honours have pointed out, will raise "even if it was an unlawful offer because it was in breach of *Chamberlain* and the policy, well, that's not this case, it's not a judicial review, there's no jurisdiction here". That's not correct. Section 161 of the Employment Relations Act which your Honours will be familiar with because the Supreme Court issued an amazing judgment *FMV*, cited in various submissions, which is to the effect that section 161 says when there is one employment matter raised in a case, the exclusive jurisdiction of the Employment Court trumps all over forums. So, even if there's only one employment aspect, the Employment Court then has all the powers of the High Court to make any orders that the High Court has, except for tort strangely, but there you go.

WINKELMANN CJ:

But that no one asked for a judicial review type orders here.

MR MEYS:

Well, as we said, we're not seeking that, but the first step is to determine whether the 2018 number of offers was unlawful and then to say, well, what is the effect of that? At that point, you know, the Crown may say "well, there's no effect because there's no jurisdiction, it's not a judicial review". We say the effect of that unlawful number of offers is that Ms Fleming was entitled to say "I accept all the other terms, 40 hours, I don't accept just this one point where you're offering 15 hours, or 22 hours, that's unlawful, I'm now challenging that in court", and that will be there should have been a mediation between the parties which the Ministry had the obligation, due to its inequality of bargaining power, it should have engaged that mediation process.

WINKELMANN CJ:

Well, you don't say she had to say "I accept that offer", she carried on doing the work which you say is an acceptance of the offer.

MR MEYS:

That's true and I just point out in the Employment Court she expressly gave evidence "I would have accepted 40 hours" and I do accept that there was a 40 hour limit except for exceptional circumstances in the FFC notice. The FFC notice is the Bible in relation to the pre-2020 period because it set out all the terms of employment and it fits the bill.

KÓS J:

So just to be clear, are you saying that the FFC offer was a lawful offer in terms of the statutory and common law *Atkinson*/*Chamberlain* backdrop?

MR MEYS:

It has to be, because Part 4A –

KÓS J:

Well, it doesn't have to be.

MR MEYS:

Well, I think it has to be, because Part 4A says expressly the Minister may gazette a notice by which and any payments to a family carer have to be made in accordance with that policy and –

WINKELMANN CJ:

Isn't the problem with that though, that this offer is notionally with Justin is the employer and he lacks legal capacity?

MR MEYS:

Well, according to the Employment Court and the Court of Appeal, that wasn't a problem because a purposive reading of the FFC notice and the operational policy it refers to clearly shows that in employment law the Ministry is the true, was the real employer. This five-way partnership was clearly a nonsense and it must be that, in fact, the Ministry was the employer.

WILLIAMS J:

Can I just take you back to the reference to good faith negotiations and the disclosure or not of the availability of the FFC. Mr Dale referred to it. Where in the evidence – well, no, let me put it this way, is it agreed that there was suppression of the existence of that policy and the ability of Ms Fleming to take advantage of it?

MR MEYS:

I don't think a smoking gun can be pointed to show there was deliberate and active suppression, but what we do have is that the Artemis report into the failures of FFC, why only a few hundred people took it up instead of 1,600 as budgeted for, expressly says the reason is we didn't go out and tell everyone about it, people don't know about it, that's one of the key reasons.

And in the Employment Court, a shorthand way of referring to the internal NASC guidance document, which was not available online or published, was it became known as "the secret document". That is that operational policy for FFC but with Ministry's notes on it to the FFC, to the NASC and that document says, you know, "effectively the system here is you can tell people about FFC

but don't answer questions that they may have about it. Once we refer them to the host agent and once they've been signed up to the host agent's documents then that the host agent will deal with any of those issues".

But I think the reason it was set up in that scheme is that section 88 notice says a person is deemed to be bound by a *Gazette* notice once they receive the first payment and I think that was the reason that the Ministry set it up that way, thinking because if the primary argument for the Ministry in the Employment Court and the Court of Appeal was that your Honours have no jurisdiction to enquire into this, into the who the true employer was, they said it's section 88 means that it's deemed, even if Justin was deemed to be the employer even if he has no capacity, and that overrides employment law. Well, that argument was set aside by all parties.

WILLIAMS J:

So this was just the Department, the Ministry sorry, not wishing to bind the, what are they called, the intervening agent to anything they might say about rights and interests of the caregiver, is that what you're talking about?

MR MEYS:

I think it was slightly different in that I think the Ministry's plan was that they needed to get someone signed up, yes, before and then that they, after that, they can't challenge it. Instead of going the employment route, which is what I have set out for you, that section 69, Part 6, good faith bargaining, transparency, disclosure, real opportunity to consider, feedback, not take it or leave it offers, mediation if you can't agree to resolve issues.

1230

Next question –

WILLIAMS J:

What question are you up to?

MR MEYS:

Good question.

WINKELMANN CJ:

These are our questions you're answering, are they, are you?

MR MEYS:

Yes, correct. Your Honour Justice Winkelmann asked "is there a statutory provision for a right of review under FFC?" And just the Ministry's operational policy for FFC stated at 304.833 and 836, specified that there would be a Ministry review process.

There were then a couple of questions for Mr Jeffries. Justice Kós asked "*Chamberlain* has an element of fair and reasonable allowance, doesn't it, so we can't expect that, you know, there would be a large, an unlimited number of hours funded?" But we accept for FFC purposes, or I do anyway, that there was a 40-hour limit. So we're not talking, we're not worrying at this stage, about is it 70 hours, 90 hours, 168 hours, and that's because Part 4A gave the Minister power to set a limit on the number of hours but Part 4A did not say that the Minister could do what he did, which is to actually tell NASCs, in internal contractual documents, the service specifications, "you're not going to be offering 40 hours to people who need supervision 24/7". The service specifications amazingly say "you will offer only a normal distribution of hours to applicants". So, it specifically says "most people will not receive 40 hours, you are required to band people and to make sure that only the highest needs will receive 40 hours", thus by implication or expressly the majority of people only received hours in the twenties, despite the NASC being the expert on this.

The Ministry hasn't met these people directly, the NASC has. The NASC met them and said "you need 24/7" –

WINKELMANN CJ:

So what document is this in?

MR MEYS:

The service specifications at –

WINKELMANN CJ:

Okay, so sounds like a good basis for judicially reviewing the service specifications.

MR MEYS:

No, that's been – that was tried.

WINKELMANN CJ:

Is that *Chamberlain*?

MR MEYS:

My desert island doc –

WINKELMANN CJ:

It was tried and succeeded, wasn't it? Or is it not this aspect of it, the predetermination?

MR MEYS:

Enforcement, yes. My desert island top five documents in this case for your Honours to read at paragraphs 7 to 10 of my main submissions. One of them is the Service Specification which is referred to at paragraph 9. The Support Package Allocation Guide and that is at 10.1.

WILLIAMS J:

Support what, sorry?

MR MEYS:

The Support Package Allocation Guide and I've quoted it at 10.1, the documentary reference for it is 201.0156, but I've quoted it at 10.1 for your Honour's benefit: "... 'each NASC [is required] to adopt strategies' to ensure that 'in practice there will be a distribution' ... it stated that the average allocation ... for high needs persons should be $600."

So this, these strategies, are borne out by what then happened. Even though we have luckily Mr Humphreys has a lot of experience in this area, luckily Ms Carrigan had a lot of experience, but even they didn't know until discovery in the Employment Court that there is a template prepared by the Ministry which automatically results in these tiny numbers of minutes. It was a mystery to all family carers, Ms Fleming, how it went from “24/7” to “15 hours”.

WINKELMANN CJ:

I see you are running out of time.

MR MEYS:

Yes.

WINKELMANN CJ:

So are you dealing with your submissions only through answering our questions, or are there particular things you wanted to – I’m not stopping you.

WILLIAMS J:

It's the questions were so good.

MR MEYS:

That’s, yes, you are better at pointing out the key issues than I am. So after, I won’t deal with 2020 onwards, but yes, well, except that it’s payments were authorised by the FFC policy and they were 40 hours except for exceptional circumstances. I see there are two more questions in my list were asked.

WINKELMANN CJ:

What are they? What’s the first one of those two?

MR MEYS:

Your Honour Justice Winkelmann asked “was the FFC policy needed to be applied to find employment or is the employment to be found outside of it?” Which I suppose we’ve already canvassed that in relation to the 2013 argument, 2018 argument. After the repeal of Part 4A in 2020, then we –

WINKELMANN CJ:

Well, your answer to my question is it does, it is the basis for the employment, isn't it?

MR MEYS:

Yes. The final question I have noted, also Justice Winkelmann, "the Crown's argument is that the Ministry is not in a position to take on employees?" It is uniquely in a position to take on employees, more so than any other possibility. It has an existing system in place with a fleet of NASC agents and host agents around the country already contacting, interviewing family carers and figuring out how many hours they are working. It arranges and asks them to sign individual employment agreements, albeit with the wrong party named as the employer. The Ministry already arranges the payments. It already has the monitoring and the audit abilities to terminate payments if an employee is not meeting their obligations.

In my submissions, a main submission, I pointed to the Health and Disability Services (Safety) Act 2001 which is an Act that says all disability services, whoever is providing them, are covered by this Act and the Ministry has the power, the Director-General of Health has the power to enter into a person's residence and stop them from providing care in their house if they believe it's not safe.

WINKELMANN CJ:

So that raises, takes us back to Justice Williams' question, is that is it wrong to transactionalise the relationship between parent and child in this way? So should it be that people are entitled to come into the house and say "how you are caring for your son is not the way you should be caring for your son"?

MR MEYS:

Well, in my submission if a person is providing terrible care, dangerous care, then they should be cut off and a normal employment relationship what do you have? A disciplinary investigation, a disciplinary outcome and they are terminated as an employee. You know, a murderer who wants to access FFC

doesn't need to be accepted by the Ministry. We're only talking about parents who, having met Ms Fleming, Justin, and Sian and Mr Humphreys, clearly their interests are aligned. No one cares more about their children than they do.

WINKELMANN CJ:

I suppose the answer to the question which I asked you, to answer my own question, is that in reality since the reality of the situation is that it's not Justin, say, who's actually the employer, it's a third-party agent who, in substance, is managing the relationship, they can still do that even if Justin is the notional employer.

MR MEYS:

Yes I will think on that, your Honour.

KÓS J:

Are you saying there has to be an employer or was it open to the Ministry in terms of the statutory and *Chamberlain/Atkinson* obligations to simply provide funding?

MR MEYS:

There has to be an employer.

KÓS J:

Why?

MR MEYS:

Because *Atkinson* and then the Ministry did then in fact set up and confirm, formalising employment relationship and still to this day requires an employment relationship and so it's –

KÓS J:

The IF system doesn't require an employer?

1240

MR MEYS:

Well it does, either employed by HCSS or you are employed by an agent of the disabled person. So still employment is required. So, yes, I think it does have to be employment in *Cowan v Kidd* did there have to be employment? It's just on the facts and in law. Services are being provided. A person has a test in *Prasad v LSG Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 for, you know, who is providing the services. The test in *Courage v Attorney-General* [2022] NZEmpC 77, (2022) 18 NZELR 746, the Gloriavale case. The test, you know, is it a volunteer or is it actually services being provided –

KÓS J:

It just seems to be completely unnecessary to involve – to impose an employment relationship. The Crown's obligation is to provide care. It can do that by funding someone like Ms Fleming and Mr Humphreys who really care for their children, by the provision of money. Why do you have to impose an employment relationship on top of this familial one?

MR MEYS:

There's a couple of answers to that, which is that the Ministry, if it provides only funding, but not actual support, then that just allows it to make a take it or leave it offer with no justiciability other than a High Court judicial review at great expense with lawyers required and the – everyone accepts the Crown could legislate this, and that would be an answer. So social security, a welfare benefit, that's legislated. They can do that. There have been, in my submissions I cite half a dozen Acts in this field since 2013 that the Crown could have legislated this area but they've chosen not to. They've left it to your Honours to decide whether employment, on common law employment obligations are found under the Employment Relations Act. So it's not a question of whether there has to be. I agree, they could –

WILLIAMS J:

Isn't it to flip it the other way might be a better way to look at it, the classic if it has a beak, and goes quack, then it's a duck, and the question really is if this is

work, or homeworking, then whatever else it is, then its caught by the Act. It's kind of a mixed question of fact and law but a lot of fact.

MR MEYS:

I hope your Honour's asked this question to the Crown. If it's not this then what is it because throughout –

WINKELMANN CJ:

Well there is actually already, isn't there, the supported living payment, support package allocation. Anyway, there is legislated for funding, isn't there, for caregivers who are on some benefit basis.

MR MEYS:

And where that takes us to, your Honour, is the Crown's ultimate submission, take it or leave it. If you don't like it, then the supported living payment, living on a benefit your whole life while you're working huge hours, the same as every other third party carer, that meets the Convention on the Rights of Persons with Disabilities. That meets our obligations. So if your Honours conclude that being on a benefit forever meets CRPD and the State's obligations, then they will succeed. If your Honours conclude that they actually in fact go further and recognise they have duties to –

WINKELMANN CJ:

Well they do go further, don't they. We don't have to conclude that because it's obvious on the face of it that they're not saying everyone has to just operate on that benefit.

MR MEYS:

Well that's what the argument announced when they say if you're offered 15 hours, or two hours, if you don't like it, well then there is no alternative. There's no fallback here. Whereas we've outlined to your Honours there is, all the terms of employment are met, just the hours was unlawful, mediation between the parties to resolve that one issue. So I don't wish to take up any more of your Honours time unless you have any further questions.

WINKELMANN CJ:

Thank you Mr Meys. So we're already behind. Although I think we're okay timewise overall though, aren't we. So far.

MR TIMMINS:

Tēnā e ngā Kaiwhakawā mō Te Kāhui Tika Tangata ahau.

WINKELMANN CJ:

Mr Timmins.

MR TIMMINS:

The Human Rights Commission is grateful for the opportunity to present to you today, and has been involved as an intervener in the *Fleming* Employment Court matter, but also at the Court of Appeal for the consolidated appeals, and I recommend to your Honours the submissions that the Human Rights Commission has made at both of those stages. They're more fulsome submissions than we've provided at this level. That's in our, the Human Rights Commission supplementary authority bundle.

We have prepared a brief outline, which I have already provided to my friends, and I also happen to have a copy of the outline that Aotearoa Disability Law intends to present to.

WINKELMANN CJ:

Hand those both up?

MR TIMMINS:

I will hand that to the registrar. We'll file soft copies.

WILLIAMS J:

Just for future reference, it's quite useful for my note taking if I can pick up your outline and drop it onto my screen, and then take notes against your outline.

MR TIMMINS:

Thank you Sir.

WILLIAMS J:

It's going to be in your interests.

MR TIMMINS:

Now the Human Rights Commission has two broad areas of interest in these appeals. The first one, which hasn't been a strong focus of our submissions, is the rights of workers, and we've highlighted in our written submissions the vulnerable status of people providing care. That is, although it hasn't been a strong focus of the written submissions, that does not mean it's no less important, and that is a theme that the Commission wishes to emphasise, particularly when we look at the relational aspects of care being provided in the home, in terms of the rights of those who are receiving care, and those who are also providing care. We think they're complementary. In terms of the international law framework on the rights of workers we rely specifically on the International Covenant of Economic and Social Cultural Rights, Article 6 and 7.

However, I do intend to turn to the Convention on the Rights of Persons with Disabilities as this has been the focus of our submissions, including through the Employment Court and the Court of Appeal. I will briefly introduce the Convention, and then I will ask my friend Ms Mitskevitch to address you on Article 12 as far as it impacts on supported decision-making. She promises she'll take no longer than five minutes so we'll make sure we can stick to that.

Although your Honours, this Court has addressed the context of the Convention most recently in the *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 case, I do think it is important to look at some of the history behind the Convention coming into play in 2008, and I just would like to draw your Honour's attention to a 2015 Special Rapporteur report which is in the Human Rights Commission's bundle of authorities at bundle 9, and if we look at paragraph, it begins at paragraph 3, the Special Rapporteur there sets out the history behind this global movement towards capturing the rights of

persons with disabilities, and at paragraph 4 she notes just there beginning: “In a very short period of time”, that is the second sentence in the paragraph, “there has been an extraordinary paradigm shift, a change in the way persons with disabilities have been perceived and hence treated.:

This is the point I wish to make. “From its initial focus on charity and medical considerations, the international community has moved towards a model that recognizes that social and environmental barriers are the real obstacles for the enjoyment of human rights by persons with disabilities.”

1250

So it is really trying to emphasise the shift from the medical charitable model to the social human rights model which we say is captured in the Convention itself, and that is further recognised down in paragraph 9.

KÓS J:

Isn’t this case more about the former, or the medical and charitable side?

MR TIMMINS:

Yes, it highlights the distinction and as –

KÓS J:

Yes, but I mean we’re not really talking about equality of opportunity here. We’re talking about who cares for Justin.

MR TIMMINS:

Exactly, and so the point of presenting that distinction is to show that the rights that are intended to be protected through the Convention haven’t been fully implemented, and so without implementing those rights, the Commission says, leads to ultimately discrimination for persons of disabilities.

WINKELMANN CJ:

So you’re not accepting what Justice Kós has said? You’re saying it is to do with moving away from a medical model to the human rights model because

the model that is being applied by the Ministry of Health is kind of a medicalised model. It's not actually enabling the disabled people to have functional, normal relationships within their family where people aren't being exploited, et cetera.

MR TIMMINS:

Yes, I apologise. That's the distinction I'm trying to make is that the model that's under question here does not reflect the social human rights model but rather reflects the medicalised charitable model, seeing persons with disabilities as beneficiaries of care as opposed to agents of their own, access to their own rights. So –

WILLIAMS J:

Can you tell me once again, because I missed it, how do I find the Special Rapporteur's report in the materials?

MR TIMMINS:

Yes, this is in the – there was a supplementary bundle of authorities that was provided by the Commission and this is particularly tab 9 of that bundle. It's the 2015 report.

WILLIAMS J:

Yes, thank you, and what page were you on?

MR TIMMINS:

It began at paragraph 4 and then there's further references to, if I can take your Honour to paragraph 9, the sort of transition to becoming towards a social model.

The other aspect I wish to introduce which is reflected in our written submissions, and that is at paragraph 10 of our written submissions, is another comment by the same Special Rapporteur in 2019 where she refers to a paradigm shift away from ableist, charitable or medical models of disability. That document, I won't take you to it, but that is at tab 11 of the Human Rights Commission's supplementary bundle.

We have in our written submissions, we've referenced that quote of "ableist" and in our footnotes "ableism" is described as a value system that considers certain typical characteristics of body and mind as essential for living a life of value, and again, Justice Kós, the point the Commission is trying to make is that the model that's under consideration here reflects an ableist perspective of disabled persons accessing their rights.

In our written submissions we have referenced the purpose of the Convention and then at paragraph 13 of my written submissions referenced what we call the sort of overarching themes that come through the Convention and which are described as the general principles of the Convention at Article 3, but those very important overarching themes from the Commission's perspective are those of inherent dignity, individual autonomy and independence.

We particularly rely on Articles 12, 19, 23 and 28 of the Convention. A central pillar of the Convention is Article 12 which references supported decision-making, and with your Honour's leave I'd just like to hand over to my friend to address that.

MS MITSKEVITCH:

Tēnā, e ngā Kaiwhakawā. I'll address four points about Article 12 of the Convention which Mr Timmins has indicated. The points that I'd like to address are outlined on page 2 of our oral outline, at the top of page 2, paragraph 5, and those points are the centrality of Article 12 to this case, the importance of looking at the text of Article 12, the distinction between legal and mental capacity, and the obligation to provide architecture for supported decision-making which has not been met in these cases.

Turning first to the centrality of Article 12, Article 12 is an enabling right. Legal capacity is the key by which people can access their full spectrum of rights. The Commission respectfully submits that the Court of Appeal in these proceedings should have been informed by Article 12 of the Convention in its analysis. This would be consistent with the approach of this Court in

TUV v Chief of Defence Force, and this is in the common bundle of authorities at tab 63, and at paragraph 66 on the screen the Majority recognised that the Committee on the Rights of Persons with Disabilities said there's an obligation on the State to abolish substitute decision-making regimes and replace these with supported decision-making regimes. That's also reflected in the Minority judgment delivered by your Honour, Chief Justice Winkelmann, which did not differ from the Majority in their recognition of this obligation, and the Minority judgment discusses this at paragraphs 95 to 99 of *TUV* which I won't take you to now but this references in particular the obligation to ascertain a person's will and preferences or the best interpretation thereof through supported decision-making instead of the earlier approach, the medical model, that had been referred to which is the best interests assessment through substituted decision-making.

Turning to these proceedings, the Court of Appeal made only passing references to Article 12. At paragraphs 76 and 84 the Court cited Chief Judge Inglis' finding in *Fleming* that substituted decision-making had occurred in these cases but did not engage in a detailed application of Article 12.

Now to the second point. Looking to the text of Article 12, this is in the authorities bundle at tab 69, in particular the Commission wishes to refer to Article 12(2): "States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others," and Article 12(3): "States shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity." For Article 12 to be realised, both of these strands must be read together.

Now a third point, a clarification of definitions. It's important to bear in mind that legal capacity and mental capacity are distinct concepts. Variants in a person's mental capacity cannot justify denial of their legal capacity. Article 12(2) recognises that every person has legal capacity. It is inherent to our humanity.

In the CRPD Committee's General Comment No. 1 which is in the authorities bundle at tab 70, paragraph 13, the Committee clarifies: "Legal capacity is the

ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on [a range of circumstances], including environmental and social factors."

Our fourth and final point on Article 12 is to demonstrate that the requirements for supported decision-making have not been met. Article 12 requires the State to put in place architecture that enables disabled people to access appropriate supports to make, communicate and implement decisions. Supports must be tailored to the diversity of individual needs. There is no one size fits all. The fact that a person might require a high level of support should not be a barrier for them to access support to make decisions.

1300

More detailed guidance on this architecture and avenues for supported decision-making are outlined at paragraph 5(d) of our oral outline, specifically the CRPD Committee's general comment number 1 at paragraph 17, the Law Commission's report on adult decision-making capacity in tab 13 of the Commission's bundle authorities at page 125, and IHC's paper on supporting decision-making at tab 14 of the Commission's bundle. I won't go through those now but they're important references to look for the architecture.

The Commission submits that this architecture is not currently in place in New Zealand but it's not to say that it cannot be in the future. In the present context, where a person requires support to make a decision about who will provide their care and whether they will employ a person to provide that care and that decision is made without the provision of support or reference to a person's rights, wills and preferences, the Commission submits that this constitutes substitute decision-making.

Unless the Court has any questions, I will pass back to Mr Timmins to address the application.

WINKELMANN CJ:

All right, well, we might take the luncheon adjournment at that point but, Mr Timmins, I take it you won't be much longer after we come back? Right, thank you.

MS MITSKEVITCH:

Thank you.

WINKELMANN CJ:

We will adjourn.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:

Mr Timmins.

MR TIMMINS:

Thank you. I am proposing not to be longer than 10 minutes.

WINKELMANN CJ:

Thank you.

MR TIMMINS:

Just before the break we were talking about Article 12 in terms of supported decision-making, and I just wanted to touch on why that's important, and the reason the Commission, the Commission thinks that Article 12 is a central facet of the Convention, and where supported decision-making hasn't been achieved, as we say has occurred in these two cases where supported decision-making has not occurred, that results in a vacuum, and the Commission says that the vacuum must be filled by the State in terms of being the employer. So where the proposition is that the disabled person is the employer, either themselves or through a nominated agent, but they haven't undergone a supported decision-making process because of their diminished

mental capacity, not their legal capacity. We say that their legal capacity remains. But where that process of supported decision-making hasn't occurred, we say they cannot be the employer, either themselves or through a nominated agent. So that creates this vacuum which the Commission says must be filled by the State. Now this does not mean that in all cases the State will be the employer. There may be other scenarios where mechanisms are set up which are still CRPD compliant, but in the particular cases in front of your Honours today we say that that is created through supported decision-making not occurring.

WILLIAMS J:

Give me your alternatives? Or at least one or two to give me a sense of what you're saying to me?

MR TIMMINS:

Yes. So there could be an alternative of where supported decision-making has occurred, and through that the exercise of agency of the disabled person, an agency is nominated as the appropriate employer.

WILLIAMS J:

Right.

MR TIMMINS:

So the important proposition there is the CRPD does not require in all circumstances that the State be the employer, and it goes back to the Commission's submission that the Convention is not a one size fits all proposition. That because of the diversity of disabled persons different arrangements may still be CRPD compliant.

KÓS J:

So does the CRPD require an employer at all?

MR TIMMINS:

Well the CRPD does not. But the human rights position, because of the vulnerability of the type of workers who are providing this care is that employment protections are preferable. But the Commission's submission is not that in all respects an employment model must be offered. That there may be, as your Honours have already talked about, other funding mechanisms which are provided, which may ultimately be CRPD compliant.

I'd now like to turn to Article 19 of the Convention. Article 19 is relevant to, and I've got it on the screen there, living independently in the community. This is really the fundamental piece of the puzzle, if you like, that in order for the State to meet this obligation, it has to provide these mechanisms to allow disabled persons to live in the community, which includes the choice of living at home, and so Article 19, we say, is being met in terms of it's to the State's benefit to create these arrangements where disabled persons are not institutionalised, because we would say that results in a breach of the Convention.

1420

The Disability Rights Committee has released a general comment where they've interpreted the scope of Article 19 and I'll just take you to that briefly, that's *General Comment No. 5* and that's in the Commission's bundle of authorities at tab 8, and what's particularly relevant there is, if I could take your Honours to, it's on page 5 and there's a bolded heading "Personal assistance." And so here, the Committee is discussing essentially the provision of funds from the State to allow disabled persons to live independently and that reference there under (i): "Funding for personal assistance must be provided on the basis of personalised criteria and take into account human rights standards for decent employment."

Then just at the very bottom of that series of paragraphs under (iv), just to reinforce the earlier message, this is the last sentence: "The control of personal assistance can be exercised through supported decision-making."

So that reference to “human rights standards for decent employment” the Commission says is very important in order to ensure the protections for the individuals providing this type of work and there’s a very recent Human Rights Council report dated 2025 which is in the bundle of authorities and that is at, excuse me, that's on the screen there now, and as I said this is a very recent report, the date is 30 January 2025 at the top right, and this is looking at the relationship between those who require support and those who are providing care and I suggest it's a very apposite report for the purposes of this hearing.

If we go to paragraph 12 –

WINKELMANN CJ:
What document number is that?

MR TIMMINS:
This is tab 6 of the supplementary authorities from the Human Rights Commission.

WINKELMANN CJ:
Thank you.

MR TIMMINS:
And if I could take your Honours to paragraph 12 and just the reference there to: “... the rights of those providing and requiring care and support are inextricably linked, and thus care and support systems must respect, protect and fulfil the rights of both those providing care and support and those requiring care and support ...” and this is because of the relational aspect between those two individuals, if you like. That in order to be rights-consistent, the rights of the person providing care is inextricably linked to the person who is receiving care.

So, an extreme example of this not working is where a person providing care is not receiving appropriate funding or appropriate support and that leads to harm

to the person receiving care, either through exploitation or violence or other forms of harm.

Then if I could take you to, I recommend the whole report, but just in the interests of time I'll go to paragraph 30 and here the Human Rights Council is specifically considering the rights of those providing care and support, and the Commission links this back further to the *General Comment No. 5* and the human rights standard for employment that was just in that General Comment, and at paragraph 30: "The systems must guarantee the rights to just and favourable conditions of work and to social security for all care and support workers and workers with unpaid care and support responsibilities, [and then] with particular attention to those who are migrant workers, domestic workers ...".

And then in the middle of paragraph 31, there is also a reference there: "Support for family members of persons with disabilities is considered as part of the rights of persons with disabilities." So, again, seeing that connection between the relational aspects of those providing care and those receiving care.

So, how does this all distil down into the Employment Relations Act? Well, the Commission's submission is that in looking at engaged, employed or contracted under the definition of "homeworker" these provisions require a broad interpretation to ensure that the rights with persons with disabilities are met in terms of being able to live independently and also in terms of being able to exercise supported decision-making agency rights under Article 12, and complementing those rights are the workers' rights for those who are providing care, and if I could just reflect on a comment Justice Williams made in terms of whether these relationships should be transactionalised and the Commission's view is that, yes, that this is part of the maturity of the Convention on the Rights of Persons with Disabilities. That in order to have a rights-consistent and protected environment, that does require a transactional aspect to ensure that those rights can be exercised.

WILLIAMS J:

Well, would it if it was really just a humans rights non-discrimination lens that was applied to it?

MR TIMMINS:

Would it require a transactional input?

WILLIAMS J:

Well, would you need to invent a contract, if discrimination were your lens?

MR TIMMINS:

So if you were to, if the discrimination in terms *Atkinson* where the family carers are not paid on the same basis as other providers of care who are employed through different models then, yes, I would say it does require an employment relationship. But the –

WILLIAMS J:

Why so?

MR TIMMINS:

Because in order to ensure consistency of treatment, equality of treatment between those who are providing care through some other model and the family members who are providing the same service.

WILLIAMS J:

Yes, but doesn't it –

WINKELMANN CJ:

Is your point that –

WILLIAMS J:

No, but the point is that if you could get to the substance without inventing a contract, isn't that the better way of doing it, if it's just an equality and dignity

issue, and not creating a private law box to put it in to make it work, it might sit rather more intuitively well within the social context within which this goes on?

MR TIMMINS:

Well, the Commission does not suggest that the employment model is the only model that will be rights compliant.

WILLIAMS J:

I thought you said it was?

MR TIMMINS:

No, what I am trying to say is it creates the best chance for rights compliance and the best chance for rights protection.

WILLIAMS J:

Because it’s nice and black and white?

MR TIMMINS:

Yes and also because the Commission’s concern about the protection of vulnerable individuals who are invisible, which is through the reporting we’ve seen, the Commission likes the employment model because it does lead to that greater form of protection.

WINKELMANN CJ:

And in the real world, if it's not a care, if it's not a family member, it will be someone who is in an employment contract, looking after the disabled person and *Atkinson* has said you can't discriminate against a family member because they’re a family member and fail to provide them the same remuneration, the same conditions, the family, effectively, the same support to achieve the CRPD outcomes.

MR TIMMINS:

To achieve Article 19 and –

WINKELMANN CJ:

Yes.

MR TIMMINS:

Yes, that's correct.

WILLIAMS J:

Another way of doing it though might just to say "you've got to provide similar terms and conditions, because you'd be discriminating if you didn't."

MR TIMMINS:

Yes.

WILLIAMS J:

You don't need a contract for that, it's just a matter of public policy.

WINKELMANN CJ:

And a benefit.

MR TIMMINS:

No, that's right, that's right, and the Commission would be consulted on that public policy process and might say that their preference would be for an employment model because of those greater protections, but they might, depending on the model that's created, they might also say that ultimately that funding option is still CRPD compliant.

WINKELMANN CJ:

And that might be, say, a benefit of an unusual kind.

MR TIMMINS:

Yes, a benefit or if an allowance mechanism that isn't a benefit, but that's all part of a policy process that would have to be undertaken.

KÓS J:

Are you focusing here on the advantages of, for instance, the ability to bring a personal grievance?

MR TIMMINS:

Yes, that's one clear advantage, but –

WINKELMANN CJ:

Sick leave, holidays.

MR TIMMINS:

Sick leave, but also health and safety in the workplace, all of those clear advantages which, in the Commission's view, make the employment model preferable.

1430

WILLIAMS J:

Yes, but let's just explore this because I think it's quite important as a conceptual approach. There are options available for someone subject to a public policy mechanism which is the equivalent of employment, without having to invent employment, for example, you could just contact the Ombudsman or the Human Rights Commission, get an investigator in, and you know how that works much better than I do, so –

MR TIMMINS:

Yes, and – sorry?

WILLIAMS J:

And in terms of holidays and so on, if there were an entitlement generally speaking in the contract space, shall I call it, Wellington speak, for holidays, et cetera, then you'd get them as a matter of non-discrimination.

MR TIMMINS:

Yes, I mean the Commission isn't wedded as a matter of it being required to that employment model and accepts that other models could be available.

WILLIAMS J:

Right, I'm just testing whether – because you say the employment model is the best model, the strongest and clearest, I'm just testing that point with you.

MR TIMMINS:

If those parameters could be achieved through that process then yes.

So unless your Honours have any further questions, those are the submissions of the Human Rights Commission.

WINKELMANN CJ:

Thank you, Mr Timmins. Ms Pope.

MS POPE:

May it please the Court, Ms Dunn and I are to split the submissions between us as between the homeworker issue which I will cover and the *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 issue which Ms Dunn will cover. Our intention is to split it at roughly 15 minutes for this first issue which should take me to 2.46 and five minutes for Ms Dunn, but we are really here to assist the Court and ADL is grateful for that opportunity.

We have handed up, and Justice Williams will be pleased to know also emailed, an outline of oral argument. What that does also include on the third page is a flow chart which is really just intended to assist the Court in terms of how the issues were determined in the Courts below and how it is that we've come to the two or three issues which are now before the Court.

WINKELMANN CJ:

That is excellent, thank you.

WILLIAMS J:

For future reference, can you put the flow chart on A3?

WINKELMANN CJ:

Well, actually, could you send it in in A3?

MS POPE:

Yes, your Honour, we can and there is an Auckland University law student who will be very pleased to listen on the livestream to the Chief Justice's praise for the flow chart.

So we begin with purpose and the homeworker extension arose from a recognition that homeworkers are vulnerable, frequently working within relationships which are legally imprecise, and the origin of the homeworker extension can be traced to 1985 Green Paper and that Green Paper is discussed at some length by the judgment delivered by Justice Glazebrook in the *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691 decision, and what that Paper shows is that flexibility was always needed and is essential in the homeworker definition to achieve the purpose of protecting homeworkers working outside of traditional employment relationships.

So we say that the purpose of the homeworker extension is consistent with a focus on substance over technicalities, and in our submission the Court of Appeal's requirement to precisely pinpoint past events which are of a quasi contractual nature is incompatible with the purpose and design of the homeworker extension which is a concept that was deliberately designed for imprecisely designed or imprecisely defined relationships.

So the homeworker extension has been successively re-enacted in legislation in New Zealand. It is the method by which New Zealand gives protection to vulnerable homeworkers and by the time it was re-enacted in the Employment Relations we had already had the *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA) decision, and the *Cashman* decision established that

homecare workers engaged by a health authority fell within both the ordinary meaning and the protective purpose of the homeworker extension.

So in our submission it's been clear for over two decades that these appellants or that homeworkers providing care are in the category of vulnerable workers that the homeworker extension was intended to protect and to protect by providing the protections of employment status. So fundamentally, in our submission this first question can be simple and that it is properly just an issue of statutory interpretation of the homeworker extension and it does not need to be put any higher than that.

Today this Court is dealing with an appeal from the exclusive jurisdiction of the Employment Court and the relevant question for the Employment Court in that jurisdiction is to determine whether on these facts an employment relationship is deemed to exist by the homeworker extension, so therefore we would respectfully submit that the fact that there may be other options or other mechanisms for challenging the legality of the way in which the State has engaged with the appellants isn't the primary question that is before this Court today. We see that the appellants aren't asking this Court to create a contract but instead asking this Court to recognise that the ERA deems these homeworkers to be employees.

I will then move to the second point which is one of substance, and it's conceptually important in our submission to consider the homeworker definition as a whole. There is a tremendous focus, at least in the written submissions, on the term "engaged" or the terms "engaged, employed or contracted", but what is not in dispute is in our submission also instructive. In the *Lowe* case in the Court of Appeal Justice O'Regan noted that *Cashman* established that the Ministry's trade or business includes the engagement of healthcare workers and that the work is done for the Ministry. The Crown has conceded these points since *Lowe*. Its concession, of course, depends on there being an engagement, but there should be no dispute that the Ministry in fact benefited from these appellants work and as a matter of substance then the Ministry engages healthcare workers in the course of its business of engaging and

monitoring health services. On that monitoring point, the Chief Justice had a question as to whether the NASC process required quality control. There is a factual finding to that extent at paragraph 78 of the *Fleming* Employment Court decision, and for a pinpoint page reference in the policies, I would direct the Court to 301.0149 in the Fleming case on appeal.

1440

So the Chief Employment Court Judge concluded that the Ministry periodically checked in with Ms Fleming to make sure that the caregiving work she did for Justin was still being done, and that it was being done to an appropriate standard. So there was a quality control element. As a matter of substance the Ministry received substantial economic and operational benefits from the appellant's doing this work, and in light of that substance the Ministry's failure to provide the appellant's with a traditional employment relationship, should not negate the application of the homeworker extension, and I would agree with the observational question raised by the Chief Justice earlier today, that it is, in fact, highly material that it was the Ministry who were setting the rules. These were technicalities under their control.

In our submission it's not necessary to find an overriding statutory obligation to fund the support. Instead we have a situation where the appellants are already doing the work, and the homeworker extension, as a matter of law, protects them as vulnerable homecare workers and deems them to have employment status.

WILLIAMS J:

Every time? Whenever the State is providing resources in home?

MS POPE:

That isn't – our submission is that it is in the case on the particular facts of this case, and they are relevantly that these appellants are in a group of carers of disabled people who were left behind. In the judgments below, and in the transcripts of evidence, your Honours will see reference to an analogy that Ms Fleming used herself as there needing to be a minibus for people, carers in

her situation who were left behind, when everyone else got on the bus, post-*Atkinson*, when funded family care came in.

WILLIAMS J:

I'm thinking of how you draw a line in legal terms rather than the factual context that doesn't scribe, sorry to make some animal metaphors, your circle too wide. When I was a kid there was a thing called family benefit, $6 a week per child that my parents were very pleased about, and the State had a duty of care, partly because, I suppose, it intervened in the family in that way. Why wouldn't that qualify?

MS POPE:

Well that wouldn't qualify because in what – we're submitting that it's on the facts of these particular appellants. There is some inherent flexibility, which is based in by design to the homeworker extension. But we have appellants who are full-time family carers of adult disabled children, who have, who needed support to make the decisions as to whether or not to take up FFC, and individualised funding, and weren't provided with that support. There will be a number of carers who may be, and will be, entirely happy with an individualised funding model, and a number of disabled people. But what we have here is a situation where Ms Fleming was left behind and left with only the status of a beneficiary in 2013 when the Ministry brought in a new policy post-*Atkinson* to say, no actually we will make funding available to family carers of adults with very high, with high needs, or very high needs. So there was a decision that was taken of, following *Atkinson*, that funded family care should be made available for people in Justin's situation.

KÓS J:

Doesn't that depend on there being a supervening obligation on the part of the Crown? I mean Justice Williams' parents when he was a little nipper were responsible for him, the State wasn't. The State is responsible, at least on a reflective basis for disabled adults.

MS POPE:

Well it is relevant as part of the overall substance of this case and what we say is that historically the Ministry has failed to recognise family care, discriminating against family carers. So it wasn't regarded as work. Then post-*Atkinson* these two appellants were left behind. They were excluded from employment protection by the Ministry's policy and it's policy implementation, and I would commend the Artemis report which Mr Meys referred to from 2015 to the Court on that basis, and that's because it is significantly a report which was to the Ministry itself in 2015 which said people aren't taking up under the family care, and characterised what the Ministry was doing in terms of publicising funded family care as being largely passive. So we have a factual situation where there's no question that Ms Fleming, or importantly Justin who was the person to whom funded family care was to be made available, was ever told or had the ability to take up this policy. So they were substantively left behind. Then we have the position of both of these appellants being that they are the parents and carers of people who, by law, under Article as of the Convention need support to make their decisions, and that support wasn't provided, and as the Human Rights Commission emphasises in its submissions, there was a one size fits all policy put in place which did not work for these appellants.

We also say that there is questions of substance. That there was substantial work. It is in the course of the Ministry's business. There's an economic benefit, and the Ministry knew that there was full-time care being provided through the NASC process.

WINKELMANN CJ:

I was just thinking that Justice Kós' question earlier today about it being like a quantum merit type claim, reminds me of a decision of mine, *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739 where the Ministry of Health did not have a contract with a retirement village to provide services but was ongoing negotiating, and it did provide services to elderly people who had a statutory entitlement to rest home subsidies, and that was a successful quantum merit claim because they were providing a benefit

in this particular circumstances. So quite similar. To liken it to the quantum merit type analysis.

MS POPE:

Yes, and that benefit is part of what we say supports the substance of this homeworker extension applying, and in terms of drawing a line it's also relevant that where capacity is not an issue. Where the disabled people don't need support with their decision-making, and family carers are engaged by the disabled person, or a host organisation, then it would follow that the carers are employed by the disabled person or the host organisation. So that's not a situation where we would say that the Crown is the employer. Alternatively where there is a situation where a disabled person needs support in their decision-making, but factually it has been provided and there has been a proper support decision-making process followed, and that resulted in choosing a host organisation, then the carers are engaged by the host decision-maker, again, and not the Crown.

1450

What is important about the particular facts of these two appellants is that they are left with no employer at all and that is significant because they are, again, within the category of vulnerable workers that the homeworker extension intends to protect, and it is through the status of employment and status is important, that it is through the status of employment that the State provides protection to vulnerable workers in that situation.

So, the Ministry, through its policy and its implementation, has created a situation where we have vulnerable homecare workers who, on the Ministry's argument, have no employer at all, have no employment status, but we argue that on a proper interpretation of the flexibility of the homeworker extension it is available to them.

I don't intend to take the Court through the analysis of the *Lowe* decision. In the outline, we have included some pinpoint references which we say, in summary, show that the interpretation of the *Lowe* decision by the

Chief Employment Court Judge was sound and that the emphasis from Justice Glazebrook's decision on substance over technicalities is the right interpretation, but that even on the decision of Justice O'Regan there is an emphasis on the homeworker extension being contextual.

So, I have gone over time. Are there any other questions or any other way that I can assist the Court on this issue?

WILLIAMS J:

What do you say to Justice O'Regan's view that engaged and engagement were added because of the piece work dimension of homeworker which, of course, is its original core meaning, so that it was the homeworker as independent contractor? Engaged as an independent contractor and now deemed to be an employee?

MS POPE:

I would go back, in my submission, to the purpose from the Green Paper, that it was always seen that it was going to be difficult to identify homeworkers and that there was a deliberate flexibility and that the conclusion of Justice Glazebrook, I think at paragraph 146, that engaged, employed and contracted is clearly a composite term intended to effectively cast a wide net.

WINKELMANN CJ:

I don't see it as a composite term, I see it as an expression which is intended, it's trying, to catch all ways in which people can actually in substance be doing this work and in circumstances where society will expect them to be renumerated.

WILLIAMS J:

So is that made clear in the Green Paper, is it, that it's all-encompassing?

MS POPE:

Well, the Green Paper, originally when the extension was enacted it did not have – the Green Paper doesn't expressly consider home carers. There was,

at that time, a focus on piece workers and machinists but there was also a recognition that we were, in the ’80s, it was seen that there was going to be a period of technological change. It's then the *Cashman* decision in the Court of Appeal which then picks up and looks at that purpose and says “no, actually home workers are squarely within this purpose.”

WILLIAMS J:

Yes.

WINKELMANN CJ:

Isn't there a continuous threat through the provision, which I know the Crown disputes, through the provision it's a substance over form which predates this legislation, it's in the common law, but that’s really all the home worker thing is aimed at, too, to get around any kind of want of form or unusual work circumstances and say, well, in substance this is an employment relationship?

MS POPE:

I would respectfully agree, your Honour.

WINKELMANN CJ:

And that will be, it included people working in people’s garages, hand manufacturing things back in the ’60s and ’70s, it includes people working in lounges and dining room tables these days.

MS POPE:

It does and that it's really recognising that the relatively – the invisibility of homecare. It’s homecare was then, as it is now, often gendered and that people working in their own home, outside of traditional employment relationships, are vulnerable and there was a decision taken in 1987 to bring that into New Zealand’s employment laws and it's remained consistent throughout.

WILLIAMS J:

So is the sequence you’ve got a Green Paper covering piece work primarily because that was still a large part of the kind of employment adjacent sector,

then *Cashman* expands that into caring at home, not just making stuff at home, and there's no pushback against that so it becomes orthodox?

MS POPE:

Well, there was certainly pushback against it in the *Cashman* case itself, but the Court accepted that the homeworker extension must be intended to include all people carrying out home work regardless of the form of contract and that providers of home support services were the exact type of vulnerable worker intended to fall under the homeworker definition.

KÓS J:

It seems to me that *Cowan v Kidd* [2020] NZEmpC 110 is the better case for you, though, because what we're dealing with here is a distinction between what is essentially volunteered services provided out of a sense of affection or love, or whatever it was in Mr Cowan's case, he just liked being on the farm, but in those other cases, the piece worker case, the homecare workers and in *Cashman*, they were clearly doing it with the intention of being renumerated. It just happened to be it was done at home, the work they were doing.

MS POPE:

The intention, though, I would submit, is not relevant because there isn't a subjective intention element of the deemed homeworker extension and even in the broader, or even in the narrower definition of employee, the *Prasad v Sky Chef's* case which is cited in our submissions is authority for the proposition that you don't need a subjective intention and that the result might be quite different.

WILLIAMS J:

Isn't it really though the sequence is the Green Paper, *Cashman*, *Atkinson*, which says if you treat people caring for family in a discriminatory fashion that's unlawful and the answer, you say, and the earlier cases have said, although sometimes equivocally and sometimes not at all, the answer is to put them in the employment box to ensure there is no substantive discrimination?

MS POPE:

That is one way that –

WILLIAMS J:

That's what's really going on?

MS POPE:

It could be one way. There's another way of conceptualising it which is, of course, that the *Cashman* merely recognised that this was a category of vulnerable homeworkers.

WILLIAMS J:

Correct.

MS POPE:

Which was always intended to be protected. But on the facts, the unusual circumstances of the appellants arise from errors on the part of the Crown to recognise that they've always had that status, and *Atkinson* is an important historical part of this, because it showed that prior to the *Atkinson* decision what these appellants were doing wasn't regarded by the State as work at all, and then in 2013 the State then decided to bring in the Funded Family Care model and it would have been available to Sian and to Justin in these circumstances, in relation to Ms Fleming and Mr Humphreys, but it was a one size fits all model which wasn't suitable for them because it required Justin and Sian to be the employers.

1500

There are other ways, as I've submitted, that the appellants were left behind. They were left behind by not knowing that the funded family care model was even available. So the sequence in terms of *Atkinson* is significant there because that is then relevant to the key period and the only period that the Court has to decide that Ms Fleming was a homeworker is one that begins in October 2013 and so from that point we have a position where Ms Fleming is being left with the status of a mere beneficiary and doesn't have employment

status, should have that employment status as a result of the homeworker extension.

Are there any other questions before I pass to Ms Dunn?

MS DUNN:

May it please the Court, as Ms Pope foreshadowed I'm dealing with the second question before the Court. It is whether the Court of Appeal was correct as to the test for work when work is conducted by homeworkers who work overnight in their own home. That is, of course, only a live issue before the Court were you to find that either Ms Fleming or Mr Humphries were in fact employees.

I am conscious of time and I am also conscious that I am the first to deal with this issue in oral submissions, so rather than take you through the three points in the road map I'm just going to deal with one point quite quickly.

It is submitted that the Court of Appeal's decision in *Idea Services* is the appropriate test for what constitutes work and that is, of course, for the purposes of the Minimum Wage Act 1983 and that includes, with regard to homeworkers, there are not two different kinds of employees. There's just one kind of employee which includes a homeworker by virtue of section 6(1)(b). The *Idea Services* test is broad, it's flexible and it is intensely fact-specific. There are three factors which are set out in all parties' written submissions and a full Court of the Employment Court in *Labour Inspector (Ministry of Business, Innovation and Employment) v Smiths City Group Ltd* [2018] NZEmpC 43, [2018] ERNZ 124 recognised additional factors may be appropriate in any given case and in that case the Court also considered whether the work was an integral part of the employee's principal activities.

WILLIAMS J:

Employers? The employers?

MS DUNN:

The employee's principal activities. The Crown's position appears to be that the test for what constitutes work for homeworkers should be something other than *Idea Services*. The Crown does not identify what that test should be and the factors referred to by the Crown in its criticisms are, in my submission, relevant to the application of the broad *Idea Services* test, not whether there should be a different test for a small and potentially vulnerable subset of employees.

That was all I proposed to say, unless your Honours have any questions.

WINKELMANN CJ:

What about the English cases the Crown asks us to look at?

MS DUNN:

Yes. Those English cases were referred to by the Court of Appeal in *Idea Services* but in my submission they were more of a cross-check than they were, you know, particularly fundamental in the Court of Appeal's decision and so, in my submission, the Court of Appeal in this case erred in the weight it put on those decisions. What is clear is that the statutory and regulatory framework in the United Kingdom is quite different. The regulations there expressly deal with both work within the home and availability for work, including sleeping, none of which is the case in New Zealand.

WINKELMANN CJ:

So is it different that the caregiver here will always be sleeping as part of their ordinary life within a house with their child?

MS DUNN:

In my submission it is not, given how broad the *Idea Services* case is. I do acknowledge that a homeworker working in their own home may have a different level of constraint that Mr Dickson did in the *Idea Services* case who was a care worker working in a care home, but that does not mean that the same test shouldn't be applicable.

Thank you. That concludes the submissions for Aotearoa Disability Law.

WINKELMANN CJ:

Thank you very much.

MS MCKECHNIE:

Good afternoon, your Honours. I did think that I might be on slightly earlier than now in the batting order for the afternoon, so while I will endeavour to finish this afternoon it will depend, Ma'am, how many questions you and your colleagues have for us.

WINKELMANN CJ:

But I imagine when you speak in relation to the next appeal it'll be shorter in any case so that should be good to –

MS MCKECHNIE:

The next appeal submissions intended for the Crown are much shorter, Ma'am. Your Honours will have just received –

WINKELMANN CJ:

So we will not ask you questions for the first 15 minutes.

MS MCKECHNIE:

Thank you, Ma'am. Before my 15 minutes starts then, Ma'am, just to be clear, the Court has just received four documents which my colleagues have also received in paper copy and your Honours can have paper copies if that would assist. The first is the outline of oral argument. The other three documents are intended to assist the Court. The first is a single page summary of the key policy documents with the bundle references listed. Apologies, that is not hyperlinked. We didn't have time to do that overnight but this is to assist the Court in finding the various policy documents for both this appeal and the second appeal.

The other two documents that you have just received are summaries of the NASC assessments for Mr Coote, for Justin, and I acknowledge – he's gone. Justin was here earlier. The first document that –

WINKELMANN CJ:

I don't know that we've received these unless we received them this morning.

REGISTRAR:

I've just received them myself now, Ma'am, and I'm passing them to you via email.

WINKELMANN CJ:

Because I was going to say I was confused about that because I thought the Crown was objecting to us receiving the things you got this morning. This is not what you were objecting to?

MS MCKECHNIE:

No, Ma'am, and in terms of objection we just noted that Mr Meys filed the primary document from 2025 and it's – we just noted it's not relevant to the matters before the Court because it's in relation to Mr Coote's allocation under individualised funding which is not a question in any way engaged by the appeal, but nor did he make any particular reference to it, so it doesn't appear anything particularly turns on it.

WINKELMANN CJ:

So what are we getting now then because we were all not listening properly because we're confused. Now we can listen properly.

MS MCKECHNIE:

Apologies, Ma'am. The first is merely just to assist you finding the documents in the bundle. So it's one page of key policy documents, Ma'am. None of these documents are fresh evidence. It's merely just summaries to assist the Court in navigating the bundle. Given the way these two bundles were done in the Employment Court we are very mindful that they are not the easiest to navigate.

WINKELMANN CJ:

So are these the same documents that were referred to by Mr Meys?

MS MCKECHNIE:

No, Ma'am.

WINKELMANN CJ:

Okay.

MS MCKECHNIE:

If you will, the key policy documents is my desert island discs and I'll take you particularly to the key documents.

WINKELMANN CJ:

This is a new desert island discs? Yours?

MS MCKECHNIE:

Yes. Unsurprisingly, Mr Meys and I might disagree on some of the priority documents. It's on the screen now, the document I'm referring to.

The second two documents, Ma'am, which I'll return to later and are predominantly for –

WINKELMANN CJ:

Still confused.

MS MCKECHNIE:

– the assistance of the Court in the detail of the application of the test, is a summary of Mr Coote's assessments and then some of the detail, and again this just picks up material that is in the bundle in a summarised form to assist the Court. Many of these documents are handwritten and they're not particularly easy to read.

WINKELMANN CJ:

So we're not getting a physical copy of this?

ELLEN FRANCE J:

Yes, we are.

MS MCKECHNIE:

You can have a physical copy, Ma'am. We certainly have them.

WINKELMANN CJ:

It's being printed, is it?

MS MCKECHNIE:

No, we have physical copies, Ma'am. Perhaps I had taken Justice Williams' – 1510

WINKELMANN CJ:

It's just coming. I suppose I'm a bit confused because it's normal to give it to the Court first before you give it to counsel. That's probably what my confusion is.

MS MCKECHNIE:

Apologies Ma'am. I thought we were doing both but saving trees hadn't provided you with paper copies, but we certainly have them for you, and we will give them to the registrar now, and I will pause while he distributes them so as to not confuse anyone any further.

WINKELMANN CJ:

Well I've obviously got a lower threshold for confusion today.

MS MCKECHNIE:

The fire alarm won't have assisted, Ma'am, I'm sure. I fear I took Justice Williams' direction about electronic a touch too literally Ma'am, so let me start again. There is a short road map of our submissions. There is a one page key policy documents, which is merely a navigation guide if you will to the key policy documents in the two bundles. You'll see in the reference list "F" is obviously for the Fleming case on appeal and "H" is for Humphreys, so that is

in relation to both appeals. The other two documents are in relation to Justin's needs assessments, and I'll return to those later and can explain the significance of those and what they demonstrate at that point.

Your Honours the position for the Crown in relation to Ms Fleming's appeal is that this is a relatively narrow question, in fact a very narrow question in the context of a much wider suite of services and supports that Parliament has directed the Ministry provide to the disabled members of New Zealand. I will touch on them in some detail at the beginning of my submissions, but they are broadly supplemented living payment, SLP, which is provided through the Ministry of Social Development, and then –

WINKELMANN CJ:

What is the supplemented living payment?

MS MCKECHNIE:

This is the benefit through the social security legislation, your Honour, provided by the Ministry of Social Development.

WINKELMANN CJ:

So is it that's the benefit name, it's not –

MS MCKECHNIE:

Yes.

WINKELMANN CJ:

It's not a sickness benefit, disability –

MS MCKECHNIE:

It has had various names over time Ma'am, but this is a carer support payment of sorts for adult, the carers of adults. So to distinguish it from family support, if you will, which was paid to parents of under 18 year olds, and it has had various names, but at present that's the name of that, and it's a statutory

scheme through the Social Security Act 2018 provided by the Ministry of Social Development.

KÓS J:

And what value is it?

MS MCKECHNIE:

Sorry Sir?

KÓS J:

How much is it.

MS MCKECHNIE:

Mr Bremner will find that for you momentarily Sir. Ms Fleming, at the point of the appeal, was receiving that funding, and you'll see from the facts she chose, part of the reason she chose to decline FFC was a misunderstanding about abatement. She's now receiving IF and no longer receiving that payment. There is an abatement relationship between the benefit and any funding through DSS. So DSS, your Honours, is Disability Support Services. At the time that this case commenced, that was provided by the Ministry of Health. Your Honour, at the commencement of this case it was $307.49 a week. The reference is 311.2429.

WINKELMANN CJ:

And is that on top of another benefit?

MS MCKECHNIE:

Mr Coote receives a benefit separately.

WINKELMANN CJ:

Right.

MS MCKECHNIE:

So Ms Fleming's, we're about minute 3 Ma'am but I'm very happy to answer your questions now . Ms Fleming received a supported living –

WINKELMANN CJ:

Well I don't think it was, yes, I suppose it was, anyway it is extremely confusing.

MS MCKECHNIE:

As you wish Ma'am. It is your court.

WINKELMANN CJ:

Yes, well tell me this anyway.

MS MCKECHNIE:

It's on the screen. So this is from a letter that we, that Simpson Grierson on behalf of the Crown wrote to Mr Dale around the time of the original hearings in relation to Ms Fleming and a concern that had come out through the evidence that she misunderstood abatement. So at short in paragraph 3 it summarises her entitlement. So Ms Fleming received supported living payment, she received an accommodation supplement as part of that, and she received a temporary additional support special benefit. In addition her evidence, and we can have the references for you overnight, is that Justin receives a benefit, and as part of that he pays rent to his mother, rent and board at this point to support the family in the household. So this is, the point of demonstrating this, your Honours, is that there is a range of services and supports provided across a range of schemes by the Crown at the direction of Parliament for disabled members of our community.

DSS was originally provided by the Ministry of Health at the commencement of this case. Then at the creation of Whaikaha, the Ministry for Disabled People, the responsibility for that scheme in its totality, which I'll return to, moved to them. Most recently, and after the commencement of this case, so directly relevant, but for completeness, it is now transferred to the Ministry for Social Development. So the individualised funding schemes and the like which we will discuss tomorrow, are now being administered by the Ministry for Social Development, but are separate and independent, and are not a statutory process which again we'll return to tomorrow.

Within DSS funding, between 2013 and 2020 the only way that resident family carers such as Ms Fleming could be paid by the Crown was through FFC. So the question for this Court is that as Ms Fleming did not receive FFC, was she nonetheless engaged as a homeworker. So it is a very narrow question, we say. There was a strong theme in the submissions this morning, particularly from Mr Dale, about concerns regarding allocation. The challenge to the allocation given under the NASC assessment for Justin's needs, and a desire to secure more hours of payment to support Ms Fleming in the household, and Mr Coote. And those submissions, which again I'll return to, seem to me to be an argument that Ms Fleming was undertaking actions which were within the scope of the policy. That the Crown had knowledge, and again I'll return to what knowledge it did have, that she was undertaking that care, and that that constitutes engagement. While the language wasn't used this morning by my friends, that is very much the argument that the Employment Court took and the Chief Justice adopted with an awareness test. A view that the – sorry, apologies, the Chief Judge, an awareness test that the Crown knew that Ms Fleming was providing his care. She was working therefore she should be paid.

Now I'll develop these themes throughout my submissions, but as a preliminary observation, my submission is that this assumes scope of work beyond the terms of the policy. One of the arguments that Mr Dale touched on occasionally was a concept of supervision, and what is work versus what is supervision. While the argument about "what is work" wasn't developed by Mr Dale, one of the key arguments that he is making, and has made in the lower courts, is that the supervision that Ms Fleming provides for Justin is work and therefore should be paid. Now that supervision is not funded or assessed under the funded family care policy, or any other DSS policy.

So the first issue with this is that there is a disagreement between the parties as to what constitutes work, and I highlight that because it is a word used very simply, but there is complexity sitting underneath it, and much of what the appellant says is work, is not considered to be fundable by anyone, private sector, third party, or parent carers under disability services support, of any sort.

Secondly, there was a clear assumption, in my submission, but not articulated particularly as to the source, that there was an obligation of the Crown, or the Ministry, to fund Ms Fleming, and as will be clear from my submissions as I develop them, the Crown's position is that there is an obligation to care for the disabled in the community, and that is provided through a range of services, but those are not unfettered and without limits, including fiscal limits, and that does not translate, in a linear way, to an obligation to pay Ms Fleming to care for her son in her home for all of the activity she undertakes, which she considers to be work.

Your Honours, in my submission the FFC policy is fundamentally relevant here, and there were a number of questions from a number of your Honours in relation to why is this policy relevant to this appeal. In my submission, your Honours, because the Crown can only pay through Part 4A, and that is an unchallenged conclusion of the Court of Appeal, the confines of that policy, and the meaning of that policy, and what can be paid through that policy is inescapably relevant to the questions of, is Ms Fleming a homeworker, and a subsequent question of, if she is a homeworker, can she be paid?

1520

So your Honours, what I intend to do in these submissions is spend a bit of time talking about those key policy documents, because I think those will answer a number of the questions that you had for my learned friends this morning, particularly in relation to the NASC assessments, Ma'am, that your Honour was asking about in terms of the purpose of a NASC assessment and what role it was undertaking, and then I will look at the interpretation question. I will adopt this very similar analysis framework to the Court of Appeal, looking at the question of interpretation and the relevance of the Convention at that point, and then the application of that interpretation to Ms Fleming's factual scenario.

We had intended that Ms Heenan, as she did in the Court of Appeal, would make submissions in relation in relation to the meaning of work; however, as there have been no submissions on behalf of the appellant, oral submissions

this morning on work, if your Honours have questions for Ms Heenan on work she is happy to, of course, answer them. She wasn't intending to give submissions on those, on our submissions that you have.

WINKELMANN CJ:

I thought we just heard submissions on the meaning of work?

MS MCKECHNIE:

We have from an intervener, Ma'am, and –

WINKELMANN CJ:

Okay, you're right, none from the appellants, okay.

MS MCKECHNIE:

And it's not a question that arises in Mr Humphreys' appeal.

WINKELMANN CJ:

And so, I mean, the submissions are there in writing and you're saying you're just happy to rest on your written submissions?

MS MCKECHNIE:

Yes Ma'am, unless the Court has questions, and then Ms Heenan will address the Court on a number of the other matters that arose in relation to some of the more technical and specific sections of the Employment Relations Act, that particularly Mr Meys raised on behalf of the second respondents as litigation guardian.

KÓS J:

Well, the question of supervision is surely one of the "work" questions?

MS MCKECHNIE:

It is, it is Sir.

KÓS J:

So I think we will have some questions for you on that.

MS MCKECHNIE:

It is Sir, but it was not addressed, it has not been addressed in any of the courts to this point and that is the key crux, really, of why we say that *Atkinson* is not an appropriate test for work. The Employment Court –

WINKELMANN CJ:

Atkinson?

MS MCKECHNIE:

Sorry, *Idea Services*, apologies Ma'am. Because that key question of to what extent is supervision in this context work, is so different from, we say, what happened in *Idea Services*, the Employment Court at first instance didn't address it and in a footnote it said that the appropriate test for work is *Idea Services.*

There was very little development of that in the Humphreys matter and slightly oddly, of course, because Mr Cranney is not advancing that question, it's slightly at cross-purposes. But that, we say, is a really important issue that needs to have appropriate evidence and consideration at first instance because it is a key question.

WINKELMANN CJ:

Hasn't it been addressed in *Chamberlain*?

MS MCKECHNIE:

No Ma'am, because the question in *Chamberlain* was is the policy, and as your Honours have discussed a lot this morning, in a judicial review context, is the policy appropriate and accurate? We say, it's right on the policy and I anticipate that is likely to be our submission and the approach we would take to examining evidence, in a first instance case, about the difference between supervision and hands-on care, which is –

WINKELMANN CJ:

I'm confused though, what was the Ministry's response to the *Chamberlain* decision in relation to its policy?

MS MCKECHNIE:

The response, Ma'am, was to introduce and I will take the Court there momentarily –

WINKELMANN CJ:

Okay, are we going to go to it?

MS MCKECHNIE:

There were, prior to *Chamberlain*, there were two types of care that were assessed under DSS. They were personal care and household management and they are broadly, Ma'am, hands-on care of an individual, showering, dressing and the like, and household management, looking after the household, feeding and the like.

What was not paid for and funded prior to *Chamberlain* was overnight care and following the *Chamberlain* decision, intermittent night care was introduced to the policy, so that was the Ministry's response to *Chamberlain*.

The Court of Appeal was critical and Mr Dale described it, if there were events in the night that require the parent to wake and look after the child, they should be paid for that. So intermittent night care was added into the NASC assessment and so when the needs of the disabled person are assessed through a NASC assessment, they now look at those three categories, the extent to which this person wakes, how much care they need overnight, that is assessed as part of the NASC assessment and goes into the allocation of funding that can then be used to pay for a range of services.

WINKELMANN CJ:

So your point is that the policy makes no provision for people such as Justin who needs supervision between these little tiny pepper pots of time, that you couldn't get an employed person to come in and out to do because they can't

be transported like they're on Star Trek, they'd have to be there, so you say that there is no obligation, there's nothing in the policy that provides a real world kind of – again, "real world" – kind of solution for people who are family members caring for someone, because they're only ever going to get these pepper pots of time?

MS MCKECHNIE:

Yes Ma'am, but I think it's probably better to conceptualise and look at the way the assessment is done, because it's a needs assessment of Justin's needs rather than assessment of the actual work or care or activities being undertaken by the individuals and so and that is a fundamental difference between the parties. The appellants want to start with an assessment, understandably, with an assessment of what they say is the work being done by the appellant. The funding policy starts with an assessment of Justin's needs, or whomever the disabled person is, and that's assessed through a calculation which leads to a document you saw earlier today which is done by a number of minutes. That is totalled up to a pot of money. That pot of money then allows you to buy services.

So what you're not doing, Ma'am, is buying two minutes at 3 o'clock in the afternoon and six minutes or a half an hour at lunchtime, you were given a pot of money that you can choose, the disabled person if they're able to themselves, or the whānau –

WINKELMANN CJ:

But it is calculated by the minutes.

MS MCKECHNIE:

It's calculated –

WINKELMANN CJ:

It's calculated by the minutes?

MS MCKECHNIE:

It's calculated by the minutes to secure the funding and then how that funding is used is up to the disabled person or their support people to determine what's best for them. So they may decide, if they want to use external IF funding and they need the most support in the day in the evening, so they're going to spend their two hours a day in the evening. There are other –

WINKELMANN CJ:

So it's consciously under-funded then, isn't it, because if you were employing someone who wasn't a family member, you couldn't fund them on a minutes basis like that, could you?

MS MCKECHNIE:

No, Ma'am. This is exactly the same policy that is used to fund external carers and so that's the distinction. So the assessment of the care needed goes to a bucket of funding and I can take your Honour, we might be at that point, to take you to the DSS service specification, and then the family can decide how to fund that care. Now, that might be to fund a family members themselves or it might be to fund external care to come into the house. But it's the same, you can't get external care to come in to do supervision and nor can you use that money to pay a family member to supervise.

WINKELMANN CJ:

I'm sorry to ask you all these questions, I just want to understand the practicality of this. Someone who does need 24-hour supervision, that policy doesn't respond to it then, because it only provides for personal cares, household duties and overnight sleeping, it doesn't provide –

MS MCKECHNIE:

Intermittent overnight cares, Ma'am.

WINKELMANN CJ:

Okay, so it doesn't provide the supervision, there's no response to supervision?

MS MCKECHNIE:

There's no response to supervision, no. And that in part, Ma'am, is because the assessment is that this funding is available to very high and high needs individuals and the policy prescription set up, which in the FFC context was through a *Gazette* notice and so secondary legislation, is now in an individualised funding policy mechanism which I expect we will talk about more tomorrow. That policy, responding to on the one hand a statutory obligation to care but a fiscal limit about the amount of care that can be provided and the amount of support the Ministry is able to provide, the policy answer to that is to provide care for those three categories but not to fund supervision.

KÓS J:

This seems to have a kind of spurious science to it. I mean, there are two other ways of looking at this. One would be to say, instead of just counting up Justin's needs, another way of looking at it would be to say, "how much would it cost the Ministry to look after this man?" And another way of looking at it would be to say, "how much of Ms Fleming's time is taken up doing what someone else would have to do for the Ministry?" Now, the hours that you calculate using the two alternative methods that I proposed would be far higher, I suggest, than your rather spurious, if I may say so, totting up on a very conservative minimalist basis.

MS MCKECHNIE:

They may be, Sir.

KÓS J:

Well, it would be, wouldn't it.

MILLER J:

I'm interested to know –

MS MCKECHNIE:

There is –

MILLER J:

Sorry, can I just – there seems to be a prior question to me which is your proposition that this idea of supervision is not within the scope of the appeal. It's been obvious from the beginning of the day that Mr Dale's argument "it's really a difference about the number of hours" comes down to what is included in the hours that are funded.

MS MCKECHNIE:

And certainly on –

MILLER J:

And in *Chamberlain*, it was reasonably clear, I thought, that the Court did see supervision as work, if you like, that was done by the carer. So I'm surprised by the idea that it isn't even a live issue before us.

MS MCKECHNIE:

Two parts to my response to that question, Sir. The first is that the question of is supervision or not paid presupposes an employment relationship of some sort for payment and there is a risk of reverse engineering back to an employment relationship from the type of care.

1530

So, in my submission, it is a secondary secondary question that – the first question needs to be assessed, is this individual engaged as a – or a homeworker – in a homeworker relationship with the Ministry under any part of the three options? So the type of work she – if what is she doing constitutes work and to the extent it is work, in my submission is a secondary question following the determination of whether or not she is a worker.

The second response, Sir, is that – and this has been a theme of the submissions between the parties – there is a disagreement between us about what *Atkinson* in the Court of Appeal determined in relation to supervision, and if…

WINKELMANN CJ:

Chamberlain.

MS MCKECHNIE:

Sorry, apologies, your Honours, *Chamberlain*. There are –

WINKELMANN CJ:

I suppose it's open to us to say what it determined.

MS MCKECHNIE:

Absolutely, yes, Ma'am. But there are elements of Justice Harrison's decision where he refers to intermittent night cares but there are a couple of other passages –

WINKELMANN CJ:

Night care, I think.

MS MCKECHNIE:

Night cares plural.

WINKELMANN CJ:

Care. Let's just say "care". Sounds like jargon to me.

MS MCKECHNIE:

It probably is jargon, Ma'am. But there are a number of other passages, Sir, where he refers to a small change not intended to be a significant change to the approach to the policy and the like. So there has been a recurring theme between myself and my learned friend, Mr Dale, about the scope of Justice Harrison's conclusions about what should be changed in the police. In any event, what was changed was that intermittent night care was included in the assessment for a NASC assessment and that has been the policy for a number of years now and I'm mindful that this is not a judicial review of the lawfulness of that policy but that is the policy that leads to the assessments. But it does lead to a really unfortunate conflation of the word "supervision" in

the NASC assessments going all the way back to 1997 where it is not being used as a term of art. It's not being used by the assessor with any particular conception that it might be work or not or any particular magic, and I can take the Court to some of those documents later in terms of Justin's particular assessments. Mr Dale, in his submissions in previous Courts and part of his submission this morning, places real emphasis on the fact supervision is referred to. But "supervision" is referred to, in my submission, by individuals undertaking assessments at the point where that term had no particular meaning. It wasn't in the policy. It wasn't defined, didn't have a particular forensic meaning that would assist this Court in determining is it work or is it not, because the type of supervision, in my submission, is potentially much more variable and there hasn't been particular evidence called on it or particular testing of it at first instance.

MILLER J:

It's so obvious, I find it hard to believe that it comes as a surprise to you to see it argued here. It's obviously a major point of disagreement and you're really saying it wasn't vented in the Courts below?

MS MCKECHNIE:

No, Sir, because the path to get to this Court being having to go through the gate of FFC, there is no question that funded family care was ever going to fund supervision. So in commencing this matter, and I'm mindful that in the third amended statement of claim by the appellant in the Employment Court there's no mention of "homeworker", "homeworker" is not pleaded and it's not mentioned in their opening submissions, so across the course of evidence we ended up in a situation where "homeworker" was addressed in closing submissions and ultimately in the judgment, but because the pleadings commence on an assessment of FFC and there is no question that supervision can be included in that and it wasn't a judicial review of the underlying policy, where supervision sat was not a question before the Employment Court and it presupposed, to return to my earlier submission, that a relationship existed such that it should be funded, and at that point the question was could

Ms Fleming be funded under FFC? If so, for what? She sought 40 hours. But we didn't get past the first question of could she be funded.

WINKELMANN CJ:

So when I look at paragraph – sorry.

ELLEN FRANCE J:

It seems to me that one of the arguments you have to address is that the number of hours that Ms Fleming was offered was, if you like, and this is probably not putting it very well, was effectively an unlawful offer and in that context the argument that we're being asked to address is, well, in that circumstance that that's part of why this should be treated as engagement, why Ms Fleming should be treated as a homeworker, because you've then allowed her to continue on doing that work, so the fact that she didn't sign on the dotted line, as it were, doesn't matter. That's the argument, which does, as I understand it, depend on whether supervision is something for which she was entitled to be paid or not.

KÓS J:

In other words what was the scope, the overall scope, of the Crown's obligation.

ELLEN FRANCE J:

Yes.

WINKELMANN CJ:

And when we look at paragraph 82 of *Chamberlain* I struggle to see your point about its meaning.

MS MCKECHNIE:

Ma'am, I'd contrast that with paragraph 67 of *Chamberlain*.

WINKELMANN CJ:

No, I'm asking to look at 82, which is a later in time paragraph as a matter of logic.

MS MCKECHNIE:

Yes, Ma'am, and in my submission in the totality of the case the distinction being drawn here is between essential needs and natural supports. The Ministry, and we are very deep in the jargon now, Ma'am, so forgive me, but I can take you to the policy documents, the policy documents from the Ministry proceed on the basis that "natural supports" encompasses supervision and the focus here is particularly on the overnight care. So you'll see the conclusion of that paragraph –

WINKELMANN CJ:

I mean the case is about overnight care but the principle, so you might say: "Well, that's an obiter comment so we choose," which would be quite a bold call, "to ignore it when we look at the lawfulness and compliance of our policy," which must comply with the statutory framework. But the statement there is of broader import than overnight care.

MS MCKECHNIE:

It is –

WINKELMANN CJ:

And it's directed at the statutory obligation, isn't it?

MS MCKECHNIE:

Ma'am, in my submission, taking this paragraph in isolation leads to – and there has been much selective emphasis between myself and my learned friend, Mr Dale, about the parts of this judgment, but looking at it in totality, and I would take the Court to paragraph 67: "At most, the acceptance of Mrs Moody's argument would have a marginal funding impact on the modest annual cost of funding family care. And we repeat that the issue now before us is of a confined nature: it is about the proper construction of statutory and derivative instruments," in relation to overnight care. So the very narrow judicial review question for *Chamberlain* was in relation to that.

WINKELMANN CJ:

So your argument is that it's obiter because it clearly is of broader import than you're saying but your argument is that the issue before the Court in that case was overnight care?

MS MCKECHNIE:

Yes, Ma'am, and in response to this decision, "intermittent night care" was introduced into the assessment policy, and so insofar as Ms Fleming has a concern about the lawfulness of that policy it's open to her to bring a judicial review on the policy. In the context where we are in an employment dispute arising from the Employment Court the challenge here is that in the context where, and I think if it's not being appealed the Ministry can only pay during this period resident family carers like Ms Fleming through the funded family care lens, does an employment relationship, if there is one, give rise to a different calculation of what work should be and therefore should be funded that sits in addition to the secondary legislation of the *Gazette* notice that sets the terms, the hours and the scope.

WINKELMANN CJ:

So implicit in this might be a question. So what you're hearing from the Court is that the Court's minded to see where there is an obligation under the statute to pay for support of this nature, supervision support, and it might be that that engages whether *Chamberlain* is authority or suggests that there is an unlawfulness in the policy.

MS MCKECHNIE:

Yes, Ma'am, and it might be a useful time to go to the New Zealand Public Health and Disability Act that set up funded family care which is in the bundle of authorities at tab 6. This Part 4A was introduced under some urgency following the *Atkinson* decision to respond to the assertion that third party carers were being paid to provide care that family members were not and it introduced a policy whereby the type of care that third party carers were being paid for, which did not include supervision, family carers could also be paid for. But the particular construction of that which begins at paragraph 70A is quite specific if

we are turning more to your supervisory jurisdiction in a judicial review context around the lawfulness of the policy: “The purpose of [this policy] is to keep –

WINKELMANN CJ:
We’ve just lost it, I think.

MS MCKECHNIE:
Do you have it, Ma’am, 70A?
1540

WINKELMANN CJ:
It's just gone of our screen – and back on, yes.

MS MCKECHNIE:
Can we put it up on the screen?

WILLIAMS J:
We got it.

MS MCKECHNIE:
Back? “(1) The purpose of this Part [4A] is to keep the funding of support services provided by persons to their family members within sustainable limits in order to give effect to the restraint imposed by section 3(2)” – which is a reference to fiscal constraints in the purpose – “... and to affirm the principle that, in the context of ... support services, [that] families generally have the primary responsibility for the well-being of their family members.” And that is, by abstraction, what moves into the context of natural supports.

WILLIAMS J:
Turns out, that wasn't such a big concern.

MS MCKECHNIE:
Sorry Sir?

WILLIAMS J:

Because there were so few takers.

MS MCKECHNIE:

Ultimately, yes.

WINKELMANN CJ:

Because of the complexity, et cetera, as Justice Harrison observes in *Chamberlain*.

MS MCKECHNIE:

That is Justice Harrison's observation, yes.

WINKELMANN CJ:

I don't think he'd be alone in it.

KÓS J:

Well, I tried to work through one of the forms over the weekend and I struggled with it. I mean, it's written for Martians.

MS MCKECHNIE:

That is a fair criticism Sir, and that is one of the reasons why the four party or the five person arrangement was set up to try and assist through this mechanism. It probably –

WINKELMANN CJ:

Rather than simplifying the forms?

MS MCKECHNIE:

It probably wasn't assisted by the urgency with which this was introduced, Ma'am.

WINKELMANN CJ:

Yes.

MS MCKECHNIE:

And following the *Atkinson* decision, in finding of discrimination, this was introduced very quickly, and while we're here, your Honours, I'll also address the assertion made a number of times this morning that this was introduced solely to manage, this employment relationship construction, was introduced solely to manage fiscal risks. That's not a fair construction of the motivations, in my submission. Fiscal was absolutely a consideration but –

WINKELMANN CJ:
Seems to be on one, doesn't it.

MS MCKECHNIE:
Yes Ma'am, and but there were, in terms of the form, to your questions earlier, Justice Williams, you know, "why do you have to do it through employment, you could have chosen any other number of mechanisms?" One of the reasons that the documents demonstrate that employment was considered was a request by some members of the disabled community to be employees and have the dignity of work rather than be beneficiaries and the particular reference to that, I won't take you there, but if you need it is at 304.0763 which is one of the Cabinet papers which introduced this scheme, and there was a range of views within the disabled community: some preferred to have an employment relationship and others –

WINKELMANN CJ:
With their caregivers?

MS MCKECHNIE:
Yes, and others –

WINKELMANN CJ:
Yes, so they wouldn't be employees, the disabled person, they'd be the employer?

MS MCKECHNIE:

They would be employees and in the context where the disabled person has an intellectual disability obviously ultimately the Court of Appeal has found that's not a possible relationship. But this is a funding arrangement –

WINKELMANN CJ:

The disabled person would be an employee?

MS MCKECHNIE:

Employer.

WINKELMANN CJ:

Okay, right.

MS MCKECHNIE:

And the funded person would be the employee.

WINKELMANN CJ:

Okay, right, that's what I was correcting, you kept on calling them employees, right.

MS MCKECHNIE:

And others, so the funded, the appellant, would an employee, others had a preference for a benefit, but that is one of the reasons why an employment relationship was introduced and imposed through Part 4A and the *Gazette* notice.

WINKELMANN CJ:

I think Mr Cranney makes this point, too, that it works very well for people who are able, who wish that autonomy, and that context.

MS MCKECHNIE:

Yes, it does Ma'am, and there was quite compelling evidence from a number of people in the Employment Court at first instance, Dr Huhana Hickey, Mr de Geest, Ms Holten on behalf of her daughter Sarah, about the way they use these mechanisms and the choices that they exercise. Two of them are

profoundly physically disabled but there are no questions of capacity and they use these mechanisms.

So, but at the point that this regime was introduced, we must acknowledge, on the face of the regime it introduces an employment relationship, set up through a quite unique statutory scheme through Part 4A and a *Gazette* notice through section 88 of the Public Health and Disability Act which sets out a very significant range of terms and conditions under which and funding will be given to an employment relationship.

WINKELMANN CJ:

So it sets up an employment regime through which provisions, sorry? Because that's quite important, just to help me, just to have this in one place.

MS MCKECHNIE:

It uses these Part 4A provisions, Ma'am, so that's 70A through 70G, and it requires that the Ministry, the government, can only pay through a Funded Family Care policy. That Funded Family Care policy was promulgated using section 88 of this Act which allows the Ministry to issue *Gazette* notices from time to time, that will come up on your screen shortly.

Section 88 is a general provision, it wasn't tied particularly to Part 4A, it will come up momentarily when Ms Goodwin finds it, but that *Gazette* notice which I can take the Court to, it is at 304.0905, which we can take the Court to momentarily once we have seen section 88, sets out significant terms and conditions including hourly rates and for what it will be paid.

All of which, following the Court of Appeal's determination that Justin cannot be an employer under Funded Family Care, because he can't be deemed to be an employer and that the Ministry have misunderstood that it was possible to do that, means that that relationship falls away. But that was the policy intention of the government and reflected in Parliament passing this regime in 2013, that the disabled person, physical and intellectual disability, would be the employer

of their parent or resident family carer, didn't have to be a parent, could have been a sibling, and then terms of that are set out.

WINKELMANN CJ:
Where does that appear? Is that in this section, it's just very small?

MS MCKECHNIE:
This is the section used to promulgate the *Gazette* notice that's now on your screen, Ma'am.

WINKELMANN CJ:
So it's the *Gazette* notices that contemplate the employment relationship?

MS MCKECHNIE:
Yes.

WINKELMANN CJ:
Right.

MS MCKECHNIE:
So if we scroll down to – there, you'll see the funded family care, just go up again please, Ms Goodwin: "The Funded Family Care Notice 2013." It sets out that this is a notice.

There is a deeming provision at paragraph 6 which was subject to so much submission in the Court of Appeal: "The disabled person accepts [this] when they accept their first payment [of] funding." The Court of Appeal found that could not apply to the intellectually disabled if they were sufficiently disabled to lack capacity, because they could not be deemed to accept.

And then it's very clear, as secondary legislation: "[The] terms and conditions can only be amended by the Minister ...".

And then it sets out, if we scroll down, the NASC assessment process, the principles, disability support services – if we pause there, this is the eligibility criteria in paragraph 14, you must be: "A disabled person ... eligible to receive [DSS] ..." – which Justin was, and – "... eligible for funded family care." Which he was in the context of Ms Fleming.

"15. The hourly rate [is] ... the adult minimum wage and other employer obligations. ..." which were paid through a top-up to allow for holiday pay and the like, as they are for short-term employees.

And: "16. The maximum allocation [for] funded family care [was] 40 hours a week ...". There is some evidence that was an exceptions process that allowed for more than 40 hours, indeed Mr Humphreys himself applied on a number of occasions and was approved for more than 40 hours through an exceptions process.

Then it sets out the various: "Responsibilities of the Ministry", and "... the disabled person". We continue to scroll down: "Responsibilities of the family carer", et cetera. So in summary Ma'am, it is very prescriptive.

While we are here, it is worth noting one of the material differences which we will return to tomorrow, is that the reference here to an agent, if you could find a footnote please Ms Goodwin that refers to "agent". There's a particular requirement under the FFC *Gazette* notice that an agent has a particular meaning and it refers, as we will see shortly, to individuals who have a legal arrangement, for example a PPPR, and that was of some significance to the Court of Appeal who decided that for the purposes of this secondary legislation, "agent" had a particular legal meaning.

I will give submissions tomorrow, as you have no doubt read in our written submissions, that the way that "nominated representative" or "nominated agent" is used in the IF policy documentation is not intended to import that. Because in this instance, this is imposing obligations on the disabled person in the *Gazette* notice in a way that in the IF policy there are no obligations imposed on the

disabled person. It doesn't have the same importing of the law of agency that the FFC notice did and that so concerned the Court of Appeal.

KÓS J:

Is there anything in this notice that supports the proposition that supervision is not covered?

MS MCKECHNIE:

The key references, if we go back up, are to the subsequent policy documents Sir, that set out how the NASC assessment will work.

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Sir, there are a number of places but one of the ones that I would, and I would urge the Court to look at the notice in its totality, but particularly paragraph 23: "The Ministry's agent," and this is a reference to the NASC, "is responsible for the following matters:" assessing the disability support service needs of the disabled person (in the footnote there is a reference to the assessment); reviewing the information provided about the disabled person; conducting reviews and the like, and in doing this they conducted an assessment applying the policy which sits underneath this *Gazette* notice which is the disability support service specification for funded family care which in turn goes through, initially, personal care and household management, and then following the *Chamberlain* decision adds on intermittent overnight care as well. So that is the policy which sits underneath the *Gazette* notice. It is applied in assessing eligibility for funding which can then be used to pay through this *Gazette* notice of funded family care.

KÓS J:

I mean I have some real –

MS MCKECHNIE:

We can check overnight, Sir. I don't think the word "supervision" is used in the notice.

KÓS J:

Right. You'll obviously sense that some of us have a real concern here about the underlying lawfulness of this restriction and see that as potentially affecting the question of whether there's an employment relationship here because if the Crown has an obligation to provide support that's greater than your policy allows then you have the Flemings and Humphreys of this world, Ms Fleming, Mr Humphreys, stuck in the situation of being a sort of compelled volunteer, performing the State's obligations on its behalf.

MS MCKECHNIE:

And, Sir, my response to that would be Parliament's direction in Part 4A and the prescription at 70A, the recognition that there is not funding to provide unlimited care in this context and that certain decisions must be taken and the balance that Parliament has struck through section 70A is to empower the Minister of Health through a *Gazette* notice to set those limits and the underlying policies and the challenge to those in my submission would be through a lawfulness challenge in relation to the scope of the policy through judicial review.

KÓS J:

Well, that's a point.

WINKELMANN CJ:

To assist you, your purpose of the Act says "to achieve for New Zealanders", et cetera, et cetera, high ideals. Then it says: "The objectives stated in subsection (1) are to be pursued to the extent that they are reasonably achievable within the funding provided."

MS MCKECHNIE:

Yes, Ma'am, and that's referred to expressly in section 70A as well. They refer back to that subparagraph of section 3, that fiscal constraint, and if you take a look at the Cabinet papers, your Honours, and I can give you the references overnight, there is an express reference to these policy decisions being taken about the limits on funding, and that ultimately played out. The bucket of

funding appropriated for this particular mechanism wasn't subscribed to in totality but at the point that Parliament promulgated section Part 4A as a response to *Atkinson* and how to pay funded family carers there was an express consideration of where to strike the balance and then subsequently in the documents promulgating the *Gazette* notice and the various policies where to strike the balance in terms of what could be funded within the fiscal constraints of the Ministry.

WINKELMANN CJ:

How is it sort of rational to form a policy like that where you end up paying much, much more if the people, the family members, can no longer care for the person because they're so grossly underfunded, as much, much less than they would – that the State would have to pay in a public institution that do not exist and would have to be built?

MS MCKECHNIE:

Ma'am, that's a policy consideration that was engaged with at the point of introducing the policy in the terms that it is and I don't think I can take that any further. It's a political decision as to what to be prioritised, in my submission, and that was the political decision taken and ultimately Parliament promulgated this regime. I'm very clearly sensing your Honour's dissatisfaction with the generousness of the regime but, with respect, my submission –

MILLER J:

It isn't just generousness though because you point correctly to the objectives in section 3(1) being qualified by the decisions to fund these services, but I seem to hear you saying that the funding constraints justify what is really ongoing discrimination against family carers. In other words, it's not simply the amount of money that's allocated to disabled care but the decision to say that family members will be deemed responsible for effectively providing this supervision free of charge, and you may be right that Parliament has expressly contemplated that but let's be clear about what's happening. It is, isn't it, continued discrimination?

WINKELMANN CJ:

Well, has Parliament expressly contemplated it?

MS MCKECHNIE:

Sir, I'm not sure it is, to answer your question, I'm not sure it can be framed fairly as discrimination because there is no comparator group here who is being paid more to care, so the allocation of funding being used either for a third party or for a –

MILLER J:

Would not the comparators be those people who would be caring for the disabled person if their family members said: "We can't or won't do it any more"?

MS MCKECHNIE:

They would be – we're in the hypothetical, Sir, they would be family – they wouldn't be family members.

MILLER J:

No.

MS MCKECHNIE:

They would be employees of either…

MILLER J:

Correct, and they're the comparator group, are they not?

WINKELMANN CJ:

Yes, in other words isn't it just *Atkinson* two?

MILLER J:

Atkinson re –

MS MCKECHNIE:

But they're not providing one-on-one care, Sir. The circumstances of the care –

WINKELMANN CJ:

No, they're being paid more to provide a lesser level of care, aren't they, because it's in an institution? So it's not one-on-one care. It's an institutional arrangement, not in a person's home.

MS MCKECHNIE:

It's not necessarily an institutional arrangement, Ma'am. There are a range of provisions and services between what you might traditionally refer to as an institutional arrangement. There are, I'm not sure if there's even evidence on this so forgive me, evidence –

WINKELMANN CJ:

So your point is that if – so if there was non-family members coming into the home would still be funded on the basis of this pepper-pot basis, it'd still be adding up the minutes?

MS MCKECHNIE:

If they were coming into the home, either because they live there or they're coming in as third parties, it would be done on this basis, and so in my submission it's not discriminatory. If it's not in the home –

WILLIAMS J:

There are homes in which care workers stay overnight.

MS MCKECHNIE:

Idea Services, Sir, exactly. That's exactly the scenario –

WILLIAMS J:

Not institutions. Homes.

MS MCKECHNIE:

Yes, exactly the scenario in *Idea Services*.

WILLIAMS J:

And they're being paid – they're not being paid nano-payments for the work they do. They get paid while they're asleep.

WINKELMANN CJ:

And also when they come in to do things they're paid in blocks of time that make it economically viable. They're not paid to come in for 10 minutes while someone goes to the bathroom and then paid to go away again for another two hours. That's not how it operates. So it isn't directly comparable.

MS MCKECHNIE:

No, Ma'am, it's not directly comparable and there's a result, and I appreciate this will be an unsatisfactory answer to your Honours, but we return to the fundamental problem, the Crown says, of what is work and the fact that this Court, and it's striking that I am having to give evidence from the Bar in relation to a range of these matters because the evidence –

WILLIAMS J:

Well, you've come from a long queue of your colleagues who are doing the same thing.

MS MCKECHNIE:

I hope I am more self aware, Sir, and was hoping not to do it. But this is a fundamental question about what constitutes work. If you are a third party carer under an employment contract coming into an *Idea Services* style home, you are providing that form of work, that is one – and you have an employment agreement which specifies what you do and how many people you're caring for and the hours that you're working and then you can go away, our submission, your Honours, is that is materially different from living in your own home and providing some hands-on care and household management for the people that you live with and in other circumstances living in the home and being in the home with your family, and the extent to which is active supervision and constitutes work or it is, and forgive me because there is no evidence, you are

in the bath and your child is in the lounge and you don't see them for two hours –

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KÓS J:

Yes, but you have just gone around in a circle from my original proposition before, about how much time is Ms Fleming required to devote to Justin, it's a bigger number than the amount that you're totting up, your nano-method produces.

MS MCKECHNIE:

In terms of supervision.

KÓS J:

Yes.

MS MCKECHNIE:

Yes Sir, it probably is.

KÓS J:

Yes, that's right.

MS MCKECHNIE:

But the –

WINKELMANN CJ:

No, in terms of the other things as well, even if you just excluded supervision, that is, it's as Justice Kós said, it's spuriously scientific. It's just not how the world functions. You're not standing there, you know, with a stop watch and you're not actually immediately on to something, now free to do your own, you know, go off and read your book or bake a cake or something, it is not how care works. Anyone who has been a caregiver understands that.

MS MCKECHNIE:

Your Honours, I very clearly can hear your frustration with the policy.

WILLIAMS J:

But the point is –

MS MCKECHNIE:

I am mindful that this policy does apply across the sector to the funding. This is a fundamental building block of the way that Parliament and the Ministry funds all disabled care.

WILLIAMS J:

But how can that work, if *Idea Services* is correct? Because that involves sleepovers and payments for the entire sleepover.

MS MCKECHNIE:

Because there is a distinction Sir, and let me return to the purpose of a NASC assessment, and the "totting up" if you will and I won't use that phrase again, but the assessments of needs then accumulates a bucket of funding and that funding is then used to pay for services and that might be a support worker. So in the context of *Idea Services*, some of that individual's funding is going towards paying Idea Services to provide residential care in a family home. Idea Services are then engaging staff –

WILLIAMS J:

I understand that.

MS MCKECHNIE:

– to come in and that, we say, is a unique question in terms of the difference between work in the home and what is work and what is living, and what –

WILLIAMS J:

Well, one shares a DNA with the caree and the other doesn't, that's the only difference.

MS MCKECHNIE:

With respect Sir, it's not the only difference, because in the former scenario you are living in your home, it is your home and the restrictions, so the genesis of the *Idea Services*, we say, assessment of work turns a lot on the restrictions that the employer places on you in terms of when you're at work you can't have guests, you can't drink, you can't, you know, you have a number of ways that you cannot live an ordinary life. There are limits on Ms Fleming because of the care she needs to provide when she is living with her son, but they are not the same limits.

And so the way the Court, we submit, will ultimately assess this, in the context of a first instance argued case where there is strong evidence assessing these matters which is not the situation we have here, in my submission, will have to explore those differences because there, we say, there are material differences and part of it returns to the observation, I think it's at paragraph 82 of the Court of Appeal's decision, there's a material difference between requiring a parent to care for their child and then if they choose to care for their child being required to pay them for everything that they consider constitutes care.

Some of it is care, but what is care and what is work? We say it is not a question that is able to be safely decided by your Honours, particularly given its huge ramifications across the disability sector.

WINKELMANN CJ:

It may just assist us in understanding, so if you don't have a parent, if you're in the community and you don't have a parent who is prepared to do all this free supervisory work and et cetera, or a family member, some other family member, if you're only going to provide care on that basis of totting up moments, that means everybody who doesn't have a family member is going into an institution, is that correct?

MS MCKECHNIE:

No, Ma'am, it's not.

WINKELMANN CJ:

Or are people without a family member living with them are supported by a different methodology?

MS MCKECHNIE:

I think it might be useful, Ma'am, if we could go to the –

WINKELMANN CJ:

So, it's 4 o'clock, so maybe that's a good question, so a good question for you to think, because that seems to be, you know, so how is someone in the community without a family caregiver funded compared to someone in the community with a family caregiver?

MS MCKECHNIE:

I will briefly answer in 30 seconds, Ma'am, and in the morning I'll take the Court to the documents.

WINKELMANN CJ:

Okay, so we might go to the policy documents, as you have wanted to take us for a while.

MS MCKECHNIE:

There are policy documents, Ma'am, and in assessing the level of support and the level of natural support, that's one of the things that's taken into account. An individual with the same health needs as another may have different care needs if the first person is in a home with an able and supportive 45-year-old or 50-year-old parent and the other doesn't have parent carers, doesn't have anybody, or the person caring for them is themselves aged.

So the needs assessment takes into account both the medical requirements and disability requirements of the individual and the circumstances in which they live to assess their assessments and to assess their needs, and takes into account that very question: "Do they have somebody who is willing to look after them and help them, or somebodies, who come into the home, siblings, friends,

family, or do then not?" And that part of the consideration in the policy documentation.

WINKELMANN CJ:

So that's natural supports, is it?

WILLIAMS J:

So, the point is, if someone can do it for free that's better, but if they can't then the State will pay, that's essentially what you're saying.

MS MCKECHNIE:

My submission would be, it would be more nuanced than that Sir.

WILLIAMS J:

That's the essence of it though, I mean, in an honest – I'm not saying you're dishonest.

MS MCKECHNIE:

For matters outside personal care, household management and night care, when we're in that penumbra of what is "is it work, care, supervision," in that grey space, that's the grey space that the policy assesses and it's more things into the first categories if there is less in the second category.

WILLIAMS J:

But the fundamental point is, that in the absence of an alternative, that help, if it is in community, is hired in and it performs exactly the same functions but, of course, you can't have a party there at the same time, but you eat there, and you watch TV there and you sleep there, and do all the other things that an ordinary person would do, except that you are being employed and then when your shift changes, someone else comes in and does the same thing. That's how it works, isn't it? In my experience, that's how it works?

MS MCKECHNIE:

I think, with your leave your Honours, I'll return to these questions in the morning.

WINKELMANN CJ:

Okay. Thank you, Ms McKechnie.

COURT ADJOURNS: 4.06 PM

COURT RESUMES ON WEDNESDAY 30 APRIL 2025 AT 10.07 AM

WINKELMANN CJ:

Mōrena.

MS MCKECHNIE:

Mōrena Ma'am. Ma'am, if I could begin with some housekeeping and the timing that we were proposing.

WINKELMANN CJ:

Yes, that would be good.

MS MCKECHNIE:

I have conferred with my colleagues. In light of perhaps not commencing my substantive submissions, my proposal was that the Crown would have the first hour of the day, including some time for Ms Heenan to speak to the issues that she is going to speak to, and Mr Dale has asked for 20 minutes in reply. That broadly gets us, should get us, to the morning adjournment, maybe slightly over.

Mr Cranney on behalf of Mr Humphreys has asked for up to an hour, 30 minutes.

WINKELMANN CJ:

I think he might need more than that. The questions are accumulating.

MS MCKECHNIE:

Thank you for that indication Ma'am, that might put pressure on my subsequent suggestions. But Mr Meys had requested up to half an hour but on the plan that Mr Cranney was going to speak for an hour we were proposing he will be finished by lunch but we are, of course, in the Court’s hands as to how you would like Mr Cranney to be submitting and while I have suggestions for the afternoon, Ma'am, they are all subject to how much time is available. So we had proposed an hour for the Crown and then Mr Cranney would like

20 minutes for reply, but obviously that will all need to be changed depending on how long the Court is with Mr Cranney.

WINKELMANN CJ:

Okay, right. All right, well –

WILLIAMS J:

Where does that get us to then?

WINKELMANN CJ:

That gets us to finishing at the end of the day, doesn't it?

MS MCKECHNIE:

It does, Ma'am.

WINKELMANN CJ:

Right. Well, let's set out on this.

MS MCKECHNIE:

There is a little bit of time in the afternoon which would allow for some expansion of Mr Cranney's submissions beyond his projection.

WINKELMANN CJ:

Yes, I worked that out, it's about 40 minutes, isn't it? No, 30 minutes. Yes, okay.

MS MCKECHNIE:

So Ma'am, to commence the hour for the Crown this morning, I'd like to re-centre the Court in relation to the issues before the Court and particularly in relation to the pleadings. The pleadings are complex, I think was the phrase that the Court of Appeal used, so to refine those and just make it clear to this Court what has happened in the courts below in relation to those questions, we have prepared a flow chart inspired by Ms Pope in Aotearoa Disability Law, which is in front of you entitled "Issues in the Fleming proceedings", does the Court have that?

WINKELMANN CJ:

Yes.

MS MCKECHNIE:

It's an A3 Ma'am.

WINKELMANN CJ:

We do and it's very helpful it's in A3.

MS MCKECHNIE:

I didn't necessarily follow all of the administrative instructions yesterday Ma'am, but I did catch that A3 was your preference.

WINKELMANN CJ:

It's just that some of us can't see small print.

MS MCKECHNIE:

We would not assume that, Ma'am. But to explain the arrangement of the document and the purpose of it, in the top line are the range of issues raised in the Employment Court. You will see that there were broadly seven. The Court of Appeal noted there were wide-ranging assertions and many hypothetical questions. The lines then track down. If there is nothing underneath, they were not subject to an application for leave or to an appeal.

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So going down to the Court of Appeal, you will see that between the appeals and the cross-appeals there were five issues that remained live and in each box the Court of Appeal's conclusion is captured. Underneath that, you will see that leave was sought to appeal a number of those issues. On two of those issues, this Court declined leave and as a result we come down to the final category of the two questions that are before the Court today in this appeal.

Of particular note, Ma'am, is the lawfulness allegations in the second box which I'll just turn to briefly to perhaps respond to and close off some of the questions that the Court had yesterday.

WINKELMANN CJ:

Can I just ask a point of clarification. The question: "Did the Employment Court err in finding that Ms Fleming" ...

MS MCKECHNIE:

Which box are you in, Ma'am?

WINKELMANN CJ:

So, "Issues in the Fleming proceedings."

MS MCKECHNIE:

Yes, Ma'am.

WINKELMANN CJ:

"Did the Employment Court get it wrong in finding that Ms Fleming had a personal grievance for discrimination? Yes." I can't recall, it doesn't have a "leave declined" there, was leave sought?

MS MCKECHNIE:

No, Ma'am.

WINKELMANN CJ:

Okay.

MS MCKECHNIE:

There are issues with discrimination which I will return to briefly, not least of which that Part 4A prevents claims for discrimination in any court. So, no, no leave was sought in relation to that finding.

WINKELMANN CJ:

And that aspect of Part 4A, does that continue in existence?

MS MCKECHNIE:

Following the repeal?

WINKELMANN CJ:

Yes?

MS MCKECHNIE:

No. Well, retrospectively yes, but not prospectively.

KÓS J:

We're not going to determine though in this case, are we, whether you've acted lawfully or not, in the sense that I suspect that you have acted unlawfully and I suspect that you have not complied with *Chamberlain*, but I also suspect that that's not actually an issue that arises directly here and your chart seems to confirm that.

MS MCKECHNIE:

Yes Sir, and that's certainly the conclusion that the Chief Judge made in the Employment Court, in paragraph 53 of her judgment which is captured.

KÓS J:

So the situation is that you may well be in breach of your obligations, but you may not be, and someone will have to decide that. The question then is how, what is the status of Ms Fleming and Mr Humphreys.

MS MCKECHNIE:

Yes Sir. Of course, we don't accept the conclusion of your first proposition.

KÓS J:

No, understand that.

MS MCKECHNIE:

But we certainly are of the view that that is not an issue that is before this Court and not something that can be determined out of the employment jurisdiction, as the Chief Judge acknowledged.

And so to briefly turn to that, I just highlight three points. Firstly, that the funding agreement, and I'm referring here and I won't take the Court to it but it's succinctly summarised at paragraph 65 of *Chamberlain*, the funding agreement was found to be a Crown funding agreement under section 10 of the Public Health and Disability Act and the Court is clear that it is a statutory instrument and statutory power subject to appropriate public or judicial review. There is obviously no remedy sought and nor could there be here to set aside the gazette notice or otherwise challenge the lawfulness of that policy in the public law sense.

Secondly, I would, as I have already been discussing with Justice Kós, highlight paragraph 53 of the Chief Judge's decision: "I agree with the Crown that the lawfulness of the policy, and whether it is within or outside the scope its empowering legislative provision, is a matter for the High Court ... it is not for this Court [the Employment Court] to concern itself with a Parliamentary decision to impose a prohibition on funding or parameters around when funding might be available."

KÓS J:

Well, there are two issues: one is the lawfulness of the policy, but the other one is whether you have complied with *Chamberlain*.

MS MCKECHNIE:

Yes Ma'am, yes Sir. And both those questions were before the Chief Judge in her making that observation and she declined on the basis that she didn't have jurisdiction to determine those matters.

WILLIAMS J:

The Employment Court does have judicial review jurisdiction specifically, in an employment context.

MS MCKECHNIE:

It does Sir, but –

WILLIAMS J:

And if that argument about vires and lawfulness arises in the context of an employment dispute, the Employment Court, I would have thought, does have jurisdiction. In fact, it has exclusive jurisdiction.

MS MCKECHNIE:

That was not the view of the Chief Judge, Sir, and that remains an undisturbed finding, that she didn't have jurisdiction to address those questions.

And thirdly and again I won't take the Court to it but I would urge if there remains concerns with this issue, noting it's not squarely before the Court, I'd highlight the sections of Part 4A that I didn't have the opportunity to go to yesterday.

Section 70C, that the Crown can only pay for support services to residential carers through a policy, and "support services" is defined in section 6 and it's a very broad, it includes care but it also includes services: "...related to or incidental to the care ...". The word "supervision" is not used, to return to your question Justice Kós from yesterday, but "related to or incidental" as a matter of statutory construction would likely include supervision.

Section 70D, subparagraphs (3)(c) and (3)(d) expressly authorise these policies to discriminate and provide lesser terms and conditions under these policies to individuals and it also allows the policies to expressly limit the hours.

WINKELMANN CJ:

And section 70D, has that survived the repeal or is that still there?

MS MCKECHNIE:

The whole section has been repealed, Ma'am. The whole policy, the funding policy and the relevant sections, have all been repealed.

And then section 70E, which is a long section but in essence prohibits claims for discrimination arising from that in any court. There are some saving provisions for cases that were under way at the time, including *Atkinson*, which

of course Mr Humphreys participated in, which was proceeding through the higher courts at the time that Part 4A was introduced.

So your Honours, in conclusion on this, those are the three pieces that I would highlight to note the statutory construction and the authorisation of the policy and to highlight that while it was clearly of concern yesterday, our submission is that it is not a question that is directly before this Court for determination and the question is –

WILLIAMS J:

You can see why they went to the employment jurisdiction then, can't you?

MS MCKECHNIE:

Well Sir, I think Mr Dale was quite open about that yesterday. I think he described it as a strategy that they'd apply, try for judicial review and now they were attempting it in the employment jurisdiction.

WILLIAMS J:

Well, in fact, according to section 70E, they had no choice.

MS MCKECHNIE:

Sorry, Sir, would you mind moving the microphone? Thank you.

WILLIAMS J:

Most people don't say they can't hear me. Section 70E indicates they didn't have any choice.

MS MCKECHNIE:

Well, Sir, it prohibits claims in any court and *Chamberlain* was decided during the period that this section was in force.

WILLIAMS J:

Right, but the –

ELLEN FRANCE J:

It, sorry, it doesn't, though, purport to limit the requirement, for example, to interpret consistently with protected rights.

MS MCKECHNIE:

It doesn't limit the application this Court takes to section 5 and section 6 of the Employment Relations Act, no, but our principle submission here is that as a claim in the employment jurisdiction looking at the interpretation of the Employment Relations Act, staying within the rubric and the parameters of that legislation, the context and the wider interpretive questions that the Court brings to bear on that, of course, there may be a range of those, but that is a question in the context of the employment jurisdiction, and I appreciate your Honour's question yesterday around a concern about unlawfulness of an offer and I will return to that later in my submissions, which seems to be where these matters intercept.

WINKELMANN CJ:

And it doesn't preclude, it doesn't exclude, the Court's judicial review jurisdiction which would have to be extremely plainly provided for.

MS MCKECHNIE:

No, it doesn't exclude that Ma'am, but nor was such a claim advanced in this case. It could have been but it was, to the extent that it was in the Employment Court, the Chief Judge found that it wasn't for her to engage with it in the context of the employment claim being made.

ELLEN FRANCE J:

The declarations sought, I appreciate this doesn't seem to have been a particular focus, but the declarations sought do include one of breach of the Human Rights Act 1993. Do you say that's prohibited by 70E?

MS MCKECHNIE:

Ma'am, I'd need to return to that and give it some thought, given that such a declaration wasn't made and it hasn't been subject to the appeal.

ELLEN FRANCE J:

No, no, I –

MS MCKECHNIE:

I can't recall my submissions from about five years ago Ma'am, on that point, so I need –

WINKELMANN CJ:

And also the question I have in my mind is timing-wise, too, because it might be precluded in respect of some policies but it wouldn't now be precluded because these have been repealed.

MS MCKECHNIE:

It's certainly not precluded in the context of individualised funding, in relation to Mr Humphreys' claim this afternoon, no. This Part 4A has no relevance, we say, Mr Humphreys may disagree, but we say it has no relevance to individualised funding, it's a fresh policy prescription. It's not a statutory process, it is a Ministry funding agreement operated through policy direction following an appropriation and there's no prohibition on any claims of any sort in relation to that.

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But the, obviously the submission we would make here is that this prohibition for the period that it was in force remains in force in relation to claims for that, despite the fact both it and the prohibition have been repealed. So, your Honours…

WINKELMANN CJ:

Moving on.

MS MCKECHNIE:

Moving on. Attempting to address the substantive submissions then in the relatively brief time remaining, the appellant here approached the Employment Court for a declaration under section 6(5) of the Employment

Relations Act which that she was an employee, and the Employment Court found, and it is an unchallenged finding, that she was not an employee for section 6(1)(a). There was insufficient direction and control that she could be seen to be subject to an employment agreement, and Ms Fleming was clear in her evidence that she would not have accepted a lawful direction from the Ministry if she considered it was not in Justin's best interests. Instead it found, the Employment Court, that Ms Fleming was a homeworker. This was broadly on the basis that there was an obligation of the State to provide care, and an awareness that Ms Fleming was providing this care, and the predominant evidence for that was the NASC assessments of Mr Coote. The way the NASC assessments got before the Court, and I will return to them at the end of these submissions, was oblique. The documents that are in a bundle all together were handed up in closing submissions, and were not subject to cross-examination because the leave, the remedies hearing has been stayed until the determination of these appeals.

The Court of Appeal disagreed with the Court's application. So the Court of Appeal found that the Employment Court had correctly understood *Lowe*, that an event needed to create a relationship in order for there to be a homeworker relationship created, but it disagreed with the way that the Chief Judge had applied it to the facts, and essentially that was first, there was no obligation on the State to provide care of the type that would provide a basis for engagement. So the particular emphasis and plank that the Employment Court had placed on that State obligation. Secondly, that looking at the facts there was no event creating a relationship, and the analysis in relation to events is in two parts of the judgment, of course, because it is, and it is more substantively discussed in the analysis of Mr Humphreys and whether he was engaged in the context of IF. But obviously the reasoning applies across both.

But I would take the Court please to the judgment in relation to Ms Fleming of the Court of Appeal from paragraph 65, which should come up on the screen. At paragraph 65 it records the Crown submissions: "… that the Judge wrongly reasoned that because lack of awareness precluded engagement in *Lowe* then awareness, without more, could be sufficient… In other words, the Judge

treated the context as sufficient to satisfy the request for an event." And they agreed, the Court agreed with the Crown's position "that awareness per se was not sufficient to create engagement".

At paragraph 66 they note: "There was no specific point at which it was possible to identify a change in Ms Fleming's status from receiving funding indirectly…" remembering that she was being supported by the State to provide care for Justin through benefit payments throughout this period, there was no event in the background context where she moved from being supported in that way to being engaged as a homeworker. As a result, in that context, "… awareness of Mr Coote's needs and the fact that Ms Fleming was meeting those needs could not, in itself, amount to engagement for the purposes of s 5."

They go on to say, in responding to one of Mr Dale's arguments: "However, as a matter of law, engagement for the purposes of the ERA requires some means of pinpointing the transition from not being engaged to being engaged. This is particularly so because there were alternative means by which the necessary care could be funded…".

And for completeness, while we're in the judgment, I also note in relation to the argument around the 2018 application at paragraph 68 on the next page, the latter part of that paragraph notes, this is in the context of was the offer sufficient: "Ms Fleming requested the specific needs assessment for the purposes of applying for FFC funding," of course that was in 2018, "and, as a result of the low hours offered, declined to accept that funding and elected to remain on her existing benefit. No agreement could result from these circumstances."

WINKELMANN CJ:

Can I ask you, what exactly do you say the Court is saying at the last sentence of paragraph 69, and do you think that's a valid distinction. For the most part I'm finding it hard to follow.

MS MCKECHNIE:

Yes I do Ma'am. The submission there is that *Cowan v Kidd* was considering a section 6(1)(a) application for a declaration of employment, and looking there through the statutory test, and there's some discussion of this in the written submissions, but it wasn't pursued by my friend's in oral submission yesterday, but your Honours will be familiar with the directions in section 6(2) when looking at section, subsection (1)(a), they are to determine the real nature of the relationship. *Kidd v Cowan* looks particularly at the direction and control undertaken there in the context of the work that was being done.

WINKELMANN CJ:

So is it your submission that homeworker the Court is not required to determine the real nature of the relationship? Because that seems to me to be hard to support.

KÓS J:

That can't be right.

MS MCKECHNIE:

We adopt the approach that the Court of Appeal took which said –

WINKELMANN CJ:

Which seemed to be taking that approach.

MS MCKECHNIE:

Which does highlight as a matter of statutory construction that subsection (2) does expressly refer to and direct the Court to consider the real nature of the relationship specifically in relation t subsection (1)(a).

KÓS J:

But (b) is included in (a).

MS MCKECHNIE:

(b) is included in (a), but the supplementary submission that I would make, Sir, is that the approach that the Courts have taken, including in *Lowe* in relation to the approach to homeworker, is that the requirements of direction and control, which so fundamentally form a consideration under 6(1)(a) in terms of the real nature of the relationship, particularly in the *Prasad* cases, there's multiple cases in relation to that, are so different to the approach taken in homeworker that the particular statutory construction of homeworker should be considered first, and then in the context of applying the construction of the section "homeworker" definition to the facts, then to the extent that that includes the context, and what is actually happening, the difference between the context, Ma'am, and the real nature of the relationship might not be very great.

WINKELMANN CJ:

Well for my part I find it very hard to accept an interpretation of the section that precludes you from taking a substance over form approach in determining whether a homeworker is included as an employee, given the protect purpose of the legislation, and given the approach the Courts take to legislation of this kind.

WILLIAMS J:

You probably don't need a statutory direction, one way or the other, to get to that point, it's just obvious, isn't it. It's the Employment Relations Act?

MS MCKECHNIE:

It is Sir, and I think that – I don't think anything particularly turns on it Ma'am.

WILLIAMS J:

No.

WINKELMANN CJ:

Although the Court of Appeal thought it did.

MS MCKECHNIE:

In part I think that reflects the nature of the argument before the Court. The argument before the Court in the Court of Appeal placed particular emphasis on the language, real nature of the relationship. I think if you look in substance at what the Court of Appeal did in applying the definition of "homeworker" to the facts, it did look at the context, and in essence looked at the real nature of the relationship. So I don't think anything – there is an odd statutory construction in my submission Ma'am, but I don't think anything particularly turns on it, and we don't advance an argument that the Court shouldn't look at the context. We say if you look at the context it doesn't meet a sensible test for engagement, but we're not trying to narrow down what the Court looks at in the context of –

WINKELMANN CJ:

So you're not taking this point that section 6(1), that section 6(2) doesn't apply?

MS MCKECHNIE:

No, not particularly Ma'am. We note that it's challenged in the appeal, and hence we respond to it in our written submissions, but we're not particularly advancing this. I don't think it's material to the Court of Appeal's analysis.

WILLIAMS J:

Your argument is that awareness is not enough and the Court of Appeal was right, and that reflects the substantive nature of the relationship as you would describe it.

MS MCKECHNIE:

Yes, yes and Sir our principal submission in that regard is that it, the Court of Appeal's construction of the test, appropriately reflects the statutory scheme in the context of the Employment Relations Act, because when looked at, particularly the extent of the obligations that arise both for employers and employees, that creates and reinforces, in our submission, the necessity for certainty about engagement.

1030

So it needs to be a practical applied test so that an employer, the State or otherwise, will know to whom they owe obligations and when and in what regard. I think Justice O'Regan succinctly summarises the threshold. If you become an employee in the Employment Relations Act in paragraph 2 of his *Lowe* decision, as an employee you gain a number of protections and rights, and as an employer you gain a number of obligations. So that's the principal submission on behalf of the State.

WINKELMANN CJ:

That's probably all we need but can I just ask you then, then you don't support what the Court of Appeal says in the last line of 69?

MS MCKECHNIE:

Ma'am, if I was seeking to assess it, I would say that at this point the Court of Appeal is discussing the interpretation of "homeworker" as distinct from the application, and so in that context I think our submission would be there is a question of statutory interpretation for "homeworker" and then when it comes to apply it then the real nature of the relationship, but as I say, Ma'am, we don't particularly take that forward. It's not a conclusionary comment, in my submission, in relation to the key reasoning of the Court of Appeal.

WINKELMANN CJ:

Well, the point is that in *Cowan* they don't really seem to be that worried about the sole notion of uncertainty because the person didn't think they were employing someone but the Court said they were.

MS MCKECHNIE:

Yes, Ma'am, but I think one of the key differences there in the facts, turning to the application, is that Mr Cowan was conducting these activities with the knowledge, direct daily engagement – sorry, I shouldn't use "engagement, that's an unhelpful use of "engagement".

WINKELMANN CJ:

Working with him.

MS MCKECHNIE:

Dealing with him daily, telling him what to do, telling him – he knew he was doing it every day. When they woke up in the morning they were physically together. He was aware he was doing it. If you are comparing this purely on the facts, we would say that is materially different to the real nature of the activities going on between a funding agency who are providing a benefit to Ms Fleming, aware that she is looking after her disabled child and that's a statutory support, and I'll return to this but every three years there's a snapshot of his needs and they go in to assess how Justin is and at that point they find out that for the last three years Ms Fleming has been looking after him and they assess the needs in that context. That level of a retrospective awareness, and we would return to some of the rubric of this Court in *Lowe* in terms of awareness and knowledge, they found out at these snapshots in time that every three years Ms Fleming has happened to care for him.

WINKELMANN CJ:

Okay, thank you.

MS MCKECHNIE:

There's a risk of hindsight bias that because that was Ms Fleming throughout his life so far that somehow converted the other way looks like an engagement. It could have been his sister and the Ministry wouldn't have found out until the next assessment.

KÓS J:

So humour me with my premise before that there is a gap here between what you are lawfully obliged to do and what you in fact did. In other words there were services that should have been funded that weren't funded. So just humour me with that proposition, okay, and you know that Ms Fleming is providing services which may be even more again. But let's say you're funding to there, in fact you had to fund to there, and the service has been provided

right up here. Now in that gap between what you should have supplied and what she is supplying, isn't there an argument there that she is providing services and she is engaged because you know that she is providing those services and it turns out that you should have funded them?

MS MCKECHNIE:

Sir, I think I'd probably have two responses to that. Firstly, while you've asked me to humour your premise, I think it does misunderstand the nature of the funding scheme and the options in funding that were both available and being used by Ms Fleming. Following Justin's needs assessments from when he was 16 when had the first assessment onwards, funding was being offered and being used by Ms Fleming for respite care and the like, so there was a – she was receiving a benefit and there was other funding supporting her which she was using for other purposes. Specifically in relation to FFC, it's a very particular process imposed by Parliament. At that point she applied and declined on the basis of the hours. If she had taken FFC, at 22 hours there would have been an abatement. At 40 hours where her evidence is she would have accepted it, she would no longer have qualified for the benefit that she had received. So it's not a matter of she's providing – even if – accepting she's providing services, which is a complex question and we say is for later, she is being supported by the State to care for her son through the benefit and that needs to be taken into account, we say, as the Court of Appeal did, in considering the multiple funding options that are in play.

Secondly, Sir, I would make that hindsight observation again, that there is a material and important difference in the context of the Employment Relations Act to find out afterwards that somebody had been doing something. At that point it's not realistic or sensible for an employer to have exercised any rights in the intervening period and Ms Fleming's –

KÓS J:

Well, that's the problem Mr Cowan had. He found out he was an employer.

MS MCKECHNIE:

Yes, but the particular facts here, Sir, are such that the care can change. So overnight we were racking our brains for analogies that are helpful here but there's actually –

WILLIAMS J:

Is one coming to –

MS MCKECHNIE:

There are very few analogies because Ms Fleming couldn't have been stopped by the State from working, and I think that's partly in answer to one of the questions that you asked yesterday, Ma'am, and that's the material difference. Mr Cowan could have stopped Mr Kidd. He could have said: "Please don't do that." In extreme circumstances he could have said: "Please leave my farm," and if every day Mr Cowan had showed up to work Mr Kidd could've said no. In this sit, Sir, it's not realistic or, frankly, it would be utterly inappropriate for the State to prevent Ms Fleming from caring for her son or impose someone else.

KÓS J:

No, the State could say: "Look, we're not sure what our legal obligation here is. We understand there's an argument about whether we should be supplying more than 2.2 hours a day. But we know you're going to provide these services. If it turns out afterwards that we were liable for more, well, we're liable." Now you could, I think, in that situation argue that Ms Fleming was engaged in providing the services up to the amount that you should have funded.

MS MCKECHNIE:

Sir, I'm cautious in responding to that again because you're taking me to a position in terms of should've funded which assumes not funded, overlooking the benefit, and assumes an obligation to fund where we say there is no specific obligation to fund in this way this sort of activity. But the other point that I would make, Sir, here, and this is distinct from *Kidd v Cowan* as well, is that, and this was clear in the evidence of Ms Fleming and indeed Mr Humphreys, the care being provided could have and did change from time to time without the

knowledge or recourse to the Ministry, and they didn't need the recourse to the Ministry because the Ministry hasn't engaged them and isn't in an employment relationship with them, but as a result, and this could happen tomorrow, if Ms Fleming chose to or realistically was unable to care for Justin, leaving aside now she's on individualised funding, but if we're assuming the same facts scenario, Mr Coote's sister, Dana Coote, has provided care for him from time to time, she could do that from tomorrow and under the NASC assessment the Crown may not know that for three years and could not have exercised any employer obligations in relation to Ms Coote or indeed anybody else who might have been providing care to Justin in this way, and so moving away from the funding question, which is clearly where the Court is focusing, and moving to an engagement and creation of an employment relationship with the obligations for an employer, we say that that is an unsafe basis for engagement because of the lack of clarity for the employer, and the employee, frankly. Ms Fleming didn't consider herself to be an employee of the Ministry during this period.

WILLIAMS J:

She probably considered herself to be a homeworker though.

MS MCKECHNIE:

There's no evidence to that. She wasn't asked and doesn't plead that, Sir. She doesn't plead that she was a homeworker.

WILLIAMS J:

Well, she worked at home doing what she did. You see, in the orthodox piecework approach an employer wouldn't care who was making the textiles in the house, whether it was the person engaged or whether it was some other member of their family. They're only interested in the product. A standard employment relationship is not what's contemplated in homeworking. That's the point, isn't it?

MS MCKECHNIE:

It is the point, Sir, but the submission that we are advancing is that even allowing for that there still needs to be a sufficient certainty of terms, I think it is

the way the Court of Appeal approaches it in their decision, in relation to what is being engaged for, what is the terms and who is being engaged.
1040

So for piecework it is for specific items, slippers let's say. A certain number of slippers will get created. But that is such a different analogy Sir because, and again forgive me because there's no evidence before the Court for this, but let's imagine a scenario where you pay $20 a slipper because it should take you an hour, and then the pieceworker says, well actually it took me two hours to make the slipper, so I want two hours, but the terms of the arrangement are you pay by item. Now that is more akin to what is work and how that adjusts. So there is a question here, should be Ms Fleming be a homeworker engaged by the Crown throughout this period, or any parts of this period. What should she be paid for, what is work.

WILLIAMS J:
Correct.

MS MCKECHNIE:
And then can she be paid because of the effects of Part 4A.

WINKELMANN CJ:
Well isn't it just simply in terms of the funding policy, because she could be paid in terms of the funding policy. Does the funding policy preclude – does the funding policy say "and in no circumstances may the Ministry of Health be the employer".

MS MCKECHNIE:
No, the funding policy says – the statute says the Ministry may only pay through the policy, and the Employment Court found at, turning to the Chief Judge's decision at paragraph 52: "Because Ms Fleming did not accept funding under Funded Family Care, she was not subject to the Gazette Notice…", and that was in the context of jurisdictional arguments being raised in the Employment Court. But there is, and we would say that's an undisturbed

finding, that she was not a homeworker under the funded family care policy, and by contrast to Mr Humphreys who in the Court finding that Mr Humphreys was a homeworker through the funded family care policy, used the events of engagement through that policy as a lens to find that he was nonetheless a homeworker. Active selection of him, approval of him as a carer, funding for him under funded family care. None of which, at a factual application level, apply to Ms Fleming.

WILLIAMS J:

But you do understand, you must see the Kafkaesque problem with that proposition. She turns it down because it isn't enough and the SLP is more remunerative in its context, but if it should have been enough, according to the policy, the fact that she turns it down then becomes the reason she doesn't get it as a matter of law in the context of this debate. It seems a particular unattractive analysis. It's a heads I win, tails you lose.

MS MCKECHNIE:

Sir, I think the Part 4A policy has been the subject of criticism in many courts. The Court of Appeal –

WILLIAMS J:

I'm not talking about the policy. I'm talking about the argument that she turns it down because the policy is being applied in a really bad way to her, she goes with the SLP, and then the answer from the Ministry is, well, she turned it down, so she can't be an employee, when she turned it down because the terms and conditions offered to her were, she says, deeply unfair, and if they weren't unfair, she would have taken them. There's no winner in that game.

MS MCKECHNIE:

Sir, I have a couple of submissions I'd make in response. Firstly, and I very much can hear the Court's concerns about the contents of the policy, the policy is lawful until set aside, and assumed to be lawful, and at present the policy is lawful and not under challenge. The application of the policy, which is a

separate question, and whether that policy is lawful under the statute, again is not before the Court. So I think –

WILLIAMS J:

It's more your argument. I'm not really talking about the content of the policy, because we can discuss that.

MS MCKECHNIE:

I think, with respect Sir, there might be an assumption in your question about the unlawfulness of the policy, which the policy is lawful at present and as applied to Ms Fleming, and Ms Fleming declined it, and that is either an event – in the context of engagement as a homeworker, we say that that, those facts should be considered in the context of whether she is engaged as a homeworker. Now either, we say, she actively declined that, and so that is not an event of engagement. Not about the lawfulness of the policy or the appropriateness of the assessment, but purely on the facts of from a contractual analysis, which my friends advanced a couple of their points rely on contractual analysis. We say on a contractual analysis you can't rely on her being offered and declining as an event of engagement, because that is so contrary to the orthodox laws of contractual analysis that you can't look at what she did and say she nonetheless accepted, and she would have accepted if only you'd made a proper offer. Sir, there are many employment relationships which don't start because an employer says, I'll employ you for this amount, then the putative employer says no, it's not enough.

WILLIAMS J:

Yes, yes, I understand this.

MS MCKECHNIE:

So in terms of the contractual events we say that that can't be relied on as an event, to use the Court of Appeal's rubric, to establish engagement. If there is an assertion it's an unlawful offer, and Ms Heenan will return to this because an unlawful offer is not a concept particularly in employment law, but even if it is, the effect of that is to take that event fact off the table because it didn't

happen, it misfired because it was unlawful, not that it's unlawfulness somehow creates engagement. That, even if it is unlawful, which it is not at present, at present it was a lawful offer. It was an unattractive offer and so Ms Fleming declined it. So if that is off the table then you're looking at what event, what transformed her from a beneficiary receiving State money to provide care for her son, and other money, and I'll come to that in a moment, to a homeworker, and that is the NASC assessment.

KÓS J:

That's why we've got two volumes of Kafka in front of us, because the other one is trying to work out what the consequence here is, when we don't know whether there's been an unlawful application of the policy. Now if there was, as I suspect, an unlawful application of the policy, then it may be much, Mr Dale's position may be much stronger. Well we just don't know. She may be – and if there was an unlawful application of the policy, and services were being provided that should have been funded under FFC or otherwise, then it may well be that there's an event, sufficient event or engagement to amount to employment. But we don't know if the premise is met.

MS MCKECHNIE:

No Sir, and my submission would be that the Court should be proceeding on the assumption that the policy is lawful because in orthodox public law tenets that is the case. It is, this is secondary legislation in the *Gazette* notice and then policies promulgated under it remain lawful until set aside. So those hypotheticals, as discomfited, I can very much hear the Court is, are not the appropriate approach to the rubric of them in the context of considering whether they are events that amount to engagement.

KÓS J:

Well I'm very much disinclined to declare that Ms Fleming is not an employee, not a homeworker, without knowing whether the premise is or isn't correct. That's the problem.

ELLEN FRANCE J:

Could I just check? As I understand it, but correct me if I'm wrong, your argument about lawfulness relates to the definitions in the policy, household management and personal care, and you say, which would, for example, I think relevantly then refers only to intermittent night care. Is that what, so you say, given those definitions, they've simply been applied in this case to get to the hours, ergo there's no question of unlawfulness. I'm just trying to understand –

MILLER J:

Put another way, you've excluded supervision because the policy does.

ELLEN FRANCE J:

Yes.

MS MCKECHNIE:

I think, despite my attempt to close the door on this particular argument this morning, it re-arose when the Chief Justice asked a question in relation to how would she be paid, and how the policy would then function for the purposes of payment, and what could she be paid for. My submission in response to that is that Ms Fleming was found by the Employment Court to be outside the FFC funding policy. So if this Court is to find that she is a homeworker, it sits independent of the FFC policy. Unlike Mr Humphreys, who went through the FFC process (inaudible) of capacity was nonetheless a homeworker. Our submission here is that Ms Fleming sits outside the FFC policy, and then, as was found in the Employment Court, and we say correctly, because of the scope of Part 4A, and particularly section 70C, all disability support services, which are drawn very broadly in the statutory scheme, can only be paid for by the Ministry through that policy. She cannot be paid.

1050

So as you'll see on the document I first handed up to the Court today, under "lost wages" the Employment Court found that Ms Fleming was entitled to lost wages except for the period that Part 4A was in force because of this prohibition in section 70C, and that was Parliament's intention, as unattractive as I can

hear the Court is finding it, to narrow down the ways in which residential family carers could be paid to only the parameters of Part 4A.

MILLER J:

Which excludes supervision, is that what you're saying? Because your point that's been put to you is that the offer being made to her was unlawful, essentially, because it was an incorrect application of the policy, and your answer is no, it wasn't, and we're stuck with that, both because the legislation says so and because that's the way the case has been run?

MS MCKECHNIE:

The only nuance to that, Sir, is I would draw the distinction section 6 of the Public Health and Disability Act defines "disability support services" very broadly, including anything that might sensibly be considered to be supervision or otherwise adjacent to or related to care, and then the policy promulgated by the Minister authorised under the Act does not pay for that. The policy decisions taken by the Government about what it would pay for reflecting section 3 of the Public Health and Disability Act, reflecting Part 4A itself which expressly refers to fiscal constraints and to limiting payment, then while it starts broadly in terms of the definition of what it could cover policy decisions are taken to not include supervision in the policy as a funded matter, and then we are very much walking into the territory of the distinction between what is a funding policy and what can be funded lawfully and appropriately under a funding policy and what, if she is independently found to be a homeworker, might be considered to be work, and then we would say that for the period that Part 4A is in force, because of the scope of the disability services definition in the Public Health and Disability Act, she can nonetheless not be paid for that period, in addition to the money that she was paid and I would just remind the Court, I took you to it yesterday, but the letter of the 10th of December 2020 at 311.2429 sets out the funds that she was receiving at the time in addition to the funds that Justin was receiving and paying to his mother as his board.

WINKELMANN CJ:

I suppose the policy is just irrational, isn't it, because it conceptualises a world in which people are cared for? You can take all the tasks that must be done for them and then do them all in 80 minutes as if one person is doing them all in 80 minutes whereas in fact things are spread throughout a day and therefore no one can pay for that level of care.

MS MCKECHNIE:

I think Parliament's intention is quite clear that that's the intention in 70A, Ma'am, and the reference to the purpose of this is in part to keep it within sustainable limits but also to affirm the principle that in the context of funding support services families generally have the primary responsibility for the wellbeing of their family members. I think Parliament's intending is expressly referring to that in terms of the care.

WINKELMANN CJ:

I don't see that that policy, as it's been implemented, falls naturally out of those words myself.

MILLER J:

That raises a question which I had and I hesitate to take you away from your argument. I'm conscious you're short of time. It did seem to me that the Chief Judge's decision rested on the, an assumption, which is not necessarily borne out by the authorities, that the State is liable to pay for disabled people's care once they reach adulthood, and that doesn't seem to be the way the legislation is framed. It talks just generally about the obligation of families to care for their members. What do you say about this point? It seems to be based on *Chamberlain* where the Court has said, well, parents cease to be liable, but that's not the same thing as saying that the State becomes liable.

MS MCKECHNIE:

We would say, Sir, that the Court of Appeal's construction in relation to this is correct in terms of what, and this is obviously in the context in the Court of Appeal of the discussion of the Convention, what the Convention requires, and

we support what we think is the orthodox position that law should be interpreted consistent with convention. The Convention doesn't create independent obligations except as introduced through legislation. So in the context of that we agree with the Court of Appeal's conclusion that it does not mandate a particular form of care. So if Ms Fleming had not only declined the offer but had decided not to care for Justin any more than the State would have had to provide some care for him, but that is different from having to pay Ms Fleming to care for her in the circumstances that she has chosen. That is a materially higher obligation and we say there is – and my submission would be that my learned friends have not pointed to a statutory basis for that obligation. When pressed yesterday, Mr Jeffries took the Court to section 3 of the Public Health and Disability Act as the source for that obligation.

MILLER J:

That doesn't contain an obligation at all. It may recognise an antecedent one.

MS MCKECHNIE:

Indeed, Sir, and –

MILLER J:

It says only that the purpose is and then it say the purpose is subject to Crown decisions about how much it funds. So if there is an obligation it is antecedent. You say that is the CRPD?

MS MCKECHNIE:

No, Sir, we say there is no obligation beyond the confines of the legislation. The legislation was the enactment of that obligation. Of course, the later part of the Public Health and Disability Act is Part 4A, so the purpose in section 3 is to provide disability services. Parliament specifically said it will be done in this form for this particular funding. There are other mechanisms but for residential family carers to provide care in their home it must be done within the four corners of Part 4A very broadly drawn.

WINKELMANN CJ:

The simple point you're making, I think, is that the obligation is no more extensive than is in the policy. I mean the policy must now create an obligation but it's no more – and section 70A, Part 4A allows the – the time period that it was in effect allowed discrimination and the Act itself allows underfunding of care because it says that there are resource constraints.

MS MCKECHNIE:

And it expressly allows differentiation of payment.

WINKELMANN CJ:

But there is currently and has been for some time an obligation to provide care. The extent of it is the issue.

MS MCKECHNIE:

Yes, Ma'am, and that would –

WINKELMANN CJ:

Well, not the issue but the extent of it could be an issue in judicial review proceedings.

MS MCKECHNIE:

And that's the final submission I'd make to draw the distinction. It's an obligation to provide care for Justin as a disabled member of the community. It's not an obligation and can't be elevated, we say, to an obligation to pay Ms Fleming to do that in her home to the extent that she is seeking rather than provide some other form of care. So if she chose not to do that, and to use the perhaps slightly horrible analogy that Justice Kós used yesterday, and she would never do this, but left Justin on the street corner, I think is the phrase you used, Sir, the State would have an obligation to look after Justin and provide for his care.

WINKELMANN CJ:

So can you tell me does the methodology of adding up little minutes, is that dictated by the policy or is that simply a computational approach, because if the

policy provides that you're to have this level of support then if you take an analysis of how that support could be provided by an employee it wouldn't give you 80 minutes. It would probably give you eight or 12 hours. So does the policy say that you're entitled to take the micro-analysis type approach or was that simply how it's been applied?

MS MCKECHNIE:

The policy, and I won't take your Honour there, please, because I'm conscious I've already run out of time on my perhaps optimistic projections this morning, the disability service specification at 308.1820 sets out both how to do this, what you assess and why, and so I was going to take the Court back there later in terms of the purpose of a NASC assessment, to answer your Honour's questions yesterday about why are these assessments being done.

WINKELMANN CJ:

But is that part of the policy that's gazetted?

MS MCKECHNIE:

No, this is the policy that's – this is the specification that sits underneath the *Gazette* notice and this specification persists. This is the specification that's also used for individualised funding.

WINKELMANN CJ:

What is it's status? Is it a statutory instrument or is it simply an in-house thing?

MS MCKECHNIE:

No, this is a –

WINKELMANN CJ:

So the answer is that the policy doesn't then contain the computational approach?

MS MCKECHNIE:

The *Gazette* notice certainly doesn't contain any computational approach. The disability service specifications do not contain particular computation. That is an assessment model used to apply the policy. It is applied vastly beyond – I think Mr Wysocki's evidence in the leave application is that 40,000 people in the disability sector have NASC assessments of this sort every year to assess their needs and the type of care. But the submission that I'd make, Ma'am, to your employee point is that it's the same assessment done of the needs of the disabled person that is then used to allocate the funds to buy third party support services as it might be to fund family members.

WINKELMANN CJ:

Yes, I understand, but I was trying to –

MS MCKECHNIE:

So the same computational approach is used in both contexts.

WINKELMANN CJ:

I was just simply trying to understand what the status of this computational approach was as a matter of law, whether it was subsidiary legislation or it was simply in-house documentation.

MS MCKECHNIE:

No, it's a mechanism to apply a specification which itself falls – did during FFC fall out of a *Gazette* notice but it independently exists.

1100

WINKELMANN CJ:

So the policy entitles people to be provided for in terms of personal care and household management and some sleepover supervision, and then the Ministry creates this model as to how it's going to arrive at it.

MS MCKECHNIE:

Yes.

WINKELMANN CJ:

Got it. Okay, thank you. So we better let you move on.

MS MCKECHNIE:

While we're there Ma'am to note in response to your questions to Mr Meys yesterday, and to Mr Dale, the review process for an allocation. So if you disagree with the computational approach, that is not a statutory process. That is a policy process that is set up and that, as well as in that document, it's an internal review which goes to, and there's evidence of this in the Employment Court, goes to a more senior member, there's a review team, to conduct a review. So that is not a statutory process, just to complete that while we were there.

WILLIAMS J:

So can you just help me with the document number that contains the relevant material?

MS MCKECHNIE:

In terms of the service specifications Sir?

WINKELMANN CJ:

Yes, is it on your chart of documents?

MS MCKECHNIE:

It is Ma'am, it is the tier 1 – let me just check I'm referring you to the right – it's the NASC service specification at the bottom of that page, 308.1820.

WILLIAMS J:

308, my documents stop at 306.

MS MCKECHNIE:

Are you looking at the Fleming bundle Sir, or the Humphreys bundle?

WILLIAMS J:

I must be looking at the Fleming bundle.

MS MCKECHNIE:

It is in the Fleming bundle at 308.

WILLIAMS J:

Well then I must be looking at the Humphreys bundle.

MS MCKECHNIE:

It's on the screen now.

ELLEN FRANCE J:

Could I just check then. So you have the statute, the *Gazette* notice, and then you've got the policy, and then these tier, different tiers, and then this document. Are they underneath that?

MS MCKECHNIE:

That's not quite how I characterise it Ma'am, because these documents are used for individualised funding. These documents are used for needs assessment, and that's the first step, and exists across multiple policies.

ELLEN FRANCE J:

Yes.

MS MCKECHNIE:

So if you will, if you envisage it as a needs assessment, this is the service specification for that, and there are various policies about how that's conducted. That's not a statutory process at any point, that's a policy-driven process, and then how that is done to the computational approach. Sitting underneath then is service co-ordination, in terms of what might be funded by the Crown, and what might be provided through the family, or what might be otherwise funded by charities, by the family themselves, et cetera. That is where these documents sit in terms of what services will be funded, and again there's a number of documents that exist right across this period and continue now in terms of those, but for the period of the FFC, in terms of the chronology of this, there were no funded services prior to 2013 if you were a resident family

member, as it was found to be discriminatory. Part 4A comes in, so for the period of seven years at the service co-ordination level, and as Justin's needs assessment is done over time, when you get to service co-ordination prior to 2013 Ms Fleming being paid under the service co-ordination was not an option. If, as an option, she chose that during that period, she had to do it through FFC. She didn't use the allocation for that so she used the allocation for other things, respite care and the like. But the policy documents pre-date continue through and continue to exist. Then the limits of FFC are lifted when the Part 4A is repealed, and the availability of individualised funding is opened up to allow, as it hadn't been previously, that to be used to fund resident family carers and also family carers could be employed by HCSS providers, as we may well discuss this afternoon in the context of Mr Humphreys' options.

WINKELMANN CJ:
So Part 4A wouldn't stop you challenging the computation approach, would it?

MS MCKECHNIE:
No.

WINKELMANN CJ:
In terms of discrimination or because in fact it's not protected by Part 4A.

MS MCKECHNIE:
No, and that's a much wider, that would be a much wider challenge with much wider ramifications than the family funded care policy because of the way that this process is so widely used. It's also used in aged care assessments. The same, very similar ideas and a computational approach is also used in the elderly sector.

WINKELMANN CJ:
But it's not such a problem for people who aren't extremely high needs because they can, yes, it may not be a problem in some contexts.

MS MCKECHNIE:

The calculation of respite care for aged, you know, family members of aged individuals, or dementia individuals, et cetera, it's a similar process used and there is no evidence before the Court because, of course, that is not under challenge.

WINKELMANN CJ:

No, right, but it helps to understand it, thanks.

MS MCKECHNIE:

So your Honours in an attempt to ensure that this matter finishes and Mr Humphreys, how much longer would the Court allow me to complete my substantive submissions on this point?

WINKELMANN CJ:

So what points have you got to cover, because I think we've got the gravamen of your submission, which is that there is no engagement in the, offer was refused so you can't give it a contractual analysis and that the contextual approach of the Employment Court was wrong.

KÓS J:

And my escape route for Mr Dale you're shutting off because you say there hasn't been proof, an establishment of a funding breach?

MS MCKECHNIE:

(nods).

KÓS J:

Yes.

WINKELMANN CJ:

What else have you got to cover?

MS MCKECHNIE:

I think there's probably only two points Ma'am, in light of that indication, that I will spend a few minutes discussing and then I will hand over to Ms Heenan in an attempt to finish by the morning adjournment.

Firstly, just to return to the NASC assessment and the purpose of the NASC assessment, and just to complete the submission in relation to that. We say that it is not a safe basis for engagement for the reasons that the Court of Appeal found, and would particularly refer your Honours to 308.1820 at 5.2. I won't take the Court there now, but that describes, we say very clearly, this focus is on Justin, and Justin's needs, and is the first stage to assess the amount of money that will be allocated to Justin. Without the service allocation of how that money is going to be spent, and it could be spent in a range of different ways, merely establishing that he has needs that could be met, does not establish that Ms Fleming is engaged to do that.

Secondly, insofar as they record that Ms Fleming is providing care, we say that it's a snapshot in time and it's a retrospective acknowledgement of that, and that she has been providing care, and again that lapse, we say, the degree of selection and awareness of who is being selected, that we say the Employment Relations Act sensibly requires in order to fulfil your employer obligations. It can't be, we say, a sensible approach to engagement that you can engage somebody without knowing for, in this factual scenario, potentially up to three years, and sensibly owe them employer obligations.

KÓS J:

But that's a nonsense argument, with respect, in relation to Ms Fleming. You knew all about her. There was no-one else but Ms Fleming, and in relation to the sister, well, that's the problem, in relation to the sister's claim. If they, if you didn't know about the sister well it may be there is no engagement, but you certainly knew about Ms Fleming.

MS MCKECHNIE:

Sir, the submission there would be that we only ever knew about Ms Fleming in retrospect and in the context where she was being otherwise funded and supported, so I would return to the –

KÓS J:

What, did these people go into the house and imagine that Ms Fleming might go away? I mean, of course she was going to be there. For years and years and years you dealt with her.

MS MCKECHNIE:

If I can contrast it with Mr Humphreys' example, there are only two examples before the Court, he's very clear in his evidence that for periods of time it was him, and for periods of time it was his wife who was paid.

KÓS J:

Sure.

MS MCKECHNIE:

And they made those decisions between themselves, there was no recourse to the Ministry, there didn't need to be.

KÓS J:

Okay, that's nice, let's sort out Ms Fleming.

MS MCKECHNIE:

Sir, I would urge you to resist an interpretation of homeworker constructed from these facts because to apply it more broadly to homeworker, my submission is to take simple awareness and a hindsight bias that, in fact, has turned out to be the case, is a dangerous and unsafe basis for engagement in the context of then entering into the personal and quite significant employer obligations that the employer would have if are a homeworker. They go well beyond whether she's paid or not. There are a range of obligations which your Honours are very familiar with in the Employment Relations Act which the employer, putative

employer, doesn't have sufficient certainty about who they're employing to be able to sensibly fulfil those. So we say as a matter of statutory construction, whatever test you adopt or apply it to the facts in the context of the Employment Relations Act, must take that into account because the purpose of that relationship, and all of the section 6 good faith obligations require that level of knowledge of a relationship and clarity of the terms and particularly the identity of the individual such that you can exercise those obligations. That would be my submission in relation to the awareness test.

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The last submission I would make, your Honours, is in relation to quantum meruit which has been raised a number of times. At risk of reattracting your ire, Sir, the submission that I would make there, firstly, of course, it isn't pleaded but in the context of this I would just bring to the Court's attention the decision of *Stewart v AFFCO New Zealand Ltd* [2022] NZEmpC 200, [2022] ERNZ 1013 which is an Employment Court decision of Judge Corkill and we can provide a copy to the Court electronically if that assists.

At paragraph 79, he confirms that the Employment Court has jurisdiction to consider claims of that sort and it's on the screen, but only where an employment relationship, it says that: "... an employment relationship is a necessary requirement." So again, consistent with the general –

WINKELMANN CJ:

But that's a formal quantum meruit analysis. Justice Kós' approach was to say it requires a contract-type scenario which is another, which is a more informal way, of describing quantum meruit and that's specifically referred to in *Lowe*.

MS MCKECHNIE:

And, indeed, Ma'am, I thought it was useful to bring this to the Court's attention.

WINKELMANN CJ:

Yes.

MS MCKECHNIE:

But also to highlight that consistent with the general thrust of the State's submission here, in order to have the rights under the Employment Relations Act, including payment and all the other obligations, the threshold question is: "Is she an employee?" And the test to be applied here, we'd urge the Court to resist the temptation of the sympathetic appellant, the test applied here to the engagement of homeworker needs, in our submission, to be able to be applied sensibly such that an employer can fulfil their obligations. And so an event or events that convert a woman who is being paid to look after her son under a benefit to being actively engaged by the Ministry of Health under a funding arrangement as a homeworker, when she declines that arrangement, we say that the test that the Court of Appeal adopted is appropriate and applied to the facts appropriately.

And with that, and I am not going to ask your Honours if you have any further questions –

WILLIAMS J:

Very wise.

MS MCKECHNIE:

Thank you Sir, may be the only wise thing I've done this morning, I am going to hand over to Ms Heenan.

WINKELMANN CJ:

Thank you.

MS HEENAN:

Thank you, your Honours. I will attempt to be very brief, given time constraints. I would just like to talk about two aspects of the Employment Relations Act my friend Mr Meys took you to yesterday.

The first is the good faith section in section 4, I think Ms Goodwin will just bring that up. So there was some discussion about the parties to the employment

relationship having to act in good faith and whether or not, in this case, there were parties to the employment relationship because at the present time Ms Fleming is not a homeworker. Mr Meys referred you to section 4(4)(ba) which does provide a duty of good faith for parties: "... bargaining for an individual employment agreement or for a variation ..." so we would accept that that obligation does exist.

Mr Meys said that an offer was made to Ms Fleming and all that was at issue between the parties was the hours of work. In our submission, Ms Fleming was not offered employment. What was being offered to her was an allocation of funding for personal care and household management for Justin, as determined by the NASC.

WINKELMANN CJ:
Well, who was going to offer that employment to her then?

MS HEENAN:
Well, that would have been Justin but, as was accepted in the Court of Appeal, he didn't have the capacity to do so. But I think our point is, it was an offer of funding allocation but we would accept that Ms Fleming would then carry out that work.

WINKELMANN CJ:
So you'd accept, therefore, the application of this policy in the context was irrational if it couldn't be carried into effect?

MS HEENAN:
I don't think that I would accept it was irrational. I think what I would say is that it was Parliament's intention, as Ms McKechnie has taken you through this morning.

WINKELMANN CJ:
Well, right, okay.

MS HEENAN:

In terms of that section, I think my point is that there's we don't have a pleading, we don't have a pleaded breach of that particular section. That is not something that was in the list of issues before the Employment Court and is something that we've had no evidence on and has not been determined.

And the remedy for a breach of that section is in section 4A and that is the penalty jurisdiction. So there's a test there as to the seriousness and sustained need of a breach of the good faith obligation and only if that test is met is there a penalty and in terms of that, and this section isn't in the bundle, but section 135A of the Employment Relations Act provides that a claim for a penalty has to be made within a year of that occurring, so that is yet to be done and, in my final submission on this point, it's unclear how this connects or applies to the question before this Court in terms of whether Ms Fleming is a homeworker.

The second section I would like to take the Courts to, which Mr Meys took you to, is section 68 and that is the section in relation to unfair bargaining. Again, as with the – sorry, I'll just wait until Ms Goodwin gets there. Again, with the breach of good faith, this is also not a claim that was before the Employment Court. It was not in the list of issues to be determined by the Employment Court. Whether or not there is unfair bargaining would need to be raised and there'd need to be an employment relationship in existence, of course, and then there's a test. So, Ms Fleming would have to demonstrate that she falls within the test. The test is broadly in section 2 and relates to a party being: "... unable to understand adequately the provisions or implications of the agreement ..." and then there are various reasons, age, sickness, et cetera. So again, no claim in relation to this that has been before the Employment Court or has been considered at first instance.

Mr Meys also referred to an obligation on the Ministry to mediate where the hours of work weren't agreed. There is no obligation on a prospective employer, if there was one in this case, to mediate where terms and conditions offered are not agreed.

Why he says this is not clear but it may be in relation to the remedy for unfair bargaining. That is found in the next section, section 69, and where there has been unfair bargaining for an individual employment agreement, the Authority has a number of options and one of those options is in section 69(1)(b) and that is where the Authority can cancel or vary the agreement.

Now, the Authority can only do that if certain circumstances are met, as you will see in section (2). Those certain circumstances are set out in section 164 of the Act and one of those circumstances are that the parties to the problem have to have mediated it before the Authority has any ability to set or vary terms. That presupposes we have an employment relationship, that there has been a claim for unfair bargaining, unfair bargaining has been established and then before the Authority can go to set or vary those terms or cancel that agreement, the parties have to have first mediated.

MILLER J:

Can I just understand how this relates to paragraph 100 of the Employment Court decision, because penalties were sought but not given, that was for: "... the Crown's [unlawful] imposition of an employment relationship as a precursor ...", how does that relate?

MS HEENAN:

I think it was a discrimination claim, your Honour.

MILLER J:

Right.

MS HEENAN:

Oh, it was good faith.

WINKELMANN CJ:

Sorry, what paragraph were we at?

MILLER J:

It's paragraph 100 of the Employment Court's decision, Ms Fleming's case. I was just trying to relate the point you were just making to what the Employment Court found in –

MS HEENAN:

So the Employment Court, in that, in the first instance decision, wasn't asked to assess whether or not there had been a breach of section 4(4)(ba), so that is the unfair, is the good faith bargaining breach. So it wasn't asked to assess that.

MILLER J:

Right.

MS HEENAN:

And that is also presently not under consideration by this Court either, in terms of where we are at.

MILLER J:

All right.

MS HEENAN:

If the Court has no further questions for me?

WINKELMANN CJ:

Thank you, Ms Heenan.

MS HEENAN:

Thank you. Those are then, in summary, for the reasons outlined obviously in our submissions and in our oral argument, the Crown respectfully submits that the appeal should be dismissed and that the Court of Appeal was correct to conclude that Ms Fleming was not engaged, employed or contracted by the Ministry under section 5 of the Employment Relations Act and also, not that we've really talked about this very much in our submissions, but that

Idea Services isn't an apt test of what constitutes work for family carers who are performing work in their own home overnight. Thank you.

WINKELMANN CJ:

Thank you. So it's Mr Cranney now, is it?

1120

MR CRANNEY:

So, your Honours, I won't waste time by telling you how quick I'm going to be.

WINKELMANN CJ:

No, don't do that.

MR CRANNEY:

What I propose to do, is to leave as much time as possible for questions, and so I want to go quite briefly through what I say is the position on the two important issues, being the "employment status" of Mr Humphreys – and when I use the "employment status" I use that with inverted commas – because as has been commented on by members of the bench, it's not really employment, it was engagement, contracting or so on in a dwelling-house and that's the nature of the protection conferred by section 6.

The second issue, of course, is the *Idea Services* issue, and I think I may start with the second one first, if your Honours are happy with that.

WINKELMANN CJ:

Yes.

MR CRANNEY:

And take your Honours to *Idea Services*, which hopefully can pop up on the screen by one of my learned friends, and if you look at paragraph 7 of the judgment which sets out the three factors which were relied upon by the Employment Court: "(a) the constraints placed on the freedom [of the] employee

...; (b) the nature and extent of responsibilities placed on the employee; and (c) the benefit to the employer ...” at paragraph 7.

Then at paragraph 10, the Court of Appeal says: “We agree with the factors the Employment Court found helpful. We also agree with the Court’s application of those factors to the facts as it found them.”

Paragraph 9 [*sic*] is saying that the approach of the Court is to say that: “The greater the ... extent [of each of these factors], the more likely it was” – that’s line 12 – “that the activity in question ought to be regarded as ‘work’.”

So the three factors are a little bit like the factors for deciding who an employee is, in the sense that they’re not prescriptive, we talked about the control, integration and fundamental tests, but each factor is looked at, and they’re very flexible factors, to allow the Court to decide the question. And it is for that reason that I say that the issue, it would be wrong to say that they’re wrong in abstract, they’re obviously correct in abstract which is what they’re supposed to be, they’re supposed to be abstractions of reality, and they have to be applied in each case.

If you look, for example, over the page at paragraph 13 and we’re getting into this issue about micro work and this is a good authority on that question, this case, where the Court rejects Mr Toogood’s proposed physical and mental exertion tests and then goes on to say that there are: “Few workers [who] are required to physical or mentally exert themselves at every moment of their work day.” And the examples that are given there are: “... shop assistants, security guards, ambulance officers, fruit pickers in inclement weather or meat workers during a stock shortage ...” and so on and that’s, I think, quite obvious. Some people are paid, nobody takes this micro approach that you only get paid for physical and mental effort, you actually in many cases and, in fact, in most cases, a large part of your day is spent being available for people to work if you must do so. That even applies to solicitors, I can tell you from personal experience, that there’s a lot of coffee is drunk.

Then if you go then to paragraph 21 of the judgment which is referring to the *British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team)* [2002] EWCA Civ 494, [2003] ICR 19 case. Now, this is a case really what we would now call "working from home", so working from home case, so the workers were required to sit at home and answer telephones instead of going into the office and you will see there the same point is being made by the Court of Appeal in Britain, set out at the extract at paragraph 12: "No one would say that an employee sitting", this is the third sentence, line 32, "sitting in the employer's premises during the day waiting for phone calls was only working, in the sense of only being entitled to be remunerated, during the periods when [they] were actually on the phone."

So again, it's materially, I say, identical to the issue that's arisen in this case in the last couple of days and when one thinks about it, it's really quite an obvious proposition that this is a, really, a bizarre method of calculating what work is, to try to work out the time when the baby wakes up in the maternity ward and is fed and put back down, that's the period of work, is simply not right.

Now, that's not to say, your Honours, that I say that there is no difficulty in the question. There may be difficulty in the question for these particular workers in coming to the correct balance of what the word "work" in section 6 of the Minimum Wage Act means in their particular circumstance, but one thing certain, it is not the extreme position which is advanced by the Crown here, which is this micro minute theory, and it may well be that at some point that it's going to have to be resolved as a result of this case. It can't obviously be completely resolved here, but I think that adjusting the three criteria may not be the right way of going about it in abstract, and so that really is my submission on that point.

WINKELMANN CJ:

I suppose when you think about it, what the Crown is, the approach the Ministry of Health has taken, is that these are family members, they live in the house and therefore with the sleeping thing, when you're sleeping at night, you're going to be sleeping somewhere.

MR CRANNEY:

Yes and to some extent and we ran into this problem with *Dickson*, sleeping is considered to be like a personal benefit as well and that's why the argument arose in those cases about what does it all mean and, of course, it needs to be resolved.

I don't know of any 24 hour a day, seven day a week judgments, but there are either agreements or potential results for the question –

WINKELMANN CJ:

It's a pragmatic.

MR CRANNEY:

Which is pragmatic.

WINKELMANN CJ:

Yes.

MR CRANNEY:

Exactly, and –

KÓS J:

Yes, I mean, it can't be lawful to hire someone for 168 hours.

MR CRANNEY:

No, that's the other problem, of course.

KÓS J:

Yes.

MR CRANNEY:

So it really is, it's not really a question of law. I think the points are correct, the three points are correct in the judgment of *Idea Services* and that's consistent with the other judgments referred to in the judgment, not just *British Telephone* [*sic*] but also *SIMAP v Consellaria de Sanidad y Consumo de la Generalidad*

Valenciana [2000] IRLR 845 (ECJ) and some of those European Union cases.

So what happened with the sleepover law was that it developed really in Europe under those more benevolent treaties and flowed back in to New Zealand through these kind of arguments? In practice, what's happened is that it's been applied incrementally, by extension quite deliberately by the unions, who actually, your Honours will have seen, they've extended it to, you know, donning and doffing, where tens of thousands of workers were actually working quite significantly in some industries because of the export regulations for decades, spending about half an hour getting ready and half an hour getting undressed at the end of it, and the meat workers and other –

WILLIAMS J:

I was thinking of the Reds we got rid of, which is an employment issue in my view.

1130

MR CRANNEY:

Yes, exactly. There's also a decision where because the workers had to stay within a kilometre of the centre of Timaru during the whole weekend, that was considered by Judge Corkill to be work, to amount to work and not on call, and there's other examples of workers being required to attend meetings before work for quite significant periods and that's all gradually been tidied up in a whole series of cases, and it's not just the money that's the issue. It's the question of the dignity of the labour which is recognised and appreciated by the employees concerned which is, of course, also a factor in this case, the dignity of work in favourable conditions. So that is possibly a slightly different approach to what the Fleming people are putting up but I think it's the correct way to go about it. It needs to be resolved in some kind of fact-finding court case or whatever, and, of course, there'll be a resolution reached. One of the benefits of –

WINKELMANN CJ:

Well, that's if the Ministry of Health doesn't sort it out itself. It's an extremely hard way for this all to be resolved for people who are not well-placed to be bringing litigation to have to push everything incrementally centimetre-by-centimetre through cases.

MR CRANNEY:

Yes, and if I can perhaps make a more general point, Ma'am, about that point. This is only a small part of this industry and so it's a small bit of a large social reality in which these things are being addressed properly. There's been sleepover cases. There's been equal pay cases. There's been statutes passed to settle these matters. There's been even cases about what we call in between travel which is caregivers going from house-to-house but not being paid for the in between travel even though they're using their own car. So there's a gradual cleaning up exercise in this area and the historical context is that for 150-odd years this work and these women workers, most of them are women workers, have been invisible in our national psyche. I grew up in the trade union movement and we were basically taught that the trade union movement was made up of men. We didn't realise that most of the work in the world, in the world, is actually done by female workers and almost all of the hard work is done by female workers, and this is all due respect for your Honours and so on, but the –

WILLIAMS J:

Which Honours are you referring to?

WINKELMANN CJ:

Well, he's showing you a little bit of respect because he's acknowledging that he's insulting you.

MR CRANNEY:

I've insulted some of you but not others.

WINKELMANN CJ:

The males.

KÓS J:

Yes, well, after your reference before to coffee, I need mine.

WINKELMANN CJ:

Yes, so it's morning tea-time but were you going to finish this point, Mr Cranney, or…

MR CRANNEY:

Well, I'll just finish on this basis to say that it's not necessarily clean and tidy and easy but it is extremely important, it's transformative of society, and this particular dispute is also, small though it is in terms of the scale of it compared to the overall picture, is extremely important ideologically for the workers concerned, for the families concerned, for the disabled people and for the dignity of work generally which is a big factor in how these cases should be decided. I'll leave it there.

WINKELMANN CJ:

Thank you.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.52 AM

MR CRANNEY:

Your Honours, just to finish the point I was making, the CRPD at Article 1 also refers to – it hasn't been referred to yet but Article 1 talks about the dignity of the persons with disabilities and states that: "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity," and it goes on to define disabilities, and so this article is fundamental and important, not just to the persons with

disabilities but also to all the persons who are caring for them, whether they be family carers or whether they be other types of carer, and there are a vast number of them.

Before I move on to Mr Humphrey's specific position, I want to talk briefly about the statutory definition of "homeworker" and try and get that out of the way in general terms before applying it, and that's at section 6 of the Employment Relations Act.

In some ways the *Lowe* decision is still regarded as highly problematic in its reasoning. In some ways it replaces the language of the statute with concepts which are not in the statute and one of those is this idea of selection, and in the world of employment law "selection" doesn't really exist as a concept. We don't tend to mention it as a thing in employment law. What happens is that people are engaged or contracted or the other word is "employed" to do certain work, and the concept of selection is a bit odd because it sort of calls to mind a collection of people all seeking work of which one is selected by the selector who is the employer, but that doesn't really have any legal foundation for it in the section, and the reason why it was used I think in *Lowe* by his Honour, Justice O'Regan, and Justice Arnold, is because they were dealing with the issue there of whether or not the worker was being engaged by the person who was doing the relief caring, sorry, by the primary carer, or whether the person was being selected by the State and the effect of the judgment really was to impose a homeworker engagement relationship between the primary carer who was unpaid and the person who was doing the relieving.

I prefer to rely on the language of the statute and to look at whether or not a person was engaged for the purposes of the section, and I refer you to my written submission at paragraph 55 on page 10. I think this is a comment by the then-Chief Justice and Justice Glazebrook that the phrase "engaged, employed or contracted" was "designed to cover all means of getting a person to do work for an employer to ensure that regard is to substance as against technicalities". I would personally not have used the word "employer" in there.

The words “a person” would be fine. But that’s I think the proper definition of the section.

WINKELMANN CJ:

The Minority I think also uses the expression “a composite phrase” which I didn’t think was correct which suggests a phrase that stands or falls on – has to be seen together, whereas it seems to me that you would say that statute is a classic form of a statute where Parliament is attempting to give words a very broad and general effect to make sure that any type of work that occurs in, and I’m going to ask you a question about this, certain circumstances is captured by it. So what do you say is Parliament’s intention to capture within that?

MR CRANNEY:

Well, first of all I agree with your comment, I heard it earlier in the hearing, your Honour, that it’s not a composite phrase, and that in the sense that you’ve just described it. It’s designed to capture, and what I think it’s designed to capture is, first of all, the person doing the work is doing the work for another person, call it the employer or the engager or the contractor. So there’s a link between the person doing the work and who the work is being done for. That’s crucial to the section, and my friends have pointed out, Mr Meys pointed out yesterday that this was dealt with in *Cashman* and in this particular area there’s authority for the proposition that the person the work, or the business that it’s been done for, is the DHB. So I think that you’re looking for work being done by one person and it’s for another person. The question about how do you assess whether the work’s been done for another person, part of it is the money, probably a big part of it.

1200

What’s the source of the money, it’s work for money, and there’s a link between the payer and the payee. Now it may not be a direct link because these days there are all sorts of fancy ways of avoiding direct links, but there has to be, I think, a link so that the payer is paying for the work and the work is being done. It’s designed to capture everything that’s done in a dwelling-house apart from the exclusions. I think the exclusions are furniture and – your plumbers,

electricians and so on, dwelling-house fixtures, fittings and furniture. So whether people like it or not, this section is there. It's been repeatedly included. It's never been amended since *Cashman* and *Cashman's* authority for the proposition that if you're in a dwelling-house, you're engaged, contracted or employed by another person, is the word used, in the course of that person's trade or business, then you're a homeworker.

WILLIAMS J:
Is that a telephone case?

MR CRANNEY:
A telephone?

WILLIAMS J:
No, sorry, was it a carer case, was it? Was that the RHA case?

MR CRANNEY:
Yes, *Cashman*. It was a carer case. The facts were slightly different. I was involved in it at the time. Some of the workers were employed directly by the RHA, or they said they were, and others were employed by a company providing services.

Now this raises another issue about *Lowe* and that is that paragraph 84 of *Lowe*, the last sentence, and this is the judgment of Justice William Young, he's saying that – he's referring to the need for "a pragmatic assessment of the relationship in question and in particular whether, allowing for the homeworker definition, it can sensibly be regarded as employment". That's not correct, in my submission. It's nothing to do with whether it could be sensibly regarded as employment. He goes on at 85 to say *Cashman* was closely akin to an employment relationship. That's not correct. It doesn't matter whether it's closely akin to an employment relationship. It's the location of the work and the engagement, contracting or – I keep forgetting the third one – engagement, employment or contracting. That's the test.

WINKELMANN CJ:

So you're saying it's clear that it's actually intending to reach beyond employment?

MR CRANNEY:

Yes.

WINKELMANN CJ:

Including contracting, so there might be no – could just be like a person who's contracting in a home environment, but also a person who's engaged in work?

MR CRANNEY:

Yes, it's work. It's engaged to, using the words of the section, to…

WINKELMANN CJ:

To do work.

MR CRANNEY:

I think the word is "to do work". *Lowe* also says that Ms Lowe wasn't a vendor, which I've never really fully understood. If she was selling her labour and it wasn't part of any sort of employment engagement or contract for services then she may well have been a vendor. She may well have been caught by that subsection as well. So –

KÓS J:

Connectedly, no one seems to talk about section 6(1)(c) but it seems to be quite interesting. That's the volunteer provision. It's a limited exception and the importance is it's a limited exception.

MR CRANNEY:

And there's a couple of other exceptions in the section. Just before I move onto section 6(1)(c), the other provision here is this section 6(2), the real nature of the relationship. In New Zealand you might as well take the section out. We're always going to have the real nature of the relationship in a New Zealand

Court. It's a question of judicial power and the rule of law. The Court decides in most cases unless there's a statutory exception the real nature of the contractual relationship between the parties, and so the people who are hoping to remove the section may find it more difficult than it looks because this is a real nature country and judicial power works that way in New Zealand and in Europe and in Britain.

WINKELMANN CJ:

Perhaps New Zealand more than most of the – the authorities always display a concern for substance over form.

MR CRANNEY:

Yes, and there's a few English cases. I just can't remember the name of one of them. One is a case about whether there's a rental or a licence to occupy a house. This is people trying to get around the requirements of housing standards, and so they started to say: "This is not really a tenancy. It's a licence to occupy," and the Court said: "No, it's not. It's a tenancy," and that's here.

So it may not have much impact on this particular case, subsection (2), because the definition of "homeworker" is so broad. It just requires doing work in a dwelling-house for someone else.

The other exceptions there, if you look at subsection (4), first of all we've got the volunteers, then we've got –

KÓS J:

The importance of that, it seems to me, is it implies that someone who is a volunteer with an expectation of payment is a person who will fit within probably (a). In other words there may be employment.

MR CRANNEY:

Yes, and we do have those sorts of examples. I mentioned in one of my footnotes the Fair Labour Standards Act in the United States which is the federal statute minimum wage statute. Some of the sleepover case law in that

that's influenced us here came from there. The word used in that section is if an employer suffers someone to work, so allows somebody to work. We haven't quite got that far here. There's a bit of that suggested here that if you allow somebody to work for you it may be that by allowing them to do it in those circumstances may be sufficient to constitute the engagement.

KÓS J:

Cowan v Kidd comes close to that.

MR CRANNEY:

Yes, *Cowan v Kidd* come close to it, and you can see why that's the case. People would otherwise…

WINKELMANN CJ:

You're saying we haven't got quite that far here, you say as a general proposition, but we have got that far here on your submission in relation to homeworkers?

MR CRANNEY:

Yes, and we haven't got that far here in terms of the language but we may not be that far away from it. If you suffer someone to work and you're – and there's a lot of this. You suffer someone to work in your restaurant as a fellow immigrant from overseas then the Courts tend to say, well, that's an employment agreement.

WINKELMANN CJ:

In terms of suffer someone to work for you, is that possibly a way of thinking about the homeworker thing? I mean is that – I'm just trying – you would say justifying the language of section – but there's also the question of…

MR CRANNEY:

Yes, I see. Yes, the language is sufficiently broad to include that. If you're doing other work for another person in a dwelling-house, and just looking at section 5 again…

WILLIAMS J:

That would get you close to suggesting that "engaged" is the verb "doing", not requiring the level of connection one sees with contracts and contracts for service and so on.

MR CRANNEY:

Yes, that's a very interesting question.

WILLIAMS J:

Well, yes, it would be a big shift from *Lowe*.

MR CRANNEY:

From *Lowe*. It doesn't even seem to have occurred to the Court in *Lowe* that –

WINKELMANN CJ:

Although there is something in the language of the section which suggests a bilateral aspect, including engaged which is someone contracted, and suffer someone to do the work for you has possibly got a bilateral aspect to it, but just, you know, because there has to be something that differentiates it from people who are just working in a home who don't wish the State to be paying any part of their money. They don't wish to be in an employment relationship.

MR CRANNEY:

Well, the first two, "engaged" and "employed", would both fit in with what Justice Williams just said, that "engaged" or "employed" could include someone actually just being there.

KÓS J:

But then you have the "for" aspect of it and who is the work for? The work here is arguably for Justin.

MR CRANNEY:

Yes, that issue, I agree, yes.

1210

KÓS J:

Yes.

MR CRANNEY:

Yes, there has to, that, to me, in order to if we were to sue Justin – well, leaving aside Justin, coming to Mr Humphreys, you would need to, he would have to establish that the money is being, he's doing the work for the people who are paying the money and, of course, that's what happens. I mean, there's a hundred-odd thousand people who work in hospitals and in the whole health sector who are doing work for patients, but the engagement, contracting or employment is with the District Health Board, or I also now say Te Whatu Ora or Health New Zealand. So, I'm saying there has to be some link between the payer.

KÓS J:

Well, you're saying they're both beneficiaries.

MR CRANNEY:

They've both beneficiaries of the same work.

KÓS J:

Yes.

MR CRANNEY:

But work within the meaning of the section is done for the payer within the meaning of the section and, of course, that's the way the whole world works, with the education system, universities, being paid to do it.

So in terms of the, to sum up in *Lowe*, some of these descriptions in *Lowe*, for example at paragraph 58, an event or a series of events which changed them from not being engaged to being engaged, well is that really saying anything? It's simply saying you have to be engaged, it's not really adding anything. What on earth is an "event"? It's simply an engagement.

WILLIAMS J:

"Events, dear boy."

MR CRANNEY:

You don't need a separate event.

WINKELMANN CJ:

Well, I suppose it might be something that creates that link between the payer and the payee.

MR CRANNEY:

That could be what's meant by an event forming that link, that's a better approach to it. So in terms of –

WILLIAMS J:

So if –

MR CRANNEY:

Sorry, I was just going to say that in terms of whether you need to know the person, it depends on I can say to somebody, "I want people hired to do X, Y and Z, please go ahead and tell them to start", I wouldn't have any idea who they were and that's what we were trying to say was happening in *Lowe*. With that, all that was happening was that the Crown was using, not in a bad sense, was using the primary caregiver as a means of, and this comes to the Minority's reasoning in *Lowe*, it was a means of engaging the labour. It doesn't matter whether you – the two, Justice O'Regan and Justice Arnold, got quite concerned about the fact that you could end up employing someone you didn't know. Well, so what? It's not the end of the world. People don't really know, some of these big corporates, don't really know them anyway, they just come in.

WINKELMANN CJ:

But you have obligations to them.

MR CRANNEY:

Yes, you could have obligations to someone that you've entered into, that you've never met yet. And in this case, in *Lowe* anyway, they met them –

MILLER J:

But you know who they are, yes? You know who they are, you may not have met them.

WINKELMANN CJ:

Or you know, you not so much know who they are, you know that they're there.

MR CRANNEY:

You know that they're there, but you may not know their name until you get the first timesheet and this is the other thing, in *Lowe* the facts were that the first one, the timesheet would go and then it would repeat and we ended up at the end of the case with a, from the point of view of the sort of issues that we're trying to talk about, with a complete disaster because there was 30,000 of them, according to the judgment, doing this, doing this work. Many of them had multiple "clients", as they called them.

WINKELMANN CJ:

So do you say that we need to depart from *Lowe* or is *Lowe* permissive enough just to be clarified?

MR CRANNEY:

Well, I came back the first time and tried to get it re-called but, I think probably correctly, was turned away. That was based on concessions made and so on.

WINKELMANN CJ:

That's big of you.

MR CRANNEY:

And that, but I do think it's wrongly decided. There's no proper rationale for it and, I mean, what did it do? It created an engagement on all of these people

as “employers”, in inverted commas, that were then the – well, anyway, I think it's wrongly decided but I don’t know whether I can get away with having it overturned here and now or not. But if it's wrong, it's wrong. It, I mean, as I said in my opening comment, you’ve got here a situation where, you know, things like sleepovers and equal pay for women workers is part of the way in which all these systems work.

And just to respond to one point made by Justice Williams, it's not just about a personal grievance rights or the other rights that your Honours referred to, the holiday rights, the pregnancy, all of those things, leave, but also the right to freely associate and form unions, to join unions, and that’s really, at the end of the day, the way in which any settlement of this hours issue is probably best attempted, anyway. These people shouldn't be in a lower status than anyone else in the health sector and the health sector is very, very heavily unionised, and there’s almost, again, most of the work done by female workers and these people are excluded from it, this small, tiny group are not covered by it.

So coming to now the, if I may, to the facts about Mr Humphreys and I want to take your Honours to some documents, and I think the background to Mr Humphreys is that he, as the Employment Court judgment notes, was employed pursuant to a series of agreements from 2014 at least and those are set out, they’re quoted in the judgment, one of them was labelled “contract for services” and the other one’s an employment agreement, and then transferred to funded family care, and then worked. So he’s, if you like, a long-term person.

MILLER J:
Is he one of the *Atkinson* plaintiffs, was he?

MR CRANNEY:
Yes.

MILLER J:
He was, yes.

MR CRANNEY:

Yes, he was one of the *Atkinson* plaintiffs and then got into funded family care. A very odd legal relationship, alleged legal relationship where his daughter was his employer which was now, we found later, the Crown admitted that was all a fiction, but was imposed by the statute, we now know it wasn't imposed by the statute, and then went through that whole period arguing about hours, the same sorts of arguments run by Ms Fleming, and then got a letter which is, if I can just take your Honours to it, at page 305.1296, and there's only two or three documents I intend to refer to and one piece of evidence which is the, if you like, the –

WINKELMANN CJ:

Is someone putting that up?

MR CRANNEY:

Yes.

WILLIAMS J:

1296?

MR CRANNEY:

306.1296.

WILLIAMS J:

306, sorry.

MR CRANNEY:

So this is the first letter. This one's written: "Dear Client" – so this is really written to Sian, not to Mr Humphreys – "I hope you are well [et cetera] ... I am writing to tell you about changes to Funded Family Care ... [and about] change to the eligibility." They've removed the: "... requirement for an employment relationship between a disabled person and their resident family member ..." and allowed younger people to be employed, and to raise the pay rates. And then the new minimum wage, and then the new I think that's the equal pay

rate, this is paragraph 2 there. And then over the page and the transition has been delayed, et cetera, it will start on the 14th.

1220

Then the very next document is 1298. Now this is the letter. "The Ministry is making changes to Funded Family Care. We wrote to you on the 30th of March," is the first paragraph, and then it sets out the disestablishment of funded family care and the support provided by the family carer can continue through HCSS. "Family members can be employed by a Home and Community Support Service to provide your care." Now this is a letter written to both of them. It's "Dear FFC Commissioner/Carer" *[sic]*. So this is to Mr Humphreys as well as to Sian. "You or your agent can access Individualised Funding and engage family member(s) to provide support directly." Then it goes on to expand on both the options.

Paragraph 1, the first option: "The HCSS option means that all employment and training obligations are looked after by an HCSS provider." Rather strange language as well, "looked after", doesn't really say there what it means. "You get to select the HCSS provider." So this is an employee or somebody selecting a provider, and the employment of your carer will be at the discretion of the provider: "The employment of your family carer will be at the discretion of the provider, and each provider has their own recruitment criteria." So there's no guarantee of transfer, of that, and there's some further documents in a minute.

Then the next bit. IF means that your budget management – this is the other option…

KÓS J:

This was the document I was struggling with over the weekend, well, sorry, the bigger document. So who was the H and CSS? What sort of person or entity was that?

MR CRANNEY:

That's a provider.

KÓS J:

Could that have been Mr Humphreys or…

MR CRANNEY:

No, no, that's one of these contractors who are managing it. Some of them were engaged to become employers of the carers. Home and Community Service, Support Service, and the second option, IF, is this managing a budget. The Crown keeps saying it was bulk funding but the word "bulk funding" is not used anywhere in the paperwork.

Then it goes on at the end of the page to say you'll be transitioned on your current allocation of support; there's no need for assessment.

Then over the page it goes through them again and says if you prefer to have your family carer continue via IF, your NASC will refer you to your preferred IF. So it's all about continuation. So he gets a letter saying, look, we're doing this, you're continuing, and then the other documents, if you look at the first one, just carrying on now to page 306.1301 and 2, and this is the transition into Home and Community Support Services or individualised funding. So they're both dealt with by this document, and then it goes on to say at, again to emphasise continuation, the paragraph: "Payment for family carers," in the middle of the page, "will continue. For disabled persons funded by the Ministry, it is the process for paying family carers that is changing with the removal of the FFC notice." So it's portrayed as a funding change.

Then at the bottom of the page it talks about individualised funding and it goes on to say that the disabled person is the employer, the nominated agent can manage the budget and contracting arrangements on their behalf, with the support of a selected individualised funding host, and then the next bit: "The disabled person as the budget holder will be the recognised employer under employment law."

Then the next options over the page, if you take HCSS there will be no employment obligations placed on disabled people. So it's a continuation of the theory, I think, that had been in place since 2014, and then at the bottom of page 306.1305 we get into this mystery about whether you can be your own employer and so on. "The Ministry strongly that there is a separate agent in place for all individualised funding arrangements. Part of the role of an Agent is quality assurance. This can become blurred when the agent and the carer are the same person. Separation…may not be possible in all circumstances," et cetera. "Hosts can work with people to find a solution that works for all parties. Equally, one person cannot be both the employer and the employee," and then at the top of the next page: "The host is not required in their contract to be an employer but may agree to so if other options are not available," and then goes on to say that the work limits are 40 hours per week.

Then in the next one which is "IF Host Information", this is for the IF host, this is on page 306.1308, the fourth to last paragraph: "The Ministry strongly recommends that there is a separate agent in place for all IF arrangements. Part of the role of an agent is quality assurance and this can become blurred when the agent and the carer are the same people. However, this may not be possible in all circumstances, and hosts can work with people to find a solution that works for all parties," but it goes on to: "One person cannot be both the employer and the employee," and it goes on again to say hosts are not required in their contracts to be an employer but may agree to be if there are no available options.

So that was the letters that were received, and just to be fair, if you look back at – no, I'll come back to that.

Then we have the Court of Appeal's finding, and I've set out in my submissions the operational policy. This is at page 4, paragraph 26, which sets out the – in fact it starts on page 3 of the submission – sets out the document governing the IF system and all of it is based on the presumption that the disabled person has capacity and yet your Honours will have seen that, and then we have the Court

of Appeal judgment and what it found, and the only other bit of evidence I want to refer your Honours to is page 201.086 and this is about this idea that Mr Humphreys was able to make decisions within the meaning of the language of the contract, and the reason I'm pointing this evidence out to your Honours is it's not realistic to make that –

WINKELMANN CJ:

What page is it, sorry?

MR CRANNEY:

It's 201.0086, and the Court of Appeal said clearly he could make decisions on behalf of Sian.

WILLIAMS J:

Carrigan?

WINKELMANN CJ:

Is it in the transcript?

MR CRANNEY:

Yes, it's in the transcript. It's a small point but you'll see there that he's been questioned about that and the question was: "So you and your wife Maria make all the decisions about Sian's treatment?" And it's obviously reflecting the social reality that an individual father doesn't make the decisions on his or her own and none of us who are fathers do that, or mothers for that matter. It's a collective decision, sometimes involving the mother and the father, occasionally the father or mother but rarely, but sometimes involving also the brother and, here, the brother and the sister.

1230

So the assumption that was made by the Court of Appeal that Mr Humphreys was capable of making all these decisions was not correct. It may have been the case if he had been a welfare guardian, he may have been legally entitled to do this or that, but he wasn't. He was just in a normal family scenario where

he was a father of a daughter and, of course, there are a whole variety of different persons, depending on the cultural context, that make decisions about children's lives and what should happen, and there are sometimes arguments and discussions about it, and quite often it will involve grandparents and other people as well as the father.

So, I think the presumption made by the Court of Appeal was not correct and on that, if I could just now take your Honour's to that, in my submission, at paragraph 68.1.

The Court of Appeal's reasoning at 256, first of all, that Mr Humphreys knew and understood that he could be an employee of another party but chose not to be and, in my submission, that is not relevant. It's unclear whether that's even true because the decision about whether to employ Mr Humphreys would have to be made by the employer and there is no automatic right to be employed by the HCSS provider.

Now, the second part of the Court of Appeal's reasoning is he must have known, Mr Humphreys must have known that in assuming the role of nominated agent and carer he would be left without an employer in any real sense. But the phrase "nominated agent or carer" was part of a HCSS document and, in any event, it's a comment that the Court made which doesn't have, or which doesn't really assist, because it was always known by everybody except the Crown that, and possibly also by the Crown, that Sian could not be an employer in any real sense, it was common ground.

Then the next thing the Court of Appeal said was that when he selected IF, he knew his daughter could not be an employer because she lacked capacity. That's true, it's always been known, and it did not follow that because she didn't have capacity that the Ministry must become the employer. Of course, it doesn't automatically follow, and the question is whether there's an engagement, contract or employment.

Then the Court of Appeal says that the Ministry have a misapprehension that Mr Humphreys could be both the carer and the agent. Again, I'm not really sure exactly even what that means. And the next one, the Court said that he was "selected" as agent by the Ministry and, again, I'm unclear about what is even being spoken of here. My understanding is that if he was an agent of anybody, he was an agent of Sian in the arrangement, and then it goes on to say that it was clear to him that his "engagement" by the Ministry was as Sian's agent and not more.

It's a series of quite unsatisfactory pieces of reasoning, in my respectful submission, and the Court should have applied the same text that have applied in relation to the Funded Family Care conclusion that he was engaged, employed or contracted by the Crown for exactly the same reasons it did in the earlier case.

Now, I just want to make a couple of final points and if there is any questions I can answer them, but one of the issues that was raised yesterday by Justice Williams is about this idea that whether or not we are trying to impose a transactional model on a family situation that does not work in any transactional way. And the answer is that there is no clear dividing line between transactional and family in these circumstances, or between any of these health-related organisations.

Under the Employment Relations Act, first of all it's not really what one would call a transactional act. There are transactional aspects to it but the fundamental underlying principle, as noted by this Court in the *UVF* [*sic*] case, or whatever it was called, is that it's a relational statute.

WINKELMANN CJ:
FM.

MR CRANNEY:
FM, yes.

WINKELMANN CJ:

FMV, yes.

MR CRANNEY:

The Courts have been criticised for using initials instead of names.

WINKELMANN CJ:

The Courts possibly are fairly criticised.

MR CRANNEY:

Those ones you can't remember. But in this particular statute, this underlying section 4 which is a, it's a very open-ended section.

WINKELMANN CJ:

Well, I mean, a sociologist would say that the employment relationship is one of the foundational relationships in our society, right up there with the family relationship.

MR CRANNEY:

Yes and this, if you look at section 4 which talks about the relationship of good faith which has always repeatedly, as the statute says, is open-ended, the parameters of it and the boundaries of the good faith obligation are not really known and the question that was raised about family, whanaungatanga and so on, the environment in which the statute is operating is New Zealand society, in which all of this debate about the Treaty, whanaungatanga and all these other things is going on, and that's where, in reality, where the intersection is taking place between the Treaty and the statute, because all of these, it is liberating to be able to come to this Court and to other courts now and talk about the Treaty in the way that we now do and it's a reality that in all of these sectors, across the whole of the health sector, that the Treaty is very much a live issue, it's debated everywhere, it's talked about right throughout the education system. and it's where the relational aspect of this particular argument is being played out in practice. I don't know what the end point of it all is. I'm very optimistic.

Just as this scenario that we're facing, to some extent it seems turbulent and difficult, but it's birth pangs. It's a transformational issue for society. It's only one of many, at the moment, but it's a particularly important one, even though it's small in terms of the whole health system, and there are opportunities in it which we have may have missed in *Lowe* for a better New Zealand, for a better Aotearoa in it.

1240

WILLIAMS J:

So you say there's no clear dividing line between the employment relationship and the family relationship, let's call them that, and does look as if section 70A of the Public Health and Disability Act is also grappling with that idea that there is no clear dividing line between the two and the law in this area is struggling to create one because Parliament says primary responsibility for caring for the wellbeing of family members is with the family. So if the job of the law is to provide guidance as to where that dividing line is, it seems to be the position this case is about that dividing line, what are your markers?

MR CRANNEY:

Well, looking at it historically in terms of what actually happened here, the original sin was the discriminatory practice that gave rise to this big argument starting in 2012, but the foundations for that, of course, went much further back. Disabled people have been invisible for hundreds of years, just in the same way that there's been vast legions of female workers unseen for the last –

MILLER J:

I'm not sure if this is really answering Justice Williams' point. I mean age might be one of the markers. We're talking about the demarcation between State and family responsibility which does seem to underpin some of the issues in this case.

MR CRANNEY:

In this particular case one of the markers is lack of capacity of the disabled person which creates a special class of situation, of relationship.

MILLER J:

Is another age in that parental rights and responsibilities are greater with respect to children?

MR CRANNEY:

Well, answer it in this way in terms of worker rights first, that worker rights are important and the dignity of labour is important, and it is problematic to set up systems that exclude people from those rights, including the rights to organising, unionising too, and so on. So whatever the dividing line is, it must find some way to respect the worker, the employee aspects of what this type of work involves.

MILLER J:

Again to press you, we're really looking at responsibility of the State for the disabled person. The corollary of the State being responsible is it has rights that are commensurate with that responsibility and that I think is what Justice Williams is driving at.

MR CRANNEY:

Yes.

WINKELMANN CJ:

Having said that, I was finding your analysis helpful. Because there's another thing going on here too which is that the caregivers can be paid for under a disability support payment or they can be paid for in an employment type, under this FFC or IF arrangement, and if they're paid for under a pension they have no employment rights, but if they're paid for under the other scheme they may, they should have employment rights.

MR CRANNEY:

Yes, this was part of what we were discussing yesterday about the issue of can it be replaced with a quasi employment rights benefit which is similar to what employment rights are. But, to my mind, that's what we've done. We've given by *Cashman*, that is what's been created. *Cashman* said if you're a carer and

you're working at home you've got the right unionise, you've got the right to minimum wage, and it's a unique scenario as far as I know. I don't know of any exact equivalent around the world but that's the way it works here, and we all tend to come, these different countries tend to come to the same conclusion in different paths but that's our path. Our path is based on employment rights and a deeming provision which actually gives these particular workers identified rights.

WINKELMANN CJ:

So you're construing section 6 is effectively a deeming provision?

MR CRANNEY:

Yes, it's deeming –

WINKELMANN CJ:

It's not really seeking, searching for an employment contract. It's saying if you're doing this work in a home situation.

MR CRANNEY:

That's it, you get the rights.

WILLIAMS J:

The thing is though that even you say for a person who is at some level working 168 hours a week that's not what you want, 40 will do, and that indicates that what's going on here is deeper, sorry to be a little vague about this, than the words in the statute.

MR CRANNEY:

Yes.

WILLIAMS J:

There are deep cultural expectations going on here. I'm not speaking about ethnic culture, but underpinning expectations upon which this law sits, both the disabilities law and the employment law, about where the mana of whānau

stops and the mana of the State starts, because you would consider a win getting 40%, sorry, 25% of what you might possibly be entitled to if you took this all the way. So, where do you scribe the line so that the law can strike the balance between the powerful underpinning cultural expectations in this area of relationship between State and family and employment law?

MR CRANNEY:

Well, can I perhaps give you a small historical parallel which may help? I know you think I'm avoiding your question again, just to give me time to think.

WINKELMANN CJ:

I mean it is okay to avoid a question.

WILLIAMS J:

You're not the first to try doing that.

WINKELMANN CJ:

Some questions are too big to answer.

MR CRANNEY:

In the – I wish I could remember the name of the cases but in the '70s or '80s or even earlier there were some cases where unions were trying to organise charitable rest homes as opposed to commercial rest homes. They still exist, these charitable rest homes. It was considered outrageous and an infringement on the rights of those charities, on the rights of those churches, et cetera, at the time, and they resisted it. They went to the Employment, whatever it was in those days, the Labour Court, and that tension is now well and truly resolved in favour of those workers having proper employment rights. It wouldn't even be thought of these days that a charitable rest home could be exempt from employment law, but in those days it seemed perfectly logical. So in some ways what we're facing now is, I don't like to say only a major difficulty, but it's a major difficulty in the sense that it has to be resolved and we've got to work out a way to resolve it, but it can't be avoided, and there may not be at this stage a clear answer to it because –

WILLIAMS J:

You're not helping me at all, Mr Cranney.

MR CRANNEY:

I know, I know, but I think I'd rather tell the truth rather than give you the wrong answer.

WINKELMANN CJ:

Isn't the answer that Parliament must – it must be free to form policies that don't pay family members for every hour that they are with the disabled person, recognising that they live with the disabled person every hour of the day?

MR CRANNEY:

Yes, there would have to be a solution.

WINKELMANN CJ:

I mean it's a political solution. It's probably beyond us to resolve this.

MR CRANNEY:

Or even a solution by agreement between the parties if you're talking about employment rights.

WINKELMANN CJ:

Mmm.

KÓS J:

Well, Parliament's –

1250

WILLIAMS J:

I think the pointing I'm making is a deeper one – sorry, Justice Kós – the point I'm making is a deeper one which is when courts interpret statutes, in fact when they interpret case law, they do so on top of a set of deeply agreed assumptions, or not. For example, when you're interpreting the ERA you realise, one, that the employment contract is at the core of that and that it's an

employment relationship statute because everybody agrees that work is such an important cog in life in this economy that the interests of the worker need to be protected in some way in addition to the contract. So these assumptions operate right across the law, in almost every area. The clash of assumptions in this case is because we're dealing with transactional rights of employees in the context of close familial relationships, and so the clearer guiderails are the easier it will be for those who need to work in this area to derive certainty and order their lives, whether it's counsel or employers or employees. That's really what I'm…

MR CRANNEY:
Yes.

WILLIAMS J:
There's more going on here than read the statute.

MR CRANNEY:
Yes, Sir, I agree and I think that both the questions which have been identified are interlinked, so there is an issue about what work is, which has to be resolved, but I don't know whether it can be resolved now. It's really what you're asking in one sense, in a slightly reduced sense. You're asking me what is the meaning of work in that particular scenario.

WILLIAMS J:
Well, so that this Court can provide some assistance in this, as you say, burgeoning area of economic activity to make it easier for people to work within it without having to keep coming here.

MR CRANNEY:
Yes, the unique aspect of all of this is that the work has been carried out by a parent for a child. The work is done in rest homes and hospitals, in all sorts of health institutions, satisfactorily in accordance with the law. The difficulty's only relating to this particular area and that's what has to be rectified, and it may be, even though the Crown won't like what I'm going to say, it may be that it has to

be sorted out by money, in other words properly fund it, this unique group, and you've got people spending their whole lives. They're not trying to get money because they want to live better now. They're all now worried about what happens when they die and what happens to their child. That's what they want the money, that's what the – the poverty that they're facing is the fear that they've got that there'll be nothing left for the child at the time of…

WINKELMANN CJ:

Well, there are various societal movements going on which have changed our position in relation to this situation. Once upon a time there just was no money for family caregivers other than disability pensions or unemployment pensions, sickness benefit for the person who was needing care and the other family member had to live within the means of that sickness benefit. Then we got the CRPD and we shifted in our thinking and we got the decision in *Atkinson*, and now we're also getting increasing understanding that in order to provide proper care you have to look after not just the disabled person but also the caregiver because of the risks of people living in extremely difficult circumstances, and that's basically what we want in a civilised society and you can see the movement going on, and you're saying that there is an adequate framework there in the legislation to protect homeworkers.

MR CRANNEY:

Yes, and I'm also saying that *Lowe* was a big step backwards because of what happened to those particular workers. But your Honours, in the unions we're used to these problems. We get defeated but we have victories all the time. We go backwards and forwards but we keep at it and we're one of the movers in society in this area which has been going on since the '60s, '50s and '40s and right back.

WINKELMANN CJ:

Right back.

MR CRANNEY:

So we're not really used to an answer that works. What we're used to doing is trying to get some way of progressing it and getting better.

WILLIAMS J:

Stop expecting a totalising answer is your point.

MR CRANNEY:

So we call it – utopianism we call it.

KÓS J:

I suppose a point I'd make, it's sort of connected to what Justice Williams is saying, is that one of the freedoms of Parliament is not to speak, and it may be that we don't find the answer in the legislation yet.

MR CRANNEY:

Yes, I think that's possibly the best – that's partly what I'm –

WINKELMANN CJ:

Which is probably what I was saying too which is that –

MR CRANNEY:

It's partly what I'm saying that let's – I would say more – there's a reference in one of the cases to a nudge. We need more than a nudge but we need, in order to begin to address this, we need to at least have a direction of some kind. Where it finally ends up and where the line is, as long as we're moving towards it, I'm happy. We're not going to get the full solution in this particular case for a number of reasons.

WINKELMANN CJ:

So if we try and think about the parameters of the cases we have before as, as you say, the principles we're discussing are principles affecting caregiving relationships where the disabled person lacks capacity to be the employer, in both cases.

MR CRANNEY:

Yes.

WINKELMANN CJ:

And so the – yes, right.

MR CRANNEY:

And it's not a universal group.

WINKELMANN CJ:

And the implications of your approach to *Lowe* would be what in a circumstance where it's a person who's a caregiver, they can't just suddenly post-fact show that they want, say that 10 years ago they wanted to be paid but they just didn't communicate it. To be engaged means that there has to have been what? What's the – so Mr Humphreys communicated a desire to be employed?

MR CRANNEY:

Well, in this particular case he was, they told him he was employed all the way through, so it's not quite the same as *Fleming*. It's –

KÓS J:

Well, until he wasn't, on their case.

MR CRANNEY:

Yes, until they said no, you're no longer –

KÓS J:

Well, they said there were two paths, one of which is, you say, the not bulk funding because they haven't used that expression but that's really what they were thinking.

MR CRANNEY:

That's right, yes.

KÓS J:

And the other one was employment.

MR CRANNEY:

Well, yes, so we're saying the first one, the IF one, option, which wasn't employment but was homeworker status in fact is what we're saying.

KÓS J:

It's an interesting theory.

MR CRANNEY:

They just continued. He just continued to do exactly the same as what he was –

WINKELMANN CJ:

Continuity.

MR CRANNEY:

Was always doing. It's not even a matter of engagement in a sense. It's a matter of continuing the engagement.

WINKELMANN CJ:

Which is why you emphasise there's continuity in that correspondence.

MR CRANNEY:

Yes. So I may not have to show engagement at the – with those letters. I think he just carried on looking after his daughter in accordance with the payment mechanism in place which they had found to be valid, the Court of Appeal, and it's not appealed.

KÓS J:

You're saying it may not be section 6(1)(a) employment but it may be 6(1)(b)? I'm sorry, I've forgotten the provisions.

WINKELMANN CJ:

It's "homeworker".

KÓS J:

Homeworker anyway.

MR CRANNEY:

Yes, 6(1)(b).

KÓS J:

Yes, 6(1)(b).

MR CRANNEY:

6(1)(b)(i). He's working at home. His job is looking after his daughter at home in accordance with the scheme.

WILLIAMS J:

So you would say that engagement is mutuality of understanding about work –

MR CRANNEY:

For…

WILLIAMS J:

That's going to be done at home?

MR CRANNEY:

Yes.

WILLIAMS J:

And it may be as a result of an event or it may be that both or all parties, if there's more than two, just know that there has been or is a continuing engagement to provide work, and this is the thing, for the engager?

MR CRANNEY:

Yes, and in this particular case here he just continued to do the work and they continued to pay for it.

KÓS J:

And the parameters weren't in doubt. There wasn't an argument about the parameters?

MR CRANNEY:

No, no. In terms of consideration they kept paying, he accepted by continuing to do the work.

WINKELMANN CJ:

And there's no suggestion he was intending to volunteer?

MR CRANNEY:

No, no. No.

KÓS J:

What about the –

WILLIAMS J:

Well, to some extent he was a volunteer.

MR CRANNEY:

Well, we're all volunteers to some extent.

KÓS J:

Well, what –

WILLIAMS J:

Well, to 75% of an extent, in fact. Sorry, Justice Kós.

KÓS J:

Isn't there an argument about the hours though?

1300

MR CRANNEY:

Yes, there's ongoing arguments about the hours, but that's not been directly raised in this particular case and will be sorted out once he's an employee.

KÓS J:

Right.

MR CRANNEY:

All of those arguments, if there are any.

WINKELMANN CJ:

And "sorted out", how will you sort it out? Will you sort it out through negotiations or –

MR CRANNEY:

Through negotiation or litigation or agreement.

WINKELMANN CJ:

Yes.

MR CRANNEY:

The funny thing is that they actually use employment models. They pay minimum wage rates, they pay equal pay rates. They just don't want to be the employer.

WINKELMANN CJ:

You might need to pull that microphone, sorry, not for our benefit, for the typists.

MR CRANNEY:

They just don't want to be the employer under the "homeworker" definition. It's a rather odd – they like this fictional thing, for good reason. Who wouldn't like to be a fiction, it would be wonderful to have a fictional intervener, if you're the employer.

WINKELMANN CJ:

Right, so that's probably your submissions?

MR CRANNEY:

Those are my submissions, your Honours.

WINKELMANN CJ:

Right, so what we're proposing is to come back at two and I think we'll just carry on, sit until we finish, so that means we've got to hear from you, Ms McKechnie? Oh, Mr Meys first. You probably won't be half an hour, Mr Meys, and we're thinking probably 15 to 20 minutes, Ms McKechnie, and then reply, okay.

KÓS J:

Two replies.

WINKELMANN CJ:

Two replies? No, one reply.

KÓS J:

Well, there's Mr Dale.

WINKELMANN CJ:

Oh, has Mr Dale not replied yet?

KÓS J:

No.

WINKELMANN CJ:

No, okay. Thank you.

KÓS J:

We just dreamed it.

WINKELMANN CJ:

It was all a dream.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.07 PM

MR MEYS:

Good afternoon, your Honours.

WINKELMANN CJ:

Mr Meys.

MR MEYS:

Firstly, Mr Cranney's analysis on the simple application of "homeworker" definition to the period since 2020 is correct.

WINKELMANN CJ:

In your submission.

MR MEYS:

In my submission.

WINKELMANN CJ:

We're the Judges.

MR MEYS:

The difficult question, the total question you were asking before about where –

WINKELMANN CJ:

Well, why since 2020? Because doesn't the section speak the same all the time?

MR MEYS:

Yes, that's correct, and in my earlier submissions, we were addressing Ms Fleming and the position until 2020 under FFC and now I'm addressing your Honours in relation to IF period only since 2020.

So where to draw the line? There are two answers to this overall question. The first is that a question raised by Justice Williams, your Honour said, "well, what about, you know, family status obligations?" With respect, family status is, by its nature, irrelevant and it cannot be considered, it is unlawful to consider in this analysis, it's discriminatory and the idea that there should be a different number of hours for a family carer compared to a third-party carer is simply can't be countenanced because of the provisions of the discrimination legislation.

WILLIAMS J:

Well, that depends, doesn't it? It's not as straight-forward as that. For a start, you've got section 5, if you're thinking about New Zealand Bill of Rights Act 1990, which has limits, and more particularly this debate sits on a bedrock of deep social and cultural assumptions that, if it can't be ignored –

MR MEYS:

That's correct.

WILLIAMS J:

So how do we deal with it?

MR MEYS:

Yes, that's correct. Well, my two answers as to how we deal with it are that these same arguments would have been before the Court in *Idea Services* itself. The idea that these people who were previously being paid, say, 40 hours, 60, 70 hours because they were sleeping over on the employer's premises, where the employee lived, and then the employee came along and said, "actually, I'm working the whole time I'm there, including while I'm asleep,

it is 168 hours", and the Court found in *Idea Services* that they were working while they were asleep.

1410

The government then at the time, Parliament legislated under the Sleepover Wages (Settlement) Act 2011 and the Sleepover Act did not reach the position "it's not 168 hours, it's actually only 90 or 70 or 40", the Sleepover Act said "employers of New Zealand, notice, you have four years to get your house in order, there's a transitional period where for the first two years or so you have to pay half of the hours at minimum wage at least, and then after two to four years all the hours of sleepover time are now at 100% rates and you need to find a way to deal with this and maybe you need to change your currently unfair business model, you may need to hire some cover, support, to help cover these hours".

So in my submission, there is no difference in the present analysis, there is no reason why a government agency that employs people should be excused from the same obligations on private businesses to find a way.

The second answer, which your Honours already came to earlier with Mr Cranney, we're only talking about 1,600 persons. According to the Cabinet papers, the Ministry of Health's own analysis, there are only about 1,600 persons who were in the high needs category, very high needs, lacked capacity to and therefore were eligible for these payments. So, the decision for your Honours does not necessarily have to affect the 40,000 other people, the slippery slope that the Crown is urging you to consider.

KÓS J:

Well, how are they being dealt with?

MR MEYS:

Well, they – does your Honour mean if they are also under the IF system?

KÓS J:

Well, presumably they're under the IF or H – goodness knows what the acronym is, HS Hong Kong Shanghai Bank version?

MR MEYS:

Yes, well, Sir, those people who are under IF but are not very high needs, their NASC assessments do not say "they require 24/7 supervision for their own safety otherwise they will hurt themselves", so that, it does not apply. If you're assessing how many hours of work are needed for them, it might be they only need someone to help them get in and out of the bath, one hour a day, and that's it. Otherwise, they have perfect capacity to manage their own affairs, they don't have health and safety needs other than these discreet nano payments. And, of course –

WILLIAMS J:

But they'd still be homeworkers?

MR MEYS:

Yes, that's correct.

WILLIAMS J:

With all the infrastructure that that brings in?

MR MEYS:

Well, so the volunteering, the volunteer conditions that his Honour Justice Kós pointed to and I refer to in my submissions, say that if you are a genuine volunteer and you have not put your hand up to be remunerated for particular, you know, services, then you're not caught by the homeworker definition and so for some people they do not indicate that they ought to be paid. It's only those people who, you know, make the request and potentially even have to bring a challenge to show that they're entitled to that payment.

WILLIAMS J:

Yes, well, they can put their hands up if they know that the policy framework is more permissive.

MR MEYS:

Yes, but I would say again the people, those persons that have capacity under IF to choose, you know, to follow the system as it's written, they are not caught because they are not being engaged in a dwelling-house to care for themselves. They are engaging, they are choosing themselves to engage, a third-party carer just the same as any other third-party carer case. In the present case, the people that lack capacity, they're not choosing anything, they're not engaging someone in a dwelling-house to do work for them.

Finally, on that point, when –

KÓS J:

Just to back up there, so the person that we're talking about, let's call it "Fred", who's got full capacity but is disabled, he is employing his mother to care for him.

MR MEYS:

Yes.

KÓS J:

She is still going to be a homeworker, isn't she?

MR MEYS:

Yes, that's correct.

KÓS J:

Yes.

MR MEYS:

Yes.

KÓS J:

But his mother's homeworker – sorry, his, Fred's homeworker?

MR MEYS:

Yes, that's correct.

KÓS J:

Yes.

MR MEYS:

We get to IF in 2020, it's correct that the Ministry could have chosen a non-employment option. It did not. IF is a continuation of the same approach. IF has been going for a long time and it requires employment as a condition of grant.

Now, the alternative analysis to the broader simple application of homeworker that Mr Cranney took you through, from paragraph 78 of my written submission: "Restructuring/redundancy process requirements," it's quite remarkable for someone with employment law experience to read the Court of Appeal judgment in *Fleming* and *Humphreys* where you get to the point where, say, Mr Humphreys is an employee as of 2019, 2020 and then what happens? It just says, "in our view, he's no longer an employee". That's quite startling to anyone who has looked at any restructure and redundancy cases and knows that an employer cannot simply send a letter or two letters out to an employee saying, "I've decided that you will now be transferred to a new employer or you are terminated".

Section 69OJ and 69OI of the Employment Relations Act require an employee protection provision be applied to every employee, both that section and also –

WINKELMANN CJ:

Which section, sorry?

MR MEYS:

Sections 69OJ and 69OI, and these sections say that an employer must set out the process in the employment agreement that the employer will follow when the new employer is proposed to take over the work and section 69OK of the Employment Relations Act sort of mimics section 4(1A) in that there are disclosure requirements for an employer who is proposing to make a decision about their employment, not only disclosure but also consultation. They have to provide enough information for the employee to make an informed decision and provide, genuinely consult with them before making the decision. It can't be predetermined.

Now, there are two cases, not only has the Ministry not followed the Act's express requirements, but if you look at any employment case, for example *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57, this was an employee who, and that was before your Honour in a hard copy if you wish, it has been emailed to you yesterday, an employee decided he would not interview for a role in a restructuring proposal and he was not given a new role.

That case sets out at paragraph 36, 38, that the proposal was semantic only, no real opportunity for consultation or feedback before the decision had actually been made behind the scenes. It was predetermined. The outcome, in paragraph 38, is that there's a breach of the good faith duty required by section 4(1A) of the Employment Relations Act.

Then at from paragraphs 40 and 41, a further breach. There was a failure to provide him with disclosure and documents that were information that was relevant.

Paragraph 42, the conclusion, these failures are a breach of good faith obligations under the Act.

Paragraph 62 of that decision: redeployment must be considered when there's a restructuring taking place; and good faith obligations also apply in the

redeployment consideration, consultation and disclosure; the Court may consider the merits or the reasonableness of the decision not to redeploy.
1420

The outcome is that it was an unjustified dismissal was found because of the breaches of section 4(1A) and crucially in that case the primary employment remedy is reinstatement. So at paragraph 85 of that decision, you will see that when there was breaches of this restructuring process, the final outcome is it's an unjustified dismissal and the primary remedy under the Act is reinstatement. That is recorded at paragraph 85 of the Judgment.

So, in the present context, what happened here, clearly the Ministry did not follow the statutory requirements for a restructuring proposal: consultation, feedback, disclosure. In fact, the same impenetrable policies and vulnerable employee issues remained that your Honours have already covered in great detail with Mr Dale in respect of *Chamberlain*: the secret templates –

WINKELMANN CJ:
Well, your main point I guess here would be they certainly don't say "and if you take this path you will cease to be an employee and that's it".

MR MEYS:
Well, the Court of Appeal judgment says Mr Humphreys made an election to continue to go with the IF model where he would effectively be both the employer and the employee at the same time and he must have known that that would, in effect, leave him without a true employer. Well, that's not correct on the law, because in say *Haddad* and also in the case of *Birthing Centre Ltd v Matsas* [2024] NZCA 139, which is also provided to your Honours, in that case a government organisation, sorry, the Ministry of Health was paying midwives under a section 88 notice, just like in the present case where there is a section 88 notice to pay family carers, and the Ministry – sorry, there was the Birthing Centre in Palmerston North funded by the Ministry had employees. The Ministry approached the Birthing Centre and said, "we've decided we're going to take you over and cut you out and we're going to provide the service,

we're going to run the facility directly through the Ministry now", and employees were simply notified they were being transferred to this new, you know, the local ADHB, the Ministry.

Similarly to *Haddad*, the outcome, no consultation, feedback, the process complied with, obligations of good faith not complied with, the outcome is unjustified dismissal and this case has a lot of factual similarities to what has occurred in the present case.

So either on Mr Cranney's analysis of simple application of homeworker definition or on the additional layer that it's not starting in a vacuum with no employment law context, as the Court of Appeal approached it, you have an existing employee who, if they actually had known the law, if they're an employment lawyer, they would say, "actually, I'm going to continue to be employed by the Ministry, just the same as *Matsas*, or if I'm justifiably dismissed the reinstatement remedy under the Employment Relations Act means I will continue to be employed by the Ministry".

Finally, in relation to the post-2020 period, everything continued the same in reality. Under IF, the Ministry still uses a NASC and a host. So whichever option you choose under IF, HCSS or the other option, you are referred to the host which then signs you up to the standard form template employment agreement, you using on behalf of both parties and it still uses the Ministry's same templates, nano-payments, computational approach.

WINKELMANN CJ:
So there's more perception that reality, in either, in the two options.

MR MEYS:
Yes.

WINKELMANN CJ:
Or the difference is more perceptual than reality?

MR MEYS:

Yes. Just to tie a bow on that, Ms McKechnie submitted retrospective knowledge only in this case, the Ministry couldn't have known who's performing the actual work under IF, it can be someone in the house, it can be another person that's been hired. The Court of Appeal actually rejected that submission at paragraph 237 to 238 in *Fleming* and *Humphreys*. Although the Court of Appeal found against appellants on other reasons, they said, "that's nonsense, you did know, you know, you're saying just because you had to wait one week for the invoice to come in, you knew all along".

My final submission then in relation to the meaning of "work". In my submission, your Honours have three options for the way forward, meaning of work in *Idea Services*. The first is a broad approach, which is effectively what the Court of Appeal in *Chamberlain* applied, to say, "the test is whether the family carer's hours are essential to allow the person to remain living in the home independently in accordance with CRPD".

A narrower approach would be that which is set out in my written submissions, I refer to three cases where effectively the ratio that decided in one way or another is, "it was an urgent health and safety need for the worker to be ready urgently, at any moment, to respond to a serious health and safety issue".

A couple of those cases went the other way, they were – these are at paragraph 110 to 113 of my written submissions.

WINKELMANN CJ:

So what are you – you're saying we have three approaches for meaning of work in *Idea Services.* Isn't one clear approach just to apply *Idea Services*?

MR MEYS:

Yes, that's the, certainly, and I was –

WINKELMANN CJ:

I'm confused by your submission.

MR MEYS:

I was presuming that your Honours were hoping to explore options, drawing the difficult line and say, "does *Idea Services*, should this Court make any comment at all about how it applies *Idea* to family carers, or should it just simply tell the courts below in future *Idea Services* is a helpful indicia, ignore the obiter in the Court of Appeal in this case", so that, it certainly is an option.

KÓS J:

You said you had three?

MR MEYS:

Yes, so in *Hill v Shand* [2014] NZERA Christchurch 66 and *Tindall v Winterset Proprietary Ltd* [2023] NZERA 608, those cases the employee was living in their own house but it was either beside or on the employer's premises and they were working in a campground-type arrangement and the evidence was that they would get woken up all the time, or every now and then at night, very common for the entire summer period, but the finding of those cases was that these were matters that they could ignore, they could safely ignore. They could say to the campground visitors, "I'm not working right now, it's the middle of the night, I'm asleep", and just like any employer that tries to chase, you know, if I tried to chase one of my employees in the middle of the night, I hope they'll tell me the same thing.

But whereas in *Leaupepetele v Wesley College Board of Trustees* [2019] NZERA 400, Auckland the employee, similarly living in their own little house but on the grounds of the employer, they were required to deal with urgent health and safety issues, disturbances overnight, that could not be ignored.

WILLIAMS J:

What was that context again, sorry?

MR MEYS:

Leaupepetele v Wesley College Board of Trustees, they were –

WILLIAMS J:

So it's a boarding school?

MR MEYS:

Yes. I'm not sure how – that's my 15 minutes up, but if you have any questions, I'm happy to answer.

WINKELMANN CJ:

Thank you, Mr Meys.

1430

MR MEYS:

Apologies, a couple of people asked me to refer your Honours to two documents in respect of the continuing process being identical under IF and FFC, no real change. They are 306.0048 which are the number 1 host is Manawanui, the biggest one by far the Ministry usually refers people to under IF, and those documents you'll see are identical effectively to the FFC templates that we use by the host to sign people up for FFC, including being obligated to comply with, you know, monitoring, audit requirements for the Ministry. Being responsible to complete the verifications guidelines so that the Ministry has the power and control to terminate the relationship if there's any breach, in their view. Thank you.

WINKELMANN CJ:

That's one document. Didn't you say there were two?

MR MEYS:

Yes, sorry, the other is 307.1465, which I already drew your Honours' attention to yesterday. That is the 2018 IF application by Ms Fleming, which was accepted and signed up between her and the Ministry of Health.

WINKELMANN CJ:

What does that show?

MR MEYS:

It's effectively the same terms and conditions.

WINKELMANN CJ:

Okay.

MR MEYS:

Whereas under IF in the first document we went to, the Ministry says, well there's an intermediary here. Manawanui and, you know, you're signing it up sort of with an agent whereas the 2018 document, same terms effectively, but the Ministry at that stage was directly the other signatory party.

WINKELMANN CJ:

Yes Mr Meys.

MR MEYS:

Thank you your Honour.

WINKELMANN CJ:

Ms McKechnie.

MS MCKECHNIE:

Your Honours, do you have an indication of your expectations around timing, noting that there are two replies I anticipate.

WINKELMANN CJ:

So I think an hour.

MS MCKECHNIE:

Thank you Ma'am.

WINKELMANN CJ:

It should be achievable if we don't ask many questions.

MS MCKECHNIE:

I am, as you will have seen in the last day and a half Ma'am, completely in your hands on that. To the extent that I can control it I'll certainly do my best.

WINKELMANN CJ:

Well I imagine the issues are much narrower for you because you've covered quite a lot of the ground already, haven't we.

MS MCKECHNIE:

Indeed. So your Honours the way I intend to approach the submissions is to make brief submissions in relation to the meaning of work. As the second question it does come up to an extent in the first question, but as the second question, and then some general observations in relation to capacity that we ask that your Honours have in mind when you come to write your judgment, then I will turn, because it's the balance of the submissions, to the interpretation question of "homeworker", particularly the oral submissions that Mr Cranney made in relation to that, but not foreshadowed in his written submissions, including his request that you consider overturning the decision, and then the application to Mr Humphreys' factual situation.

So turning first to the submissions that my learned friend Mr Cranney made in relation to work. Now I have three quick points that I would like to make here. The first is that when Mr Cranney submitted that this question is complex in this scenario of residential family care, and made the submission that there was a need for a fact-finding case to assess that, the Crown agrees with that. If a case is required to resolve this, it is a case of that sort. The factors in *IDEA Services* may well be relevant. The position of the State is not that those three factors are irrelevant, but they are not the only factors, potentially, that are in play, because of the particularly unique scenario here, and the test for what is work in the context of a homeworker quite separate from a care context itself has never been considered in the Courts in New Zealand. So working in the context of homeworker, and in the context of care and a homeworker, are novel and the purpose of the Crown's appeal to the Court of Appeal in the first instance was to ensure that when the Employment Court comes to address

these issues, either in remedies hearings for these matters, or in subsequent cases, they are looking beyond the four corners if *IDEA Services*.

Secondly, and related point, is that the State agrees with the deep and powerful observations of Justice Williams in relation to the complex societal questions engaged here around responsibility, and the deeper societal expectations of family responsibilities and mana, and State responsibilities and mana, and where those lines sit, and there are many complex elements to that, including the inability of the State to enforce others to go into homes, and the dignity of the home, let alone the family, and where that line is, between State and family, crystallising in work, and that is another reason we say that it is more complex than just the factors considered in *IDEA Services*, which were complex themselves.

Thirdly, to indicate that we have heard the indications from this Court that given those issues a political solution to this may well be preferable, rather than continuing to litigate. So I can confirm that the State has heard that loud and clear your Honours in terms of those challenges and the policy, deep policy ramifications of it, which may well be more suitable for a political solution.

Your Honours, I now turn to a more general comment, and this is more of a request. In the last two days there has been, necessarily, quite shorthand use of the word “capacity”, somebody does or does not have capacity, and in this case, for these two individuals, the State acknowledges that they do not have sufficient intellectual capacity to contract. But that is not a simple question for the Ministry and in seeking to apply the decision of this Court beyond the two individuals before the Court today, the question of what is capacity is difficult, and I raise this just to ask that when your Honours use it, you are thoughtful of that complexity so we are able to operationalise, as the Ministry, this decision with that in mind. I particularly highlight here that even within the intellectual disabled members of our community there was, of course, a very wide range of capacity, and seeking to support decision-making, rather than substitute decision-making, makes capacity very difficult to codify, and any codification risks excluding and disempowering individuals, and that’s one of the criticisms

of the PPPR and the Special Rapporteur in the United Nations is very critical of the PPPR because it is overly legalistic.

The current situation under IF, which I will take the Court to in the application part of my submissions, has an informal arrangement, predominantly guided by the family, and an assessment of whether the individual who is the nominated representative or nominated agent is able to speak and make decisions – sorry, not speak, able to make decisions on behalf of the disabled person. It's deliberately an informal, flexible approach. It seeks, and I will develop the submission later, it seeks to support decision-making and the Ministry considers it to be a rights-enhancing approach to capacity rather than a more legalistic approach.

WINKELMANN CJ:
Can you just repeat that submission? I think I failed to follow it.

MS MCKECHNIE:
It's not a submission so much as a request, Ma'am, that when this Court uses "capacity" you have in mind the wider application of the term to the range of individuals that the Ministry engages with on a day-to-day basis, both directly and through their agents, and the complexity of considering and assessing, and in some instances the quite confronting reality of assessing the capacity of individuals. In some cases it will be obvious, and for the two individuals here, the State acknowledges that they do not have the intellectual capacity to contract under an employment relationship, but they have capacity to do other things, and the Ministry seeks in its policies to enable that and to support that through themselves and their families to the greatest extent possible.
1440

KÓS J:
Well, we may dealing here with a very small subclass of the 1,600. It's those people who lack mental capacity to enter legal amounts.

MS MCKECHNIE:

I would be surprised, we don't have any evidence Sir, but given the 40,000 people who use individualised funding, I would anticipate it's more than 1,600 who may not have capacity.

WINKELMANN CJ:

Well, there are people who are elderly have – there will be all sorts of people who might be in that category.

MS MCKECHNIE:

From the limited evidence that we do have before the Court, Lisa Holten who gave evidence, she used her daughter's – and it was very clear that Ms Holten, Sarah Holten, did not have intellectual capacity to contract – she used her appropriation, her allocation, to use IF. So she was never in the FFC funding, in the 1,600, she was using IF. But there's Lisa gave very powerful evidence, if your Honour's have not read it, about how she supported her daughter to express her preferences about what sort of care she wanted, who as individuals she connected with and wanted to care for her, and Lisa gave very compelling oral evidence about how she did that and how she felt she was maximising that. She's not in that 1,600, Sir, so there is no particular number before the Court and at present it's not assessed in a way, that it would actually be difficult without doing the assessment, to actually provide the Court with a definitive answer.

WINKELMANN CJ:

I mean, we can be careful as we like, but the reality is there is a law about what is capacity and there are obligations on the State under legislation, the State has assumed obligations under international law, and we can't make that all go away.

MS MCKECHNIE:

No Ma'am, but one of the submissions that I will develop later is that the structure of individualised funding does not engage the capacity issues that FFC did and that, in this instance, it is not set up in a way that requires questions

of capacity of the intellectually disabled to participate in it, because it's not deeming or imposing employment obligations on them. Capacity arose here, the pointy end of that argument, was in the context of FFC around deemed employment relationships.

The submission that I will make, contrary to Mr Cranney's submission, is that capacity in this context, there is a representative or an agent where there is no capacity, but that lack of capacity doesn't drive the definition of homeworker. The policy doesn't require it and is set up to decide and perhaps that's an appropriate time to turn to that application. I don't want to that other submission any further, but to note.

WINKELMANN CJ:
So that's we're onto your third and final thing which is interpretation, question of homeworker?

MS MCKECHNIE:
There are two parts to homeworker, Ma'am, interpretation and application, so yes we are in.

WINKELMANN CJ:
Okay.

MS MCKECHNIE:
We're in interpretation and again, just to make some preliminary comments there, your Honours. We note that we had not expected Mr Humphreys, through Mr Cranney, to seek to overturn *Lowe*.

WINKELMANN CJ:
Well, I did ask him, to be fair to him.

MS MCKECHNIE:
And we note that your Honours didn't invite submissions on that in your lead judgment, as you have in others, and so given that, we adopt the submissions

of the Crown in the *Putua* hearing that was heard before you recently, to the extent that they apply. Obviously, there are no submissions in our current written submissions because we hadn't anticipated the issue, so to the extent that those submissions set out the circumstances in which the Crown says it's appropriate for an apex court to overturn a decision, and your Honour's will have heard Crown counsel on that previously so I don't intend –

KÓS J:

It's a bit tricky, we're not, I mean, the trouble with *Lowe* is it's very difficult to work out what on earth the ratio is. That's not really a question of overturning it, is of making it work. It's a neat distinction.

MS MCKECHNIE:

It is Sir, I mean, that is not the position of the Crown in terms of the Majority in *Lowe*, but if that were the way the Court approached it and that was this Court's conclusion, yes, that wouldn't be an overturning, that would be, I think the phrase the Chief Justice used before, was –

WINKELMANN CJ:

Explaining it. Clarifying it.

MS MCKECHNIE:

I think "flexible" or words to that effect. There is, of course, a distinction between a clarification and an overturning but I just note, to the extent that this may be an overturning and your Honours were considering it, to protect the interests of the Crown we adopt those submissions and I won't take that any further, for the moment.

So turning to the substantive challenge to the interpretation.

KÓS J:

Well, I'm not sure I understand that. For a start, I wasn't in *Putua* so that's all lost on me, but if your issue here is that you are taken by surprise by this, isn't the right response to allow you to make further submissions on *Lowe*?

WILLIAMS J:
Or photocopy.

MS MCKECHNIE:
If you are offering me that opportunity Sir, I would certainly take it.

WINKELMANN CJ:
So all you need to do is file the submissions on this point from *Putua* in this proceeding and if you wish to make, if any party wish to make, I mean, so Mr Cranney only dealt with it on the hoof because I was asking him, I suppose, although one might say it was possibly implicit in all the submissions?

KÓS J:
I thought so.

WINKELMANN CJ:
That the status of *Lowe* was...

MS MCKECHNIE:
Perhaps not Mr Cranney's, given he didn't take any issue with the interpretation in his submissions, Ma'am.

WINKELMANN CJ:
Well, I felt it was implicit in all the submissions that what *Lowe* meant and whether it could fit within the statutory framework was in the air. Well, so if we could just –

MS MCKECHNIE:
Well, if I could take Justice Kós' invitation and it may be that those submissions are just re-filed. I'll need to seek instructions Ma'am, in terms of if that invitation is standing.

WINKELMANN CJ:
No, I was saying you should certainly re-file the submissions in this case, but the question is whether there should be leave to make any further submissions

because, I mean, you say that *Lowe* is correct and you may have nothing to say, but you might want to reflect on that. So I suppose we could give you another week but does anybody else want to be heard as to whether they would wish to file submissions? Mr Cranney, you would.

MS MCKECHNIE:

That would be perfectly appropriate, if you were giving us the opportunity to file further submissions, then of course.

WINKELMANN CJ:

Well, but if Mr Cranney or if Ms Pope –

MS POPE:

Your Honour, I do recall that the Crown did foreshadow in one of the written submissions that this precise point was made that as they understood it this case was not about overturning *Lowe* and if there was, and so it was addressed to some extent as a possibility in submissions Ma'am.

MS MCKECHNIE:

Yes, if I can adopt that it's in a footnote Ma'am in our submissions in relation to this point, noting that your Honours hadn't foreshadowed it and, as you have in other cases, we had assumed that this was not proceeding on that basis.

WINKELMANN CJ:

Yes.

MS MCKECHNIE:

So we did put a marker in the ground, to an extent.

WINKELMANN CJ:

Yes, so if I can just conclude, so does anybody else wish to file submissions? Because Ms McKechnie, if everybody else is going to – if anybody else is going to file, your submissions have the opportunity to come after them, so I'm just

trying to clarify if anybody else wished to filed submissions on that point, in addition to what they've said. Mr Cranney?

MR CRANNEY:
Well, I would like to file a submission, Ma'am, to say that it should be overturned.

WINKELMANN CJ:
All right, well, perhaps you could do that by the end of next week and Ms McKechnie can have a week afterwards, after, and if you file your *Putua* submissions about, I mean, about –

MS MCKECHNIE:
It's the principles at the beginning of our submissions that I was referring to.

WINKELMANN CJ:
Principles, yes.

MS MCKECHNIE:
Yes.

WINKELMANN CJ:
I knew that, so not the rest of them.

MS MCKECHNIE:
They are very, they are long, I read them over lunch Ma'am, before the firearm, they're a long 60 pages, it's only the first couple of pages that set out the principles and we will adapt and apply those in response to Mr Cranney's submission. Thank you, Ma'am.

So turning to the argument that Mr Cranney advanced before the adjournment. As I understood it, he was advancing the following and in response to your Honour's question, Justice Williams, a person who does work for another person. Two, I think my learned friend's phrase was "part of it is the money", which he developed into a sense of a link created by the money, but he was

clear in his submission, I took, that it was not a direct link and in part he made reference to, I think, sophisticated payment mechanisms that are now used.

WILLIAMS J:
Well, who's paying in substance.

MS MCKECHNIE:
Who's paying in substance, yes, I think in essence that was Mr Cranney's submission, Sir. And then thirdly, that it is in a dwelling-house. Then in –

WINKELMANN CJ:
What's the second? A person?

MS MCKECHNIE:
The second?

WINKELMANN CJ:
Yes, yes, substance, got it, yes.

MS MCKECHNIE:
So, first, is that the work, the person must be doing work for another person.

WINKELMANN CJ:
Yes, got it, I've got it.

MS MCKECHNIE:
In substance who's paying, and dwelling-house. And as he developed his oral submissions on this point, he moved on to make submissions that, in response to your Honour's questions, Ma'am, it doesn't matter that it's not something closely akin to an employment relationship and, in fact, his submission was that homeworker in the Act went beyond employment and beyond an employment relationship, in response to your Honour's question.

WINKELMANN CJ:
I don't think it was in response to my question. He said that from the outset.

MS MCKECHNIE:

Nothing turns on that, Ma'am. That is how I understand his submission, what his submission is in terms of the interpretation of homeworker in the statutory scheme and in response to that, your Honours, I'll make four submissions.

The first response to the beyond employment suggestion and there is something of a theme, in my submission, about the approach that my learned friend Mr Cranney was taking here, that they were relatively unilateral rights of an employee but without the reflexive obligations of an employer and, as I will develop in a later point, becoming unilateral.

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But in my initial submission about beyond employment, looking at the statutory wording of the section, and we'll put it up on the screen to assist the Court, of section 6, it is stretching beyond Parliament's intention, in my submission, that homeworker in the context of the Employment Relations Act is intended to go beyond the relationship of employment. Whatever was intended by Parliament in homeworker, and I'll return to the Green Paper in a subsequent point, it was not that. Partly because it's contrary to the scheme of the Act, but partly just in the construction of the section.

This is particularly picking up an observation that Justice Kós made earlier, actually I can't remember Sir if it was yesterday or this morning, but you challenged me in relation to it being a subset of employee, and I would return to that point now to make the point that that, in my submission, reflects Parliament's intention that whatever homeworker is, it is a subset of employee. It is not intended to go beyond an employment relationship. So those guard-rails that I was referring to before in terms of the corners of the employment relationship and the mutuality of the, I think it's a relational statute as how this Court has described it.

WINKELMANN CJ:

Isn't that a tautologist kind of an argument? I mean where does it take you, because the question is whether it's an employment relationship.

MS MCKECHNIE:

Yes Ma'am, but my submission would be that it still needs to maintain sufficient certainty as to the nature of that relationship, who is doing what for whom and on what terms, with enough certainty, accepting that it is an extension of the classical contractual framing of employment, that it can be sensibly be understood to be an employment relationship, which is what I understand Mr Cranney was pushing against in terms of Justice O'Regan's construction in *Lowe*, that as I read his Honour's judgment the, whatever homeworker is it needs to be in the nature of an employment relationship with sufficient certainty that that has real meaning, and that of course builds on the earlier submission I made today that, from an employer's perspective, there must be sufficient certainty as to who and what is the work such that you can actually fulfil your obligations as an employer.

KÓS J:

That's more Justice Young's position, I think, than Justice O'Regan's, but the difficulty you have to confront is the definition of "homeworker" and the use of the words "engaged, employed or contracted". If you're right, why do we have "engaged" and why do we have "contracted"?

WINKELMANN CJ:

Or "employed". So is your submission, do you mean that there has to be certainty of the bilateral relationship, some certainty of a bilateral relationship, including the identity of the worker and the work being done. Is that it?

MS MCKECHNIE:

It will necessarily be a flexible interpretation in terms of the application, Ma'am. I mean I think there were examples that Justice Miller raised before about identity. So the test at an interpretation level the State isn't arguing for a checklist if you will. But the conception of how what is the minimum threshold to constituting engagement, while those words are broad, the submission at its highest level is that they exist within the context and statutory scheme of the Employment Relations Act. So they must make sense when looking at the obligations placed on employers, and the rights of employees.

WINKELMANN CJ:

Okay so it would be enough for engaged on anybody's, I think, interpretation that you're doing work in a dwelling-house at someone's request.

KÓS J:

At some point I would like an answer to my question.

WINKELMANN CJ:

Did you ask, I'm sorry.

MS MCKECHNIE:

I think that is my submission on that point Sir, that the words, while they are in isolation potentially expansive, they need to operate within the, as all words do, within the context of a statutory scheme that they operate within, and this is a statutory of universal application. This "homeworker" definition applies potentially to anybody working in a dwelling-house. It's not a disability statutory scheme. So the words need to be interpreted in that context, and I acknowledge that taken in isolation they are quite expansive and in series, and I agree with your Honours' observations made earlier to my friends that they, with the "or" the statutory classical interpretation is it's not a composite phrase, it's three parts of a phrase, but from a drafting perspective the distinction between those three in the context of this, I can see the attraction of approaching it together because the differences between them are not clear.

WINKELMANN CJ:

So I'm just not clear what you're saying.

MS MCKECHNIE:

What I'm saying Ma'am is that the submission, in terms of beyond employment, and what my friend then developed in terms of what his test is, doing work, the ultimate source of the money, and in a dwelling-house, simpliciter is too low, that's a very unfortunate…

WINKELMANN CJ:

Minimal. Not enough.

MS MCKECHNIE:

Thank you Ma'am. Is too minimal to meet the purposive requirements of the Employment Relations Act because –

WINKELMANN CJ:

But that's, again, tautologist, because what this is doing is expanding the Employment Relations Act to make sure that homeworkers are caught within it. So anyone's idea, saying, well you may have a classical idea about what an employment relationship is, but we want to make clear that you understand that a homeworker who is engaged to do work in someone's house is an employee.

KÓS J:

I think, may I just add to that seeing as we're doing a tag-team at the moment, that's a classical use of the word "includes" as a drafting extension in section 6(1)(b). When it says: "(a) means", and then in "(b) includes" that's expansive rather than descriptive. That's how I would see it, and that seems to be reinforced by the wider definition of those three words in "homeworker".

MS MCKECHNIE:

Yes Sir, but I would return – and I will acknowledge your Honours, we are right at the edge of what can sensibly be included in the Employment Relations Act, but the submission, and I don't think I can take it much further than this, is that whatever approach your Honours take to that phrase in relation to the creation of a homeworker relationship, the submission for the State is that it needs to have sufficient certainty to enable the obligations of the employer to be fulfillable, because otherwise the purpose of the employment relationship, and I'll develop this, this is one of the other points, why have employment? Why do you need employment in the context of State-funding mechanisms, because that's we're talking about here, we're talking about a State-funding mechanism with an obligation to care for an individual being potentially transmuted into an employment relationship, and in my submission, I'll move there now, there's no

need for an employment relationship, and this perhaps picks up one of the questions, Sir, that you were asking yesterday. Why do you need employment here? Why do these people need to be engaged as homeworkers if we are so far to the edges of the Employment Relations Act that an employer cannot fulfil their obligations towards the employee. You don't need employment. What does employment add if the test is so lax that an employer cannot fulfil their obligations, and I would pick up one of the observations or submissions that Mr Meys made around restructuring.

Now we don't accept that's a sensible submission in the context of interpretation, but what it highlights is if he's right, how can you know who you are restructuring as the employer if you don't know who you've engaged as a homeworker. I can take your Honours to a screed of examples in the Employment Relations Act which do not work if you don't have sufficient certainty about who and what, for how long, and for how much money.

WINKELMANN CJ:
So it's sort of a bilateral relationship you're talking about, as I said?

MS MCKECHNIE:
Yes.

WINKELMANN CJ:
Right, okay.

MS MCKECHNIE:
And that is essentially the submission Ma'am. There must be sufficient bilateralism that the obligations in the Act can be fulfilled, otherwise what's the purpose of including them in the Act. It doesn't give them any obligations or rights that they can rely on because their employer can't fulfil them.

WILLIAMS J:
You don't really need to argument that this needs to be employment or employment-adjacent. You just have to say it has to be certain so that the

punitive employer knows what they're in for. So the questions are, you have got to know who is working, who is hiring, and on what terms. Those were the three things you said?

MS MCKECHNIE:

Broadly Sir. I'll come back to develop the argument a little bit more in the context of funding arrangements, because I think this is particularly challenging for the State because the –

WILLIAMS J:

See my point is that we do know, all three of those things, in these cases. There may be cases that you don't, but that's not the case here. We know that very well, we've known it for a long time.

MS MCKECHNIE:

That, I think, then returns, and I risk another literature reference from your colleague –

WINKELMANN CJ:

And that they're not a volunteer.

MS MCKECHNIE:

But that risks going back to what is the meaning of "work" and it becomes very circular at that point if, because there is no agreement, there's no mutuality or bilateralism about workers. There is about care, your Honours, but not about work, which is paid for.

WINKELMANN CJ:

I don't know if that is the issue here.

WILLIAMS J:

No, I don't think so.

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WINKELMANN CJ:

Isn't one of the issues here in the first appeal whether the person's a volunteer or is actually expecting to be paid? It's possibly the critical issue in that case. In the appeal that we're hearing now, what's the issue that you would say goes to why the person's not a homeworker, why the father's not a homeworker?

MS MCKECHNIE:

If I can park that, Ma'am, for the application answer.

WINKELMANN CJ:

Okay, right.

MS MCKECHNIE:

In terms of the volunteer point, Mr Dale didn't develop that but to respond to your Honour's question, if a volunteer with an expectation to get paid, the evidence, as I understand it, is that there was no request from Ms Fleming to be paid until 2018 at which point it was declined. So I leave that there but I don't understand any evidence before 2018 that she had an expectation to get paid, or a request to get paid. The factual scenario for Mr Humphreys is quite different, in part because he was a participant in the *Atkinson* litigation. But if I can please just –

KÓS J:

I'm not sure the State aspect matters that much to your argument. As I see your argument it's also raising the spectre that in purely private relationships there could be a homeworker relationship if we're not careful. For instance, a child who stays at home looking after their elderly parents with a hope or expectation, so just managed to get outside the volunteer provision in section 6(1)(c), but who says later on when it comes to the question of the estate: "Well, I should get more than my siblings because I was an employee of the parent who's just died and I have all these back years of pay." That seems to be a spectre underlying your argument. So it's not just a public/private issue. It's also a private/private one.

MS MCKECHNIE:

No, that is certainly, forgive me for leading with the State perspective, Sir, but yes, those are – the risks around the certainty of work and –

WINKELMANN CJ:

Right, I think we've got that.

MS MCKECHNIE:

So forgive me, if I can return to my argument, the second of the four submissions is the bilateral, the need for bilateralism. That, in our submission, reflects the structure of the ERA. At its most –

WILLIAMS J:

You mean mutuality?

MS MCKECHNIE:

Mutuality, yes, bilateral, relational. You know, they're all words, I think, that capture the essence of the submission I'm seeking to make, and at its most fundamental it's a question of why give an individual access to the rights and obligations in the Employment Relations Act if their employer cannot fulfil those obligations? What is the advantage? Why? What would Parliament have intended to have done for those so close to the edge that the employer doesn't know they owe the obligations?

The third argument –

ELLEN FRANCE J:

It's not solely obligations that the employer would have to fulfil. It's also, as Mr Cranney says, things like freedom of association and your ability to become part of the union and so on.

MS MCKECHNIE:

From a freedom of association perspective outside of unions, Ma'am, there is nothing stopping, as there are, peak bodies representing homecarers who

come together to negotiate and discuss funding agreements with the Crown. I mean this is not a situation of a union or nothing, as pained as Mr Cranney may be to hear that. In the context of a funding arrangement there are peak bodies, there are carers associations. I believe Mr Parkinson's evidence in the Employment Court, which spoke to the policy ramifications, talked about the consultation processes undertaken with representative groups which carers who are not employees can and do join. They have a collective voice in negotiations, as many individuals do who receive funding will negotiate with funding and, as you will see in Mr Parkinson's cross-examination, they are very powerful groups in this context and they are taken seriously by the Ministry. They are respected voices for freedom of association.

To move to my third submission, and this is predominantly being led from the State although I acknowledge, Justice Kós, your point that it's not solely a State issue, but it turns on the work for another person because a lack of clarity about work, in my submission, is particularly problematical for the State when there is a statutory obligation or a statutory power to do something, and in this context we say there is no statutory obligation to the level argued for but there's clearly a statutory obligation to provide care, but there's statutory obligations in all sorts of contexts, so indulge me. I think I may have come up with an analogy that is useful to demonstrate this. Whether a State has a statutory obligation or it's otherwise in the public good, and you can read a statutory obligation to include it, and there's a funding stream, so there's an appropriation from Parliament to do that thing, there are real risks then about what constitutes work and how you prevent people from doing it, and so there needs to be sensible limits to this because without that relational element or connection or knowledge, work for another person, and particularly in the context of State funding agreements, can be very broad.

So to give you an example in the volunteer context, the Department of Conservation does pest control on the DOC estate. It's done by paid employees and there is an appropriation and there is a statutory obligation in the Conservation Act to do that. Somebody volunteers on the Conservation

estate and undertakes pest control and they say they have an expectation of getting paid. This –

WILLIAMS J:

They have an or no expectation?

MS MCKECHNIE:

They say they do. They unilaterally, Sir, have an – they say: "You need to pay me," and the Department of Conservation says: "No. You're a volunteer." But it's very difficult to prevent that person, given the size of the Conservation estate, from practically doing that, and in that situation, without the certainty of what workers and something beyond the Crown having an obligation for that work to happen. So that person says, and they might be right, they're doing it for the State. They're only motivated to do it for the government, et cetera.

WINKELMANN CJ:

I don't think you need to – we see the, get the picture. That's why bilateralism is important, mutuality is important.

MS MCKECHNIE:

Indeed, and particularly in this context because the State would not want to stop, not only can't but wouldn't want to stop Ms Fleming or Mr Humphreys from caring for their child. It would be utterly inappropriate.

WINKELMANN CJ:

Yes, well, that's a long way away from that though, isn't it?

MS MCKECHNIE:

So that, in our submission, reinforces the need for that bilateral aspect, or, I think your Honour used the phrase earlier, Sir, mutuality of understanding, and then that mutuality of understanding what is work and what will be paid for, not just what you are doing, so knowledge, but what we agree you will be paid for, we say, is a key element as part of this.

WILLIAMS J:

So if you're negotiating your walk to mutuality and there is a disagreement over that, then that kind of fits the ERA model, doesn't it? This whole policy matrix is designed to get mutuality.

MS MCKECHNIE:

I'm not sure it does, Sir, because the typical result of a failure to agree is a withdrawal of labour. So the common short-term leverage that an employee has if they're dissatisfied, assuming we're in an employment relationship, of course, is to withdraw labour, and we acknowledge here that labour is very unlikely to be withdrawn. It can be withdrawn. There's no obligation for this labour. But to your observations, Sir, it isn't going to be, and so that is another way in which this type of arrangement is quite distinct and different from a classical employment relationship or a homeworker arrangement. If homeworkers do not like the terms of the agreement, they do not undertake the work. We acknowledge here that that withdrawal of labour is not a power that most of these individuals will want to exercise. Again, which we say moves it away from a homeworker in an ERA engagement and moves it into a funding arrangement where the hours of work, I acknowledge, may need a political clarification.

So the fourth submission I would make here is – and this ties particularly to the application in this context – is under FFC there was clarity, albeit not necessarily enthusiasm, for what was work because the policy expressly said what was work, and Mr Humphreys was paid for work and, in terms of the interpretation, in terms of certainty, in our submission that's a key element of this. The work being done for the Ministry in the course of the Ministry's business was defined by the policy.

If you move to IF, as we are in this case, you are now in a situation where there are two options, and my learned friend didn't develop this and so I'd be interested to see what he says in reply, either – and this goes in part to the continuity argument which I'll develop in a moment – he is a homeworker engaged on IF. So the IF allocation, now we say this isn't the case but it is

more the case, if you will, than where I'm going to go next, that funding allocation is certainty of terms of a sort, what will be paid for, and that is much more equivalent to the funded family care arrangements where there's certainty of what is work in terms of what will be paid for.

1510

But if you are moving beyond that, and I did take from Mr Cranney's submissions, and his repeated references to we'll park hours and we'll come back to it. He wants to move past that your Honours. So he is asking that Mr Fleming *[sic]* be engaged as a homeworker, where there is no mutuality of agreement or understanding about what it is he will be paid for.

WINKELMANN CJ:

He parked it though?

MS MCKECHNIE:

He did park it Ma'am, but in my submission –

WINKELMANN CJ:

But is this going to this appeal or is this another – are you arguing something that's for another day?

MS MCKECHNIE:

No I'm arguing, Ma'am, that he can't have his cake and eat it too.

WINKELMANN CJ:

Well he's not trying to have his cake in this case. He's saying, in the – we are arguing about the terms and conditions though.

MS MCKECHNIE:

No Ma'am, sorry, let me articulate myself better. In my submission the fact of the parking undercuts the mutuality of understanding. The fact that he is coming to this Court and asking for a declaration that Mr Humphreys is a homeworker, but also putting you on notice, and putting the Ministry on notice

that he does not agree about how much he is working, in my submission that undercuts the application of the test. You can't have a test, in my submission, back to my mutuality and clarity about what's being paid for, where you simultaneously say we have enough certainty that you shouldn't, you've engaged me as a homeworker, but I disagree about what I'm getting paid for.

WILLIAMS J:

He doesn't agree that he's getting a fair price. This is a fight over price. Because he's doing the work, the question is, how much he gets for it.

MS MCKECHNIE:

But again Sir –

WINKELMANN CJ:

Are you saying he's just, he's therefore really saying he's a volunteer? What are you saying is the true legal construct then?

MS MCKECHNIE:

What I'm saying, it's a funding arrangement Ma'am.

WINKELMANN CJ:

No, no, he's a homeworker. He's doing work, which is clearly for the Government because they've said: "You can do it on this basis, you can do it on that basis." He says: "Oh okay, I'll do it on the basis." One of the bases you've suggested, and then what, you say: "Lo and behold, on that basis you're a volunteer." What are you saying is the situation?

MS MCKECHNIE:

No he's not a volunteer Ma'am. There is funding available for this but we're saying in context like this, where there is no event or events that engages him as a homeworker, and the Court of Appeal is clear that the Crown didn't intend to engage him as a –

WINKELMANN CJ:

Engaged him to do work in that home. It's not engaging him as a homeworker. It's engaging him to do work in a dwelling –

MS MCKECHNIE:

Engaging him to do work in a home. He is funded, there is funding available, and where he is the agent, so we'll turn now to application because we've moved to that point, I think I've got five points to make in that regard.

WINKELMANN CJ:

I thought we were on application, because you said application in this context.

MS MCKECHNIE:

No we're, I was trying to develop the interpretation argument Ma'am, but we're now firmly in application. He's engaged as an agent, and so when the allocation of funding is being used to employ other people, and he has to agree to this before he is signed up as an agent, and he has. In order to ensure the third party individuals who might be contracted directly, or engaged directly, almost always under contracts of service, have employment rights, he is empowered to enter into those, and required to by the policy, to enter into employment agreements with those individuals.

He can also buy services from third party providers, HCSS providers such as Taikura, or he can buy things if they fit within the policy, or the like. But to ensure that that third party support worker, if they are employed directly, have employment rights, he is empowered by the policy, as the nominated representative, to make those decisions and enter into those contracts. In my submission that's appropriate, to doesn't impose that relationship on Mr Humphreys, it didn't have to be Mr Humphreys, it could have been somebody else, and he chose, and the Ministry engages him to do that. But where he decides to pay himself, the submission from the Ministry is that the Court of Appeal is correct, and in that scenario it's a funding arrangement. There is no employer.

He's not a volunteer Ma'am because there is funding available, which he is receiving. But he is not engaged as a homeworker by the Ministry who did not make the selection of him, he chose that himself as a homeworker to do that under, in our submission, a sensible reading of the homeworker test.

WINKELMANN CJ:

Well wouldn't he then, on your submission, fall into subsection (b): "Includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser."

MS MCKECHNIE:

Sorry Ma'am, can you repeat that?

WINKELMANN CJ:

It's subsection (b) of the definition of "homeworker". I mean this sounds like an incredibly technical argument, which is hard, that you are making which is hard –

MS MCKECHNIE:

Ma'am, at its essence it's not a technical argument because it returns to the submission that I made earlier about what is the need for an employment relationship. There is funding available for Sian. It's a significant amount of funding, reflecting Sian's significant needs, and Mr Humphreys is the nominated representative or agent to decide how to spend that money. Some of that money he has decided will be used by him to provide direct care.

WINKELMANN CJ:

So how is he nominated? Who nominated him?

MS MCKECHNIE:

There's a policy, Ma'am, which I can take the Court to in a moment under individualised funding where the Ministry enters into an arrangement with a person about what to do with their funding, and it's clear that if you are not able

to make decisions for yourself, you will have a nominated representative or agent. In our submission it doesn't import the law of agency, it's a policy document, and perhaps the use of the word "agent" is unhelpful. But nominated representative or agent who can make decisions on behalf of the disabled person about how to spend their allocation, and that's what Mr Humphreys is, and he's agreed to that, and agreed to take on the obligations about what that means, and the policy sets out what those obligations are, including if he chooses to employ a support worker directly to enter into that employment relationship with the third party support worker.

KÓS J:

Just remind me, who is the employer in that situation?

MS MCKECHNIE:

In that situation it's Mr Humphreys.

KÓS J:

Yes.

WINKELMANN CJ:

Can I ask you then why he doesn't, on your scenario, or he doesn't do that, how he's not caught by: "Homeworker includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser." Because on your analysis it's a vendor, he's being funded by you to provide these services, a funding contract, which sounds like vendor and purchaser.

MS MCKECHNIE:

Well Ma'am I would return to the mutuality and certainty relationship here because Mr Humphreys can decide week to week how he spends this money, and the Ministry has no role in that. The Ministry doesn't want a role. This is intended to empower the disabled person and their families to choose as they wish and when they wish, what's the best way to provide services and support in the home. So the Ministry does not know, and doesn't want to know, when

it is Mr Humphreys, and when it is Mrs Humphreys, and when it is a sibling, and when it is a third party. Whether Mr Humphreys is going on holiday to Europe for a month and during that period that money will be used to short-term contract Bronwyn, or the like, and then when they get back they will decide, because Sian's mother is between jobs, that she will be paid for the next six weeks. This is intended to be flexible Ma'am, but at any of those points the Ministry doesn't have the knowledge of who that person is, and isn't selecting them.

So back to the definition of "homeworker". In order to make sense of the obligations that the Ministry would have, not to pay, because the Ministry will pay, because this is a funding agreement in which that money will pay. But if we are moving beyond a funding agreement and making, reading a definition of "homeworker" such that that is a homeworker relationship, in my submission, that must mean something. Beyond funding. Because there is funding. He's not a volunteer, unpaid. He will be funded. But why is he a homeworker, quite apart from what the Ministry may have done to make him one, why does he need to be a homeworker under Parliament's intention of the purpose of the Employment Relations Act? What does that give him?

Now my submission Ma'am here is probably what is being sought, and the Court can infer that from the let's park the hours and leave them until later, is what is being sought is a challenge to what is actually work. So if the intention here is by being a homeworker, and that is all Mr Humphreys sought in the Employment Court. All he wants is a declaration he's an employee. He doesn't want anything else. Why? Well, I would intuit, and interested to see what Mr Cranney says should you ask him, I anticipate he will make a claim for hours, beyond the IF funding allocation he has at the moment, on the basis that the Ministry has engaged him as a homeworker, and therefore has a series of obligations arising from their employment status.

WILLIAMS J:

I think that's been well and truly signalled.

MS MCKECHNIE:

Very strongly signalled.

WILLIAMS J:

That's the point.

MS MCKECHNIE:

Well there's two points Sir. There's also a question about health and safety remodelling of a bathroom, but that has in the meantime been resolved between the Ministry and Mr Humphreys.

WILLIAMS J:

Glad to hear it.

KÓS J:

Well all the people that Mr Humphreys is hiring to do work in the house, they're going to be homeworkers, aren't they?

MS MCKECHNIE:

No Sir, I wouldn't have thought so.

KÓS J:

Why not?

MS MCKECHNIE:

Because I would've thought that they would be under an employment agreement contracted by Mr Humphreys, and so they would fall into section 6(1)(a).

KÓS J:

Oh I see. Or they could be, well it depends, but they could also be homeworkers.

WILLIAMS J:

Well they're certainly working at home.

MS MCKECHNIE:

Yes Sir. I'm not sure whether – I hadn't turned my mind to whether or not those are intended to be mutually exclusive. I mean once somebody becomes a homeworker in our submission they become an employee and as a result they are subject to lawful direction, which returning to the evidence of both Mr Humphreys and Ms Fleming, they will not accept lawful direction if they consider it is in contrary to the best interests of their children.

1520

WINKELMANN CJ:

Well, they may not accept it but you might say: "Well, you don't accept it. We've got our obligations," which the Ministry must have. They cannot just say: "Oh, here's the funding," and allow it to be spent in a neglectful way. There's no way there's no obligation on the Ministry. So at a certain point when the Ministry is doing its investigations it will say: "This work is not meeting the needs for which we're funding you. We terminate that." So they are ab direction.

MS MCKECHNIE:

Ma'am, firstly, that isn't what happens in fact, but just to tease out that hypothetical, the logical conclusion is either to cease funding or to remove Justin, or in this case Sian, or to require – because we still have the obligations to Sian. We can't continue – Sian has to be looked after, so – and this is I think is one of the many ways in which the contrast and the contradiction between a funding arrangement to enable families to have flexibility and look after themselves and imposing an employment relationship, it's not a comfortable mixture.

WINKELMANN CJ:

So is it the case that the Ministry doesn't do anything the way of checking that care is being provided?

MS MCKECHNIE:

There are NASC assessments as we have discussed periodically and they are done at request and in –

WILLIAMS J:
And there are standards set out in the policies.

MS MCKECHNIE:
There are standards. But returning to a more –

WINKELMANN CJ:
No, but you see that is direction, isn't it? I mean if they have to comply with the directions in the policy then that's direction.

MS MCKECHNIE:
They are – we can have a look at the directions, Ma'am. They are very minimal in terms of quality of service. The Ministry is not directing particular types of activities.

So to give a more realistic example, Mr Coote going to a day programme. Let's say, for example, the Ministry says: "We don't want to pay you, Ms Fleming, for this care. We are going to pay for a day programme," and that's very clear and you have funding for that day programme, and this is a situation at the moment and in the particular scenario it's because the day programme is no longer available, but let's imagine a scenario which has happened in the past where Mr Coote goes to the day programme and doesn't like it. He has a bad interaction with another person attending. It's an authorised, licensed, perfectly appropriate day programme but Mr Coote doesn't want to go. The Ministry is not and would never be in a position of wanting to compel Mr Coote to attend a programme that he and Ms Fleming think is not suitable for him, even though it's, in its macro sense from a provider's perspective, perfectly appropriate, and in that scenario what's the logical conclusion? That as a result of Ms Fleming making that decision and taking on that care herself the Ministry now must fund her for that care at a higher rate. It very quickly collapses into those connections between familial obligations, and I'm aware this Court made some allusions to fiduciary obligations in the context of adult children. I will come up with the acronym in a moment when Mr Bremner gives it to me.

WINKELMANN CJ:

ABC.

MS MCKECHNIE:

Thank you, Ma'am. ABC. I should have remembered that one; it's the most obvious. That's an expression of those kind of obligations, and so it gets very complicated, Ma'am, very quickly when you're talking about lawful direction in an employee sense, and one of the reasons the Ministry does not want to engage these individuals as homeworkers because they do not want to be telling these families what to do beyond the most minimum safety and care requirements. We want to be empowering the flexibility for these families, either the disabled person themselves or supported by their families to do what they want to best fulfil their lives and participate in society, and there is funding for that. To step across into an employment relations arrangement and impose those obligations and impose those checks and those preferences and the ability to direct, the Ministry does not want to do that, and at the most fundamental, in my submission, you do not need to read the "homeworker" definition and impose an employment relationship here. Because Mr Humphreys is being funded –

WINKELMANN CJ:

Okay, well, I think you've made that submission. We're going round in circles.

MS MCKECHNIE:

Thank you, Ma'am. I'll move on to my next submission then which is a more – so briefly because I covered it before, I touched it before, the agency engagement. I won't take your Honours there because of time but the references to the policies that set out what an agent is and how this fits together are the two individualised funding policies and the references are 306, and these are on my desert island disc lists, your Honour, 306.1358 and 306.1324, and I'd start in that second document. That's the policy document at 1337 which sets out the definition of "person" and makes clear in that context the role of the nominated representative or agent to make decisions on behalf of the person. These are the policy documents. There is an error in the document that

Mr Cranney took you to which was material provided to the recipients of FFC around who the budget holder would be and employer obligations. He took you to that passage about the fact that the disabled person would have the employment obligations. That is an error in that document. You will see in the policy documents that it is very clear that the agent will hold those obligations if they are undertaken with third parties and in my submission those policy documents are obviously the definitive document in the context of a newsletter, the errors I'm –

WINKELMANN CJ:

Is there evidence it's an error?

MS MCKECHNIE:

Well, there's a conflict between them, Ma'am. The policy document says it's the agent and the flyer to families unfortunately makes an error. So in my submission, Ma'am, it's open to the Court to infer it's an error. It's a direct conflict, and the policy documents that I've just given you the references to make that clear who holds those obligations.

So the submission here is that in terms of the differences between – and this goes to Mr Cranney's continuity argument – the differences between FFC and IF, firstly, capacity is not engaged in individualised funding. It's a materially different policy with a range of different options and we say the removal of FFC is a supervening event. It creates material difference, such that the continuity cannot continue. He now has options and those – and the matters that the Court of Appeal rely on we support.

WINKELMANN CJ:

So you just say the Court of Appeal's right?

MS MCKECHNIE:

We say the Court of Appeal is right on that, Ma'am, yes.

WINKELMANN CJ:

On everything, on this – I mean you just follow their –

MS MCKECHNIE:

We do, Ma'am, and in response to the oral submissions that my learned friends have made we would also develop that point around hours which I made before, so I would repeat that in this context that that certainty of hours under FFC does not exist under IF. There can be more hours. For example, I can't remember, forgive me, off the top of my head, what Sian's allocation is but Justin's current allocation is in the 90 hours a week, and that's used to pay for a range of different things, including Ms Fleming at her – and her and Justin's election.

WINKELMANN CJ:

Does it also have to pay for the agents who have to manage all that, all the contractual stuff and that sort of thing?

MS MCKECHNIE:

Agents are not paid under the policy, Ma'am, no.

The fourth submission that I would make here is to return to the letters that my learned friend took you to that were written in 2020, when those letters were written Mr Humphreys was not a homeworker in the knowledge of the Ministry, and the Court of Appeal acknowledged that it was a good faith understand that they didn't know that Mr Humphreys had been engaged as a homeworker and so I ask the Court to consider those letters in that context. The letters aren't seeking to end a homeworker relationship because the Ministry was not aware there was a homeworker relationship.

So he was not an existing employee, and this is responding to a submission that Mr Meys made. Mr Humphreys was not an existing employee in the knowledge of the Ministry at the time that it wrote those letters or that it moved from FFC to IF. So in my submission it would be inappropriate to put too much weight on those letters as somehow not changing a situation that the Ministry wasn't aware it was in. So in my submission those letters only go so far.

The point I would highlight about the letters though is it refers to you don't need a re-assessment for your allocation.

WINKELMANN CJ:

Well, one of them is to a caregiver, isn't it?

MS MCKECHNIE:

It's to the –

KÓS J:

Client.

WINKELMANN CJ:

Client/caregiver.

MS MCKECHNIE:

– /carer, yes.

WINKELMANN CJ:

The second, yes.

MS MCKECHNIE:

In the context of FFC where that was what the Ministry thought Mr Humphreys was at the time.

WINKELMANN CJ:

What? A caregiver?

MS MCKECHNIE:

Under FFC, yes. Moving from FFC into IF, and they were paying him to do that, Ma'am. They paid him 44 hours a week to do that.

WINKELMANN CJ:

So they didn't think he was an employee? They thought he was…

MS MCKECHNIE:

They thought he was being funded through the FFC relationship where Sian was his employer for the purposes of the funding policy.

WINKELMANN CJ:

So they knew he was an employee?

1530

MS MCKECHNIE:

Of his daughter.

WINKELMANN CJ:

So they were leaving his daughter to manage the technical, the redundancy, et cetera, aspects, were they, without any capacity?

MS MCKECHNIE:

Ma'am, I think the problems of that, that were highlighted in the Court of Appeal, stand as highlighted in the Court of Appeal. The point I make here is to the extent that there is an argument of continuation of homeworker status from FFC to IF, at the point that that transfer happened, the Ministry in good faith did not understand, as the Court of Appeal has now determined and the Ministry is not challenging, that they had engaged him as a homeworker, because Sian lacked that capacity, and my submission is only to note that your Honours should look at those letters in that context and, in my submission, they only go so far from a continuity perspective, given the context of the letters at the time that they were written.

But your Honour, the comment about redundancy, which I think is picking up a submission made by Mr Meys, that returns to my need for certainty. If you are not aware that you have an employee, you are not aware that you owe them redundancy obligations and you have to go through that process. If the test is read or applied to facts that are such that it lacks that knowledge, then, I mean, one submission would be it places the employer in an invidious situation, but my primary submission would be then the reading is contrary to the scheme of

the Act, because the scheme of the Act is intended to import those obligations and if you read admission to the Act so low you can't fulfil the obligations, returning to my primary submission, then that is too far within what the Employment Relations Act is intended by Parliament to do.

KÓS J:

It's just that the definition of "employee" is broader, I mean, the volunteer provision, for instance, and *Cowan v Kidd* is an example of application, indicates that there will be uncertainty.

MS MCKECHNIE:

There will be uncertainty Sir, and "homeworker" is unique, well, homeworker is unique in a number of ways, but even as against "person intending to work" because, immediately below it in the definition, because the way "person intending to work" is subsequently treated in the legislation is quite specific. It's not anybody intending to work, you have to have agreed a contract but not have started working, so it's a very narrow category and that's specified elsewhere in the legislation. "Homeworker" is not and, in my submission, the intention of Parliament is then that, unlike "person intending to work", where once you are in the Act, if you will, you have very thin specific obligations intended to protect people in that window, "homeworker" it's an unfettered access to the Act and, in my submission, that's Parliament's intention that if you are a homeworker you are intended to be able to avail yourselves of all of the obligations in the Act and all of the obligations of the employer are in play and that, in turn, requires a reading of "homeworker" such that those can be fulfilled. Which I think I have now, I know you have listened to me make that submission a number of times, so I won't make it again.

WINKELMANN CJ:

So, good.

MS MCKECHNIE:

But the final submission on the application point, and I think I have made most of this submission already in response to your Honours' questions, is in relation

to that question of hours and the material difference here between FFC and IF and the lack of certainty about the nature of the declaration that my learned friend is seeking that he is a homeworker.

In my submission, if your Honours are open to finding that he is engaged as a homeworker under IF, I would urge you to be specific about the terms of that. Is that in relation to the allocation of funding, which is what we say, if the Court is going to entertain "homeworker" which, of course, we say you shouldn't, but if you are, is it for what the Ministry has agreed to pay for, so closer to that mutuality of understanding in that relational matter? Or is it simpliciter, such that anything he might be doing that is considered to be work on behalf of the Ministry, against the background of an inchoate and very broad statutory obligation to care for the disabled, is in play? Because if it's the latter, in my submission, that is so vague as to prevent engagement for the reasons explained. But if your Honours are going to go there, we would be grateful if you could indicate which of the two, because that will assist.

WILLIAMS J:

Sounds like Mr Cranney wants to have a fight over that.

MS MCKECHNIE:

I think Mr Cranney does want to have a fight over that Sir, and that is why –

WILLIAMS J:

It would be useful if there were some facts.

MS MCKECHNIE:

That is why I make the submission, well, Sir, I actually argue it's an interpretation question. If the hours are in play and they're not agreed, then the mutuality of understanding and what is work and what will be paid for is absent.

WINKELMANN CJ:

Well, I mean, isn't there a simple answer for you –

MS MCKECHNIE:

So in my submission, it's fatal to his argument.

WINKELMANN CJ:

It's a simple argument, isn't it, which is that the whole thing is occurring within the context of the policy and the funding, that's the whole mutuality. The mutuality isn't, it's not just a blank sheet of paper, the case has to be good –

MS MCKECHNIE:

I don't think Mr Cranney would accept that, Ma'am.

WINKELMANN CJ:

All right, okay, but yes, right, we've heard you on that, anyway.

MS MCKECHNIE:

Yes.

WINKELMANN CJ:

I think, again, we're going around in circles.

MS MCKECHNIE:

So to conclude we say that that is relative to interpretation because it lacks, or application of the interpretation, because it lacks certainty. But even with that certainty, because of this, the flexibility given by this policy, nonetheless the Ministry does not want and it's contrary to the funding scheme to have that degree of control and doesn't consider it has engaged Mr Humphreys as a homeworker under individualised funding.

WILLIAMS J:

That is a kind of submission that there's a minimum degree of interference that makes you an employer, is there law about that? Because it –

MS MCKECHNIE:

I think you're about to make it Sir.

WILLIAMS J:

No.

WINKELMANN CJ:

I mean, generally, homeworker, you say caregivers regularly go, are provided by agencies and our job is simply to go somewhere and provide this basic level of care and there's not a direction they go there and the family helps them work out what is a necessary level of care, and that's how caregiving works in the community.

MS MCKECHNIE:

But those individuals are under employment agreements, typically, with providers and if not –

WINKELMANN CJ:

Yes.

MS MCKECHNIE:

– they can be directly employed. They have job descriptions, they have hours, they have tasks. They often have training, they need health and safety training, they need medical training often because they're providing nursing services or other care services. They, at the very minimum, they'd require first aid training.

WINKELMANN CJ:

I mean, I understand the difference.

MS MCKECHNIE:

There are job descriptions which settle, in my submission Ma'am, they're not equivalent situations.

WINKELMANN CJ:

So my point simply is that the caregiving that goes on in the dwelling-house is, in reality, quite similar as to what, as to its nature, even if it's an external provider, the family shape the nature of the caregiving that's required.

MS MCKECHNIE:

In terms of –

WINKELMANN CJ:

So it's not the employer who's directing, "and you will do this and then you will do that", it's the family that shape it, although the employer may say, "you're engaged to provide meals and not to clean", or "to shower and to vacuum but not to clean the bathrooms", within the –

MS MCKECHNIE:

Well the, in fact, the situation is set up the other way around, Ma'am, because the policy individualised funding is intended to empower the family to choose exactly that, "we pay, we want to pay you, service provider, and you will send us a staff member, to do meals and to do cleaning, or to do bathing", or to do whatever the needs are that that individual requires. So, the needs are assessed but then the families themselves decided, "well, we need help with bathing, but we can do that and we're going to save that money and we're going to use the money on physical therapy, or more help with meals, or the like", so the family, the individual or the family assisting if necessary, which is the case here, then decides how to spend that money from the allocation they have on the things that will best help them live their best lives.

And it's not necessarily, you might be assessed to need help with bathing, but that doesn't translate directly to getting help with bathing if the family decide they want to do that and use other assistance.

WINKELMANN CJ:

Okay, right, thank you very much, Ms McKechnie.

MS MCKECHNIE:

Thank you, your Honours.

WINKELMANN CJ:

So that takes us to your reply, Mr Dale, or Mr Cranney's reply. It might help us if we have Mr Cranney's reply first, since that's all fresh in our mind. I'm not quite sure why we didn't take your reply earlier, Mr Dale, that's my fault probably.

MR CRANNEY:

I do feel, if your Honours please, I do feel as if I have been described as a far greater villain than I really am. Really, I mean the, of course –

WINKELMANN CJ:

I'm glad you are prepared to accept some level of villainy.

MR CRANNEY:

I deserve some of it, but I think that if, you know, if Mr Humphreys wants to argue that he should have more hours, the State's not going to crumble into a pile of dust and workers have these rights . Workers are entitled to say, "look, I want a better life, I want to complain to the Ministry about my conditions and my wages and my hours", and this is a very healthy activity in a democratic society and there needs to be much more of it than we've currently got, given the way the world is drifting.

1540

So, there is nothing wrong with caregivers in vulnerable positions getting organised and trying to get their life improved, and so all of these terrible fears, because I said we were going to raise as hours, should just be (inaudible). Don't worry too much about it. I mean the worst that will happen is you'll get some more hours. It's not the end of the world.

My second submission is that, and I'm not sure if I fully understood the submission that was made, but I did understand that my friend was trying to limit the definition of "homeworker" so as to perhaps exclude contracts for services? I think?

WINKELMANN CJ:

Yes, I thought so too.

MR CRANNEY:

Or something like that. If you look at *Lowe*, and possibly there's some bits of it I don't want to overturn.

WILLIAMS J:

It has highs and lows.

WINKELMANN CJ:

No, that's not good. Try harder.

MR CRANNEY:

If one looks at paragraph 40 to 43 there's a passage there about: "Mr Cranney said this was a fundamental error on the Court of Appeal's part." I take the Court of Appeal for saying that this couldn't be employment because there was no control, and Mr Cranney had submitted at the hearing, well, the whole point of it is to cover situations where there's no control, as well as where there's control, and the Court of Appeal, both the minority of two, and the minority of the other two, accepted that submission and said that it was a mistake made by the Court of Appeal. So that's at paragraph 40 to 43 in the first two, and paragraph 147 to I think 151. "We do not accept the respondents' submission that the term engage (and presumably employ and contract) require that an employer have a degree of control and oversight over the work carried out."

So the idea of this is to catch situations which are not, which are contracts for services, and that's quite specific. If one looks at the Act, the definition of "employment agreement", which is in section 5, it says: "Employment agreement (a) means a contract of service; and (b) includes a contract for services between an employer and a homeworker." And that's the definition of an employment agreement for the purposes of the Act, and then it goes on to say that it: "(c) includes an employee's terms and conditions... in (i) a collective

agreement; or (ii) a collective agreement together with any additional terms… (iii) an individual employment agreement."

So the situation is quite clear, that is if you're doing work for another in a dwelling-house, then that's an employment agreement, even if it's a contract for services, and these descriptions that we've had about Mr Humphreys being an agent, organising, being the employer on behalf of his daughter, they are simply pure mythology and not real. They are not real in substance. In fact he gets up in the morning and does the work for the Ministry, who pays the money to him, for him to spend as he sees fit on his family's needs, and that's how the system works.

In terms of the so-called need for certainty, I fully understand the difficulties in employment law, but it's because of the time of our history where we've got a peculiar branch of the law where we don't agree what an employee is, and we don't agree what an employee is, and we don't agree what work is. Now that's a rather odd scenario but life is developing. These things are becoming clearer as time goes on, and they will adjust.

WINKELMANN CJ:

Well agreements, clarity comes in and out as society evolves.

MR CRANNEY:

Exactly and the, it may, as I said earlier, it may not be easy but it has to be done, and these things have to be addressed. In terms of overturning low my friend –

WILLIAMS J:

I think the Crown says, yes, that may well be right. That's Parliament's job. If we are in a time of significant social change around the phenomenon of work and State responsibility, then it's not for judges to go interfering in that. It's for the politicians.

MR CRANNEY:

And that may well be the way that life goes, but…

WINKELMANN CJ:

In the meantime we apply the Act.

MR CRANNEY:

We apply the Act. We've got some exceptions already put in there by Parliament for the film industry, for example. So they've said in there that even if you're an employee, you're not covered by the Act. Even if you're a cafeteria worker working for Peter Jackson, you're not covered by it. So there have been sharemilkers and real estate agents, both of which come from Court of Appeal judgments who found that they were employees, and were subsequently overruled by statute, and the sharemilkers very early in the '30s, and I think the real estate agents relatively recently, to a lawyer, in the '80s. So there will be arguments about exceptions and there's not here at the moment. This is one of the most vulnerable groups, and no one is disagreeing with that. Vulnerable groups of employees and they are currently entitled to protection, and that's what Parliament has done, and the section has continued. It came in, the interpretation of the section we're arguing about came in in *Cashman* in the early '90s. That was the Court of Appeal decision, and it was really, repeated in the Employment Relations Act 2000, and all knowledge of the way it had been previously interpreted, and your Honours will be aware of the purpose of that submission. In fact there's a recent judgment of this Court dealing with s 214 which, on one reading, precludes any appeal from the Employment Court to the Court of Appeal. But the Courts said, well, this Court said, well, you know, that interpretation of the section has been current for a long time, it's been repeated in various sections without amendment, and therefore that's the interpretation. So I think to some extent my submission is that Parliament has considered it, and has left it as it is.

In terms of the question of *Lowe*, about whether it should be overturned, I wasn't part, like Justice Kós, I've not really, quite aware of this case that's been referred to, or even if it was a case.

WINKELMANN CJ:

Putua.

MR CRANNEY:

Yes, so I'll have to fish that out, so I'm not really quite sure –

WINKELMANN CJ:

Well you won't fish it out because there's no judgment yet.

MR CRANNEY:

Right.

WINKELMANN CJ:

You'll get given the submissions the Crown made.

MR CRANNEY:

I'll investigate it. So I'm not really quite sure –

WINKELMANN CJ:

So all that is – all that Ms McKechnie is referring to in relation to that is the circumstances in which the Court will overturn itself, and the submissions that she will be incorporating will simply be reviewing what the Australia High Court has said, the UK Supreme Court has said, the Canadian Supreme Court has said, about this, and a couple of articles, and I'm sure she can actually probably give you an extract in advance.

MS MCKECHNIE:

They're public already Ma'am.

WINKELMANN CJ:

Oh are they. They're public on our website.

MR CRANNEY:

Yes Ma'am. She will certainly help me, we get on very well, and I'll get the…

WINKELMANN CJ:

Even if she –

MS MCKECHNIE:

Whether I want to or not Ma'am.

MR CRANNEY:

I say that genuinely, and Ma'am it's been a long case, and we've been treated with absolute courtesy by the Crown all the way through this, who have assisted us, our side, in various ways, so I don't want to leave any bad feeling here.

WINKELMANN CJ:

Even though she's described you as a villain Mr Cranney.

MR CRANNEY:

Oh yes that's, but I take that –

WILLIAMS J:

You took that as a compliment.

MR CRANNEY:

As a badge of honour Ma'am.

WINKELMANN CJ:

So, well that is very good of you to acknowledge that Mr Cranney, thank you.

MR CRANNEY:

Thank you your Honours.

WINKELMANN CJ:

Is that it?

MR CRANNEY:

Yes indeed. Unless you've got any questions Ma'am.

WINKELMANN CJ:

No, questioned out. We might finish on time. Mr Dale?

MR DALE KC:

Thank you Ma'am. A couple of things we can get out of the way relatively quickly. In *Lowe* we say it's distinguishable. Ours is a direct engagement case, *Lowe* is an indirect engagement case and so doesn't assist the Crown.

1550

The second point is in relation to IF. Your Honour Justice Williams is quite right, we need more facts. The problem is, and on a day-to-day basis there are difficulties in dealing with the Ministry. My learned friend referred a moment ago to the fact that Ms Fleming is entitled to respite payments of up to 90 hours. While this case is being conducted, there has been a fight going on on the internet between Ms Carrigan and the Ministry about the terms of payment because money's been held up. There are constant battles with the Ministry.

There are 22 cases in the Employment Relations Authority in Christchurch. I'm counsel and Ms Carrigan is involved. In one of them, all the man wants is enough money to buy a new washing machine because he spends most of his day in the laundry. These are day-to-day practical distressing problems and, to be frank, if it weren't for Ms Carrigan many of them would just have to suffer it but because she is tireless and understands the process intimately she fights back. But if there is homeworker status then the path to relief is much easier. She can file a grievance in the Employment Relations Authority and get an answer. We can't judicially review every time we have a complaint. It's just not practical.

So the harsh reality of all of this is that homeworker status is an important issue. You can't decide, because you don't have the information, on what all the issues will be that will arise but you'll have enough information. There will be enough information for the Employment Relations Authority to make rulings, but the homeworker status issue is important.

Under IF as well the host has to approve payment every two weeks. This host business is another mechanism that clips the ticket on the amount involved that the payment has to be approved every two weeks. You'll find the authority for that at 310.2230.

Turning back to the broader picture and the history of this matter, it needs to be remembered that the Crown right from the start has had a role to play in Justin's upbringing and care. If I can hand to you a summary of the NASC assessments, I've got copies here and I can hand those up. There's nothing particularly new about this evidence. But I wanted to take you to 310.2149 which is the first document which is the needs assessment service co-ordination, just to give you a little history of what the Crown saw as its obligations, and the first document there is a document headed "Needs Assessment", client service co-ordination. It's a 1997 document when Justin is about 16, and what follows is correspondence between various State agencies, Waitemata Health, Spectrum Care, and so forth, all dealing with Justin's day-to-day needs and individual difficulties that he faced.

We can go through to an example, page 310.2163. This is by the time Justin is 17 years and four months old and here the Crown – and I bring your Honours' attention to this document because it shows the extent to which the Crown has engaged in his care and support. This is a good thing, not a bad thing, but it was a process which illustrates the close association and overview that the Crown had for Justin's care and support.

So at 310.2169 we see the first NASC document, again by a Crown agency, where there is a detailed description of Justin's day-to-day needs. Now the Crown knows through this process who's looking after Justin. It's Christine. They know the difficulties she faces because, for example, at 310.2175 there's a comment that he's "unaware of safety" and that's a particular problem. Justin is on one view an affable, likeable young man. You can talk to him and have a lively conversation but he doesn't know the limits, and one illustration that was given to me was that he uses a particularly offensive ethnic slur because he's heard other people say it and use it and he thinks it's funny. Now

if he uses that word in the wrong street he's going to get a kicking because it's offensive. He doesn't understand that. Sian, I know Mr Cranney won't mind me saying this, but she can't be left near a road because she has no appreciation of road safety. She just – it doesn't compute. This is the day-to-day issue that people like Peter Humphreys and Christine have to put up with, and it's all here because the Crown know it because they've got this document.

So if we go to page 310.2179, in January 2004 there's again the Crown agency talking to Justin about some support that he receives. It's only modest on the terms but nevertheless the Crown is there, the Crown is engaged.

Similarly, 210.2183, when Justin is aged, again correspondence, this time from Taikura Trust to Justin, talking about his home support and carer support.

So now, of course, what happened – and while this is going on there are other actual contractual relationships between the parties. For example, Cliff Robinson who was a parent who died some years ago but was a longstanding gladiator in this area, he was subject to a specific employment contract with the Crown which you'll find at 310.2140.

So it's not as though the Crown didn't know what was going on and they know that Christine is providing the services and they know from 1997 that, *Cashman*, that there's an issue about payment of homeworkers who are engaged by the health authorities to work within the home for the purpose in plain meaning of the "homeworker" definition, and that's the background.

So these NASCs which are three years or annual, they're the Ministry's own process. They designed it. They implement it and they know what's going on when the work is being provided. Instead of the Crown having to do it and find someone to do it, the parent steps up. Parents want to be supported for a number of reasons, none of them, in my experience, fiscal. They need support because they are vulnerable. They need support because there is a cost involved in providing care for a high-needs disabled. Many people, of course,

don't seek any support. They just carry the burden of the process themselves. There are a number of people in this courtroom today who fulfil that role without any recourse to the State, but there are many, like our man in Christchurch with his washing machine, that are terribly vulnerable and they deserve and are entitled to protection from the Crown.

It's extraordinary that we should be engaging here on a transactional basis over something which, from a societal perspective, is absolutely fundamental. We have a social contract which requires the State, the Crown, as a matter of its honour, nothing else, to care for the high-needs disabled and those who have to rely on the State for support, and we know the obligation exists because of CRPD, te Tiriti, whānau tikanga. We know that in fact the Crown was doing what it was supposed to do and I've just illustrated the care and attention that was being applied to how Justin was being brought up and how they addressed his day-to-day problems.

Unfortunately, what happened is in 2012 the Crown's policy of discriminating in terms of family members was brought to the fore in the decision in *Atkinson*, and *Atkinson* was a resounding victory where the Court said what the Crown had been doing was discriminatory and had to stop.

1600

What followed was a spiteful piece of legislation, Part 4A. It may be dressed up as being a solution to the need for a policy, as if there wasn't one already, but really what it was about was preventing any further claims being brought for discrimination. It was passed despite the Attorney-General of the day, Christopher Finlayson, pointing out that it was in breach of the Bill of Rights. It passed into law and so no claims could be brought.

It is, however, tightly constrained. It does not impinge upon employment relations. Your Honour Chief Justice in *Spencer v Ministry of Health* [2016] NZHC 1650, [2016] 3 NZLR 513 was called upon to rule upon the limits of Part 4A and you determined that it be interpreted tightly and to its terms.

But the fact is, that the Crown have relied upon that policy to narrow down and, we say, nickel and dime those who are otherwise eligible and so when Ms Fleming, having finally learned about FFC, in spite of the Crown not having accepted that it should have been public knowledge and circulated and people like Christine alerted to its existence, she finally makes an application in 2018 and gets an absurd response of 22 hours. No one in this Court yet has been able to explain how 22 hours makes the slightest bit of sense.

WINKELMANN CJ:

So when we look at your document, summary of all assessments, there's the doc, there's an assessment that was rejected of –

MR DALE KC:

15 hours?

WINKELMANN CJ:

15, 21, 23, 24, 22 hours, and then, so that's based on a NASC?

MR DALE KC:

Yes.

WINKELMANN CJ:

In September of 2018?

MR DALE KC:

Yes.

WINKELMANN CJ:

And the next one is October 2021, which results in an assessment of 50 hours.

MR DALE KC:

Yes.

WINKELMANN CJ:

Plus 40 hours respite.

MR DALE KC:

That's the provision that I mentioned earlier, and I said there's –

WINKELMANN CJ:

It's more or less current, I think, so –

MR DALE KC:

So you can take from that, that –

WINKELMANN CJ:

No, but can I just ask, nothing changed between those?

MR DALE KC:

No, no. I was just going to say that. And so you can take from that observation that it is possible to undertake a NASC and come up with something which is sensible. Now, I should say, while I think of it, no one is suggesting that payments should be made for 168 hours. That's clearly absurd. In *Chamberlain*, I acknowledge that 40 hours was appropriate and in Ms Fleming's case, when she put her hand up for FFC, 40 hours would have been acceptable. Now, there may well be examples in cases where more than 40 hours will be required. I should have thought it would be rare for there to be less, but what's wrong with paying someone 40 hours for undertaking what is an all-consuming obligation to care for a high-needs disabled son?

But the fact is, that the 22 hours that was offered is derisory and led to the proceeding in *Chamberlain* and, as I said in my initial submissions, *Chamberlain* was thought to be the solution. We wouldn't need to be here, because we had demonstrated that so long as the payment is related to facilitating community involvement and being able to live an ordinary life as best you can, as long as it's linked to something in paragraph 82 of the judgement, as your Honour observed in the exchanges with my learned friend, is how you do it. It's quite straight-forward.

I didn't, by the way, in *Chamberlain*, go along to court arguing that night supports was a separate category, or even supervision. All I said was, if your "personal care", it must mean something sensible, and so personal care means looking after somebody. It doesn't mean you give them their breakfast and then leave them for two hours, hoping they don't go outside and get run over. It's simply got to be linked, in a realistic and practical way, to what they do.

In the course of this, today, in the exchanges with the Bench, I stumbled across the idea of arguing, what about an accident at night, and so I used as an example an attendance where if an independent caregiver were there and had to get up and change the bed and all that kind of stuff, they would be paid for it, and I said why wouldn't Ms Fleming not be paid like, or Mrs Moody, not be paid likewise, and that's how the judgment came about, and then Ms Carrigan and I tried to follow up. We tried to meet the Minister, we tried everything we could to move forward, so we did not spend our life judicially reviewing the Ministry of Health, and that's where we got to.

So since then, nothing really has changed because we seem to be dealing with the same bureaucrats that got in the way in the first place.

WINKELMANN CJ:

So Mr Dale, "engaged", why is having, the real crunch with Ms Fleming's case, is why is she not just a volunteer when she's rejected that offer of 22 hours?

MR DALE KC:

Twenty-two hours was an unlawful offer, in my submission. The Crown knew perfectly well that it was unachievable and made no sense. They knew that she was undertaking the business that would otherwise be undertaken by the Crown on its behalf and for which she should have been entitled, where she was entitled, to be paid. So "homeworker" status is –

KÓS J:

So, isn't that the missing element here, the missing point? We don't have that finding of unlawful offer. We have your assertion of it, but we haven't got that

judicial review and I know you don't want to keep doing judicial reviews, but that bit seems rather important?

MR DALE KC:

I should have thought the Court would be sufficiently familiar with the needs and requirements of for caring for a high-needs individual, as we have here, on the facts you already know. It's what I said before, no one has come along to this Court, or even the Court of Appeal, or the Employment Court and said, "22 hours works because of", and some reasons. There is no answer. I invite you to assume that the offer was unlawful because it did not accord with –

WINKELMANN CJ:

It was in bad faith.

MR DALE KC:

In bad faith, on any standard. It's indefensible.

WILLIAMS J:

Well, isn't the point "this is what we can afford to offer", isn't that point?

MR DALE KC:

Well, I don't know, I don't know whether –

WILLIAMS J:

Because you're not an employee?

MR DALE KC:

Pardon Sir?

WILLIAMS J:

Because you're not an employee and this is a matter of public policy and affordability. That's really what they're saying. "We'll help you out to this extent, the rest is on you."

MR DALE KC:

Well, the obligation on the Crown to care for people like Justin doesn't depend on their being a funding allocation. The obligation exists and which means once you recognise your obligation, then you must fund it. It's not the other way around, in this case.

WILLIAMS J:

So where's the obligation come from?

MR DALE KC:

Te Tiriti, all those factors I mentioned earlier.

WINKELMANN CJ:

From the policy, Mr Dale.

MR DALE KC:

Pardon?

WINKELMANN CJ:

Your answer is, it comes from the policy.

MR DALE KC:

The policy, and –

WINKELMANN CJ:

And I think your case simply is, and tell me if this is not your case, the Crown had to, in a public law way of complying with its duties, apply the policy.

MR DALE KC:

Yes.

WINKELMANN CJ:

And in good faith, reasonably, and it didn't do that and that's your argument and the evidence is that the same policy, no change in circumstance, three years later it's assessing it at 90 hours.

MR DALE KC:

Yes. That's 25 words or less, that's right.

WINKELMANN CJ:

I mean, this was an argument not made earlier, it's Justice Kós' point. I mean, it has been traversed today, I'm not saying, and yesterday, but...

MR DALE KC:

Yes, yes. But that's it in a nutshell. So, it seems to me that this is as far as I need to take it.

WINKELMANN CJ:

Thank you.

MR DALE KC:

Unless I can assist you further.

WINKELMANN CJ:

Mr Meys, do you have anything to say?

MR MEYS:

Nothing, thank you.

WINKELMANN CJ:

Thank you.

MS MCKECHNIE:

Ma'am, with your leave, in light of the new argument being made, advanced by Mr Dale, can I make one short submission in relation to the 2021 document please?

WINKELMANN CJ:

So, this is in relation to the new assessment?

MS MCKECHNIE:

Yes Ma'am.

WINKELMANN CJ:

Yes, certainly, Ms McKechnie.

MS MCKECHNIE:

Ma'am, I just want to note that that was evidence, updating evidence provided to the Court of Appeal, so it was not the subject of cross-examination, it was not pleaded, and the argument being advanced here, as a result, was not tested in the Employment Court. That document was admitted by the Court of Appeal as updating evidence as to the current situation of care being provided, rather than being a material element of an argument being advanced in the Employment Court.

1610

KÓS J:

Well, it would have to be, wouldn't it, because the hearing in the Employment Court took place in December 2020?

MS MCKECHNIE:

Of the date, Sir, yes. Yes, Sir, indeed. Thank you.

MR DALE KC:

There's a couple of points that my learned friend, Mr Jeffries, in particular wanted me to address with you. One was to remind the Court that the exceptional circumstances issue has been reserved until later and just you recall there was an exchange with the Court on that issue.

The second point was the SLP payment to which reference was made. I just point out to the Court that that is about $7 an hour, so I think it speaks for itself.

Part 4A, as I've said, was confined to discrimination issues and doesn't affect employment rights.

HCSS, PC and personal care and household management, they're subsets. In fact, Part 4A is more specifically aimed at DSS. The distinction probably doesn't matter that much but Part 4A doesn't preclude the claim being pursued, and under employment law in particular the narrow definitions, they simply don't fit with the work that's been done. It just doesn't make any sense.

WINKELMANN CJ:
I think we've got that one.

MR DALE KC:
Yes, I think it's…

I wanted, by the way, to reserve the question on costs. We're legally aided, as you may know. We have a difficulty with legal aid in the sense that in the Court of Appeal decision they're now asking for the legal aid payments to be made by Ms Fleming. We don't understand quite how that works, given the legal aid was granted, but I just want to reserve the right to file memorandum on that issue should the appeal succeed.

WINKELMANN CJ:
Right, thank you.

MR DALE KC:
Ordinarily, the Court wouldn't make any orders and the Crown are not seeking any costs but there is a problem for Ms Fleming arising out of the Court of Appeal decision which we are currently negotiating.

WINKELMANN CJ:
All right.

MR DALE KC:
So unless I can assist you further, Ma'am.

WINKELMANN CJ:

Thank you very much, Mr Dale. Thank you. That's everybody, isn't it, yes? Thank you, counsel, for your very helpful submissions and we reserve our decision.

COURT ADJOURNS: 4.13 PM