-

IN THE COURT OF APPEAL OF NEW ZEALAND

CA169/2015
[2016] NZCA 369

BETWEEN	DIRECTOR-GENERAL OF HEALTH, MINISTRY OF HEALTH First Appellant	
	CHIEF EXECUTIVE, CAPITAL AND COAST DISTRICT HEALTH BOARD Second Appellant	
AND	JANET ELSIE LOWE Respondent	

Hearing:	23 June 2016
Court:	Harrison, Wild and French JJ
Counsel:	J C Holden and M J R Conway for Appellants P Cranney and A McInally for Respondent
Judgment:	1 August 2016 at 3.30 pm

JUDGMENT OF THE COURT

A **We answer the question of law submitted for determination by this Court:**

> **"Was the respondent a 'homeworker', as that term is defined by s 5 of the Employment Relations Act 2000, and therefore an employee of the first and second appellants, when she undertook support care pursuant to the Carer Support Scheme?"**

No.

B **The appeal is allowed and the decision of the Employment Court quashed.**

C Costs are to lie where they fall.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Under the Employment Relations Act 2000 (the Act), the term "employee" includes a "homeworker",[1] as defined by s 5. Section 5 states:

> **homeworker—**
>
> (a) means a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
>
> (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.

[2] The question for determination in this appeal is whether the respondent, Ms Lowe, comes within this definition when undertaking relief care pursuant to a government programme known as the Carer Support Scheme. A Full Court of the Employment Court held Ms Lowe was a homeworker within the meaning of s 5 and so deemed to be an employee to whom obligations were owed under the Act and under other employee protection legislation, such as the Minimum Wage Act 1983 and the Holidays Act 2003.[2]

[3] The Ministry of Health (the Ministry) and the Capital and Coast District Health Board (the DHB), both of which fund the Carer Support Scheme, now appeal the decision.

Factual background

[4] The purpose of the Carer Support Scheme is to provide respite to persons who provide unpaid full time care to a person with a disability. Typically, the full

---

1 Employment Relations Act 2000, s 6(1)(b)(i).

2 *Lowe v Director-General of Health, Ministry of Health* [2015] NZEmpC 24.

time carer is a member of the disabled person's family who is willing to provide a level of care that enables the disabled person to continue living in their own home. The Carer Support Scheme aims to give the full time carer a break from full time care by assisting with the cost of a relief carer for a specified number of days per year based on a needs assessment.

[5] Eligibility for carer support is assessed by a Needs Assessment Co-ordination Organisation. It decides whether the disabled person is eligible for carer support, whether carer support is an appropriate support option for the disabled person and the full time carer, and also decides the extent of the eligibility in terms of number of days per year. The Needs Assessment Co-Ordination Organisation then informs the disabled person and the full time carer about their carer support allocation and how the system works. It also informs the Ministry how many days per year it has allocated to the full time carer for support.

[6] Once the Ministry receives the notification, it forwards a carer support claim form to the full time carer. Funding is only available for the cost of a relief carer who is over 16 years' old, who is not a legal guardian, parent, spouse or partner of the disabled person and who does not live at the same address as the disabled person. Subject to those limits, the full time carer is then free to select a relief carer of their choice. After the relief care has been provided, the full time carer and the relief carer complete and sign the claim form for payment. The claim form must record the date(s) on which the relief care was provided and must state whether payment is to be made to the full time carer or the relief carer.

[7] The claim form does not require the relief carer and full time carer to specify what work has been done. All that is required is confirmation the relief carer assisted the full time carer to take a break for the amount of time claimed.

[8] Payment of carer support is through Sector Operations, a shared payment agency that administers payment on behalf of the Ministry and all District Health Boards. Generally, if the disabled person is under 65 years of age, the payment is funded by the Ministry and if over 65 years by the relevant District Health Board.

[9] Over a number of years, the respondent, Ms Lowe, has provided intermittent relief care for at least three different families under the auspices of the Carer Support Scheme. Payment was made directly to Ms Lowe in some instances. In others the full time carer was paid and then paid Ms Lowe. No tax was deducted from the payments.

[10] Ms Lowe did not have any contact with the Ministry or the DHB or Sector Operations, other than occasions when she contacted the Ministry over delay in receiving payment. She did not receive any training from either of the appellants and they did not monitor her performance.

The history of the proceedings

Employment Relations Authority

[11] In 2013 Ms Lowe issued proceedings in the Employment Relations Authority seeking a determination that she was engaged as a homeworker by "either the Ministry of Health or Capital and Coast District Health Board, either on their own behalf or in combination with other persons". The Employment Relations Authority did not accept that contention. It held Ms Lowe did not come within the definition of homeworker.[3]

Employment Court

[12] Ms Lowe then filed proceedings in the Employment Court challenging the Authority's determination and seeking arrears of wages under the Minimum Wage Act and the Holidays Act against the appellants. It was and is common ground that if Ms Lowe is a homeworker, she would be entitled to the rights accorded employees under the Act as well as other employment legislation such as the Minimum Wage Act and the Holidays Act.

[13] The Chief Judge of the Employment Court directed that the challenge raised significant issues and should be considered by a Full Court.[4]

---

3 *Lowe v Director-General of Health, Ministry of Health* [2014] NZERA Wellington 24.
4 *Lowe v Director-General of Health, Ministry of Health* EmpC WRC 11/14, 3 July 2014.

[14] The Full Court took a different view to the Employment Relations Authority. The Court concluded that "having regard to these factors", the substance of the arrangement was one of "engagement" within the meaning of s 5 of the Act.[5] It is not entirely clear what factors the Court was relying upon. However, we have proceeded on the assumption that it is all the matters referred to in the two paragraphs immediately preceding the Court's finding of engagement. Those matters are:

- To discharge their statutory responsibilities, the Ministry or the DHB offered to pay carer support workers on certain terms and conditions.
- The work would be of a particular kind — as defined by the needs assessment.
- The work was in fact performed in a dwellinghouse.
- Once the Ministry was assured the work had been undertaken the worker was paid.
- Ms Lowe made a living in material part from the provision of homecare.

[15] It is a noteworthy feature of the decision that the Court reserved the issue of remedies and did not expressly identify who had engaged Ms Lowe, only that she was engaged.[6] The definition of homeworker does, however, contain criteria that must be satisfied relating to the person doing the engaging. The Court also did not address why, if there was an engagement, it could not be by the full time carer in their own right or possibly as agent for the appellants. An agency analysis was advanced at the hearing in the Employment Court by an intervener.[7]

---

5 *Lowe v Director-General of Health, Ministry of Health*, above n 2, at [55].

6 At [60].

7 Carers New Zealand Trust was granted intervener status by Chief Judge Colgan in the Employment Court: *Lowe v Director-General of Health, Ministry of Health* EmpC WRC 11/14, 7 August 2014. The Trust is an entity with wide connections in the carer sector.

[16] We have assumed the Employment Court must be taken as having implicitly found the engagement was by either or both of the two appellants without any question of agency.

Leave to appeal to this Court

[17] Dissatisfied with the outcome of the Employment Court decision, the Ministry and the DHB sought and were granted leave to appeal to this Court under s 214 of the Act on the following question of law:[8]

> Was the respondent a 'homeworker', as that term is defined by s 5 of the Employment Relations Act 2000, and therefore an employee of the first and/or second appellants, when she undertook support care pursuant to the Carer Support Scheme?

Analysis

[18] For convenience we again set out the statutory definition of "homeworker":

> (a) means a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
>
> (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.

[19] It was common ground that Ms Lowe was neither employed not contracted by the appellants. It follows the answer to the question of law can only be "yes" if:

(a) Ms Lowe was engaged by the appellants;

(b) in the course of the appellants' trade or business;

(c) to do work for the appellants;

(d) in a dwellinghouse.

---

8 *Director-General of Health v Lowe* [2015] NZCA 226.

[20] The statutory definition of homeworker had its genesis in s 2 of the Labour Relations Act 1987. Counsel for the appellants, Ms Holden, submitted the primary reason for the inclusion of a homeworker definition was because of a perceived need to protect machinists in the clothing industry working at home on piece rates. However, it is clear from the relevant Green Paper that the purpose of including the homeworker definition was wider than that.[9] Its purpose was to prevent exploitation of vulnerable workers working at home. It was not limited to any particular category of worker.

[21] This was confirmed by this Court in *Cashman v Central Regional Health Authority,*[10] a decision relied on heavily by the Employment Court in the present case. In *Cashman* the definition of homeworker was held to include homecare workers who had signed contracts ostensibly as independent contractors. This Court held that, although the position of the homecare workers was quite different from outworkers engaged in piecework, they were similarly vulnerable and susceptible to manipulation if allowed to be treated as independent contractors.[11]

[22] It follows we agree the mere fact Ms Lowe is engaged in relief care rather than piecework cannot of itself exclude her from the definition of homeworker. We also accept the inclusion of homeworkers as employees was intended to extend the definition of employee to relationships that would not qualify as a contract of service. We accept too, on the authority of *Cashman*, that the fact carer support is connected to the appellants' statutory functions is sufficient to satisfy the requirements of the s 5 definition that the work be done in the course of a trade or business and "for" the appellants.[12] But that, of course, does not obviate the need to establish an engagement.

[23] Counsel for Ms Lowe, Mr Cranney, told us there are approximately 27,000 relief carers in New Zealand. He described them as a significant workforce without any employment rights who receive inadequate recompense for the work they do.

---

9 Labour Government *Industrial Relations: A Framework for Review* (Ministry of Labour, 17 December 1985) at 87.

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

11 At 13.

12 At 10.

Mr Cranney submitted this case was indistinguishable from *Cashman* and that because relief carers like Ms Lowe are vulnerable like the plaintiffs in *Cashman* they too should be held to come within the definition of homeworkers.

[24] We do not accept that submission, which, in our view, would require the Court to abdicate its function of statutory interpretation and ignore the text of s 5. The word "engage" is a word of action. Its ordinary and natural meaning involves concepts of "securing" something, "involving intensely", and "participating".[13] In the context of engaging someone to do work, we consider the word "engage" in its natural and ordinary meaning requires that the person doing the engaging take an active role in both the selection and oversight or control of the work of the particular individual whose status is at issue. There must be a relationship. Parliament cannot have intended otherwise.

[25] We also do not agree this case is indistinguishable from *Cashman*. Indeed, in our view, correctly analysed *Cashman* was a very different case and the Employment Court placed undue reliance on it. In *Cashman* the plaintiffs were carers who provided home care services under written contracts they had with a regional health authority and later a limited liability company connected to the regional health authority (the defendants). It was the defendants who arranged for the carers to provide the services. The carers did not directly approach the person in need of care and offer their services. Instead, carers were referred to persons in need of care by the defendants. The contracts between the carers specified the services to be provided and how they were to be provided. There was even an express contractual provision about training of carers.

[26] On the facts of this case, neither the Ministry nor the DHB has any role in selecting the relief carer and until the claim form is submitted do not even know their identity. Nor do they have any involvement in arranging the timing, nature or extent of the support to be provided or where it is to be provided. Those matters are within the sole discretion of the full time carer, who makes all the arrangements. The full time carer would be free, for example, to select an organisation such as a rest home

---

[13] *Collins English Dictionary* (HarperCollins Publishers, Glasgow, 10th ed, 2009) at 548; Graeme Kennedy and Tony Deverson (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008) at 355.

provider rather than an individual like Ms Lowe. It would also be open to the full time carer to engage the relief carer for longer periods than those funded by the appellants. Similarly, it is the full time carer's decision whether to use the relief carer's services again. A full time carer can change or use different relief carers without any reference to the appellants. The relief carer has no relationship with the appellants prior to or while carrying out the work. Yet, if the Employment Court were correct, Ms Lowe would potentially have the right, for example, to bring a personal grievance claim against the appellants.

[27] Contrary to the view of the Employment Court, we consider the Carer Support Scheme can fairly be described in substance as a subsidy. It is so described in the Ministry's documentation. The Employment Court found the claim forms and invoices did not include the word "subsidy",[14] but that is factually incorrect.

[28] In our view, in all the circumstances of this case, if Ms Lowe is engaged by anyone it must be the full time carer. That would not bring Ms Lowe within the definition of homeworker because the full time carer would not have engaged her in the course of a trade or business.

[29] We have considered whether the full time carer could be the agent of the appellants, an argument advanced by an intervener in the Employment Court and adopted in this Court by Mr Cranney. However, the degree of autonomy enjoyed by the full time carer is inconsistent with the existence of any agency.

[30] The Employment Court appears to have been influenced by the fact Ms Lowe has been undertaking relief care for a long period of time. However, as Mr Cranney accepted on appeal, in the context of the facts in this case either Ms Lowe was engaged within the meaning of s 5 on the first occasion she provided relief care or not at all. To hold otherwise is problematic as a matter of principle and would create uncertainty. Although there have been changes to the Carer Support Scheme from time to time, it has remained substantially the same throughout.

---

[14] *Lowe v Director-General of Health, Ministry of Health*, above n 2, at [20].

[31] In our assessment, the only basis on which it could be held in this case that the Ministry and the DHB engaged Ms Lowe is if subsidising the cost of the work is sufficient to constitute engagement. We acknowledge that, in the context of an employment protection measure, words should be given a broad meaning and regard had to international instruments.[15] But to hold that third party funding amounts to engagement would be to stray so far from the natural and ordinary meaning of the word "engage" as to ignore it.

[32] Mr Cranney conceded funding alone was not sufficient, but submitted the appellants did much more than just provide funding. He relied on the fact the needs of the disabled person are assessed by a Crown agency and that it is the Crown that promulgates carer support guidelines. Mr Cranney also drew our attention to the standard terms and conditions contained on the claim form.

[33] We do not consider any of those matters, whether viewed individually or collectively, take the case beyond mere funding into the category of an engagement under the Act.

[34] The relevant purpose of the needs assessment is simply to assess the full time carer's eligibility for the subsidy. In other words, it is an integral part of the funding.

[35] Similarly, the standard terms and conditions on the back of the claim form are essentially about the mechanics of claiming and receiving the subsidy. They regulate, for example, the timeframes for lodging claims and the timeframes within which the Ministry will pay on receipt of a correctly completed form. Liability for income tax and GST is expressly stated to be the responsibility of the relief carer. We acknowledge the existence of a term that the Ministry may order random audit checks. But the audits are primarily designed to avoid false claims and to ensure the money is being used for the funded purpose, which again must be an integral part of any public subsidy scheme.

---

[15] See for example: Convention Concerning Decent Work for Domestic Workers ILO 189 (adopted 16 June 2011, entered into force 5 September 2013).

[36] As mentioned, Mr Cranney relied on Ministry-promulgated carer support guidelines (the guidelines). The standard terms and conditions on the claim form refer to the guidelines and state that a copy is available on request. The guidelines themselves are not, however, addressed to the relief carer. They are an internal Ministry document for service co-ordinators. The front cover of the guidelines expressly states that. The guidelines consist of an exposition of the Carer Support Scheme. They do not contain any provision that supports Mr Cranney's argument other than one sentence that states carer support services "will be delivered" in a culturally sensitive way. We do not accept this one sentence is capable of constituting sufficient control so as to amount to an engagement. We note too another statement in the guidelines that expressly states:

> The disabled person and/or their full-time carers have the choice over who provides informal Carer Support services and so are responsible for the type and quality of support received.

[37] We conclude Ms Lowe was not engaged by the appellants within the meaning of s 5 of the Act. In light of this conclusion, it is not necessary for us to address a further argument raised by the appellants, namely that under the Carer Support Scheme there was no express or implied requirement the work be carried out in a dwellinghouse. Suffice it to say we consider the point distinctly arguable. As Mr Cranney conceded, the Carer Support Scheme does contemplate the possibility of work being undertaken at a place other than a dwellinghouse. There was evidence, for example, that the relief carers would be free to take the disabled person on outings, assuming they were well enough.

Outcome

[38] Our answer to the question of law for determination is "no". It follows that the appeal is allowed and the decision of the Employment Court quashed.

[39] As regards costs, the parties agreed that, this being in the nature of a test case, there should be no award of costs regardless of outcome. Costs are therefore to lie where they fall.

Solicitors:
Crown Law Office, Wellington for Appellants
Oakley Moran, Wellington for Respondent