ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF PLAINTIFF AND OTHER PERSONS

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 123
EMPC 28/2022

IN THE MATTER OF	an application for a declaration pursuant to s 6(5) of the Employment Relations Act 2000
BETWEEN	CSN Plaintiff
AND	ROYAL DISTRICT NURSING SERVICE NEW ZEALAND LIMITED Defendant

Hearing:	10 and 17 May 2022 (Heard at Wellington via Virtual Meeting Room)
Appearances:	A Fechney, advocate for the plaintiff A F Drake and R Judd, counsel for the defendant
Judgment:	11 July 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] CSN worked as an employee of Royal District Nursing Service New Zealand Ltd (RDNS), providing paid care for her son (DSO) who had suffered a serious brain injury in a 2010 car accident.

[2] CSN was paid by RDNS under an Accident Compensation Corporation (ACC) funded subcontract, to provide a substantial number of hours of care, along with her

brother (GWA). CSN and her son live at CSN's own home. She says the only people in their bubble are other family members: her parents, her brother, and his wife.

[3] During November 2021, RDNS concluded CSN fell within the definition of "care and support worker" under the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Vaccinations Order).[1] It took the position it was unable to continue employing CSN if she was not vaccinated.

[4] Since CSN chose not to be vaccinated for COVID-19, RDNS terminated her employment with effect from 23 November 2021.

[5] CSN says that from her perspective, nothing changed. She had to continue caring for DSO with whom she resides, but on an unpaid basis, which created significant financial pressure.

[6] CSN now seeks a declaration under s 6(5) of the Employment Relations Act 2000 (the Act) that she continued to have an employment relationship with RDNS, notwithstanding the purported termination of her employment. She says this continued until 27 April 2022, at which point RDNS no longer held any contractual obligations for the provision of care to DSO because it terminated its subcontract with the relevant ACC agent, Access Community Health Ltd (Access).

[7] RDNS's position is that the fixed-term individual employment agreement (IEA) with CSN was correctly terminated, and that there is no basis for concluding the employment relationship continued after the notice of termination was given. Thereafter, ACC carried the primary responsibility for providing for support of DSO by CSN.

[8] There are two issues which now fall for determination by the Court:

(a) Was CSN a care and support worker under the Vaccinations Order?

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1 Section 4 and sch 2.

(b) Did the employment relationship between the parties continue from 23 November 2021 to 27 April 2022?

The framework for the work performed by CSN

[9] DSO has cover under the Accident Compensation Act 2001 as a result of the accident he suffered in 2010.

[10] Since his care and support needs are significant and complex, he has comprehensive entitlements under that Act.

[11] ACC funds extensive care per week, as an aspect of its Integrated Home and Community Support Services (IHCS).

[12] In this case, ACC has an IHCS contract with Access as the lead provider. Access contracts to provide certain services via providers with whom it subcontracts. Those services are fully described in a detailed schedule of services attached to its contract with ACC.

[13] Access in turn entered into a subcontract with RDNS. As a result, that organisation was required to employ, or engage, nominated support workers, including family carers, so as to provide DSO with the entitlements as assessed under a service plan.

[14] RDNS entered into an IEA with CSN. It stated that employment would commence on 13 January 2020 and would end when the client no longer required support services from RDNS.

[15] It contained a provision entitled "Ending your employment relationship". That clause stated that the employee could terminate the agreement by giving one month's notice in writing; and that the employer could likewise terminate on one month's notice, as well as summarily at any time for serious misconduct, or if the person to whom the care was being delivered, or if their next-of-kin requested this. The provision specifically noted that CSN was employed as a nominated support worker specifically for DSO.

[16] The document stated that CSN would be employed with a guaranteed minimum of 60 hours worked per week.

[17] The balance of the agreement contained a full range of standard terms and conditions.

[18] Attached to the document was a position description, which described key relationships, key result areas, and competencies and qualifications. The main purpose of the position was to provide a "high quality service which maintains the highest dignity, respect and quality of life for people who access the service".

[19] At relevant times, DSO was the subject of funded hours of support as follows:

(a) *Support hours – standard*: this service was described as providing attendant care and home management; it relates to non-complex support hours, a term which is defined in the applicable guidelines. One hundred and eleven hours per week were funded on this basis.

(b) *Complex support hours:* This entitlement was also for attendant care and home management. In the applicable guidelines, the term was described as being purchased for clients who have exceptional medical support needs and/or behaviours of concern. One hour per week was funded on this basis.

(c) *Overnight care*: this is provided for clients who require overnight support. This was intended to provide support for DSO overnight. Seven eight-hour units were provided per week.

[20] Accordingly, 168 hours of support were funded.

[21] RDNS also supplied nursing services to DSO. This was provided under a separate contract with ACC. Those services were delivered by registered nurses.

[22] Until 23 November 2021, CSN undertook 87 funded hours per week, and GWA worked 25 funded hours per week. They also provided overnight care.

[23] On 26 November 2021, RDNS provided a letter to CSN confirming that cessation of her employment occurred on 23 November 2021, when verbal notice of termination had been given. No payment was made in lieu of notice. Following discussion with the Court, RDNS agreed that one month's notice should have been given. The Court was subsequently advised that in error CSN had not been paid in lieu of notice, and that RDNS was accordingly taking steps to rectify the oversight.

[24] In the termination letter, RDNS stated that the reason it was taking this step was because CSN had chosen not to be vaccinated under the Vaccinations Order. It said there were no redeployment options, so that the employment relationship needed to come to an end.

[25] At this stage, RDNS did not terminate its contractual commitment with Access to provide care services for DSO, a step it could have taken.

[26] It continued to fund work carried out by GWA for DSO, as the other nominated support worker.

[27] However, in April 2022, GWA declined to receive a booster dose of the COVID-19 vaccine – as required for care and support workers under an amendment to the Vaccinations Order which took effect on 23 January 2022 – so RDNS concluded it could no longer fund work carried out by him. It gave notice to ACC that it was ending its commitment in respect of DSO with effect from 27 April 2022.

Applicable COVID-19 legislative provisions

[28] The application requires consideration of the legislative enactments relevant to COVID-19 vaccinations.

[29] The starting point is the provisions of the COVID-19 Public Health Response Act 2020 (the COVID-19 Act).

[30] The purpose of the COVID-19 Act is to support a public health response to COVID-19 that, inter alia:[2]

- prevents, and limits the risk of, the outbreak or spread of COVID-19;
- avoids, mitigates or remedies the actual or potential adverse effects of the COVID-19 outbreak, whether direct or indirect;
- is co-ordinated, orderly and proportionate;
- allows social, economic, and other factors to be taken into account where it is relevant to do so; and
- has enforceable measures in addition to the relevant voluntary measures in public health and other guidance that support the response.

[31] Under s 9, the Minister for COVID-19 Response may make orders according to criteria set out in the section. Section 11 describes in detail the type of orders which the Minister may make. Section 12 describes general provisions relating to COVID-19 orders; for present purposes these include orders which:

- Impose different measures for different circumstances and different classes of persons or things.
- Apply generally to all persons in New Zealand or to any person or specified class of persons in New Zealand.

[32] The Vaccinations Order was originally promulgated on 28 April 2021. It came into force on 30 April 2021.

[33] There were many subsequent amendments. Relevant for the present application are amendments relating to care and support workers, which were

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2 Section 4.

originally introduced on 25 October 2021[3] and then amended late on 6 November 2021.[4]

[34] Before referring to the relevant definitions, it is necessary to refer to cl 3, which at the time of CSN's termination of employment, stated that the purpose of the Vaccinations Order was as follows:[5]

> The purpose of this order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring certain work to be carried out by affected persons who are vaccinated.[6]

[35] Several definitions in cl 4 need to be referred to.

[36] The first is "certain work", which is defined in cl 4 as follows:

> **certain work**, in relation to an affected person, means work that the affected person carries out (whether paid or unpaid) in respect of a group specified in Schedule 2
>
> …

[37] In the same clause, an "affected person" means "a person who belongs to a group (or whose work would cause them to belong to a group)" .

[38] Part 7 of sch 2 describes "groups" in relation to the health and disability sector. "Care and support workers" are included in that Part.[7]

[39] Returning to cl 4, the term "care and support worker" was defined this way in the version which took effect on 25 October 2021:[8]

> **care and support worker** means a person employed or engaged to carry out work that includes going to the home or place of residence of another person (not being the home or place of residence of a family member) to provide care and support services
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> …

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3 COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021.
4 COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order 2021.
5 As at 14 July 2021 and prior to the amendment of 23 January 2022.
6 As noted at para [27], the words "and have received a booster dose" were added with effect from 23 January 2022: COVID-19 Public Health Response (Vaccinations) Amendment Order 2022.
7 Part 7.4.
8 COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021, cl 4 [version one].

[40] This definition was amended soon after so that the version that became effective on 6 November 2021 provided:[9]

> **care and support worker** means a person employed or engaged to provide care and support services within a home or place of residence
>
> …

[41] A "home or place of residence" was defined in both versions as follows:

> **home or place of residence** includes a residential care facility, retirement village, and rest home
>
> …

[42] The concept of "care and support services" was defined in both versions as:[10]

> **care and support services** means services that are funded by the Ministry of Health, a DHB, or ACC and provided to a person for the purpose of–
>
> (a) assisting the person to continue to live in the person's home or in the community (such as personal care and household management services); or
>
> (b) providing mental health and addiction support services, or vocational and disability support services; or
>
> (c) if the person has a disability, assisting the person to work in the community; or
>
> (d) if the person has an injury covered by the Accident Compensation Act 2001, supporting the person's rehabilitation from the injury or supporting them to achieve and sustain their maximum level of participation in everyday life
>
> …

[43] At the time of CSN's termination of employment, the term "vaccinated" was defined in this way:

> **vaccinated**, in relation to an affected person, means the person has received all of the doses of a COVID-19 vaccine or combination of COVID-19 vaccines specified in the first column of the table in Schedule 3 administered

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9 COVID-19 Public Health Response (Required Testing and Vaccinations) Amendment Order 2021, cl 7(2) [version two].

10 COVID-19 Public Health Response (Vaccinations) Order 2021, cl 4 (first inserted with effect from 25 October 2021 by COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021, cl 4).

in accordance with the requirements specified for that vaccine or combination of vaccines in the second column of that table

…

[44] At the same time, sch 3 relevantly provided that both doses of Pfizer/BioNTech needed to be received before the person involved would become "an affected person", and thus be covered by the Vaccinations Order. Provision was also made for one dose being received before becoming an affected person and the second dose being received within 35 days after becoming an affected person.

[45] The various definitions came together in two relevant clauses. Clause 7 of the Vaccinations Order provided that an "affected person must not carry out certain work unless they are … vaccinated …". Clause 8 stated that "a relevant PCBU must not allow an affected person ... to carry out certain work unless satisfied that the affected person … is vaccinated …".

[46] A "relevant PCBU" is a PCBU within the meaning of s 17 of the Health and Safety at Work Act 2015 who employs or engages "an affected person" to carry out certain work: cl 4.

[47] The Vaccinations Order also provides for penalties where infringements of duties occur.

First issue: was CSN a care and support worker under the Vaccinations Order?

Submissions

[48] Ms Fechney, advocate for CSN, submitted in summary that the plaintiff was not covered by the definition of "care and support worker" which applied from late 6 November 2021.

[49] She argued that it could not have been intended that a care and support worker living in their own home and supporting a disabled person by providing care and support services would be covered by the definition, as that would not advance the

purpose of the Vaccinations Order; that is, inclusion of a worker such as CSN would not prevent or limit the risk or outbreak or spread of COVID-19.

[50] In a case such as the present, the caregiver has no option but to continue working by providing support. If regarded as being covered by the Vaccinations Order, such a caregiver could not be paid, or funded for the work. To conclude that the clause did cover a vulnerable homeworker in circumstances such as CSN would be absurd.

[51] Ms Fechney said that other interpretative tools supported a conclusion that such an outcome could not have been intended, including the context provided purpose provisions of the COVID-19 Act, and by the Convention on the Rights of Persons with Disabilities (the Convention).[11]

[52] Mr Drake, counsel for RDNS, focused on the history of the provision, noting that CSN had not been covered by the definition of "care and support worker" in version one of the Vaccinations Order, which contained an express exception – "not being the home or place of residence of a family member".[12] This exception was removed for a family member providing care in version two of the Vaccinations Order.[13] The modification brought about a substantial change. It resulted in CSN being captured by the requirements of the Vaccinations Order, and imposed liability on an employer for any breach.

Principles

[53] Until recently, s 5 of the Interpretation Act 1999 required courts to ascertain the meaning of legislation "from its text and in the light of its purpose". The classic statement of the Supreme Court in 2007 of the Court's approach to statutory interpretation in New Zealand, as spelt out in *Commerce Commission v Fonterra Co-operative Group Ltd*, was:[14]

> …

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11 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008). The Convention was ratified by New Zealand on 25 September 2008.

12 At [40].

13 At [41].

14 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36 [2007] 3 NZLR 767 at [22] (footnotes omitted).

> The meaning of an exactment must be ascertained from its text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[54] On 28 October 2021, most sections of the Legislation Act 2019 came into force with the Interpretation Act 1999 being repealed. Section 10(1) confirms the *Fonterra* approach. This new provision states that "the meaning of legislation must be ascertained from its text and in the light of its purpose and context".

[55] Ms Fechney argued that a rights-based conclusion should be adopted, under the New Zealand Bill of Rights Act 1990, placing weight on s 6 which states that:

> ...
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[56] She said that the applicable right was found in s 11, which confirms that everyone has the right to refuse to undergo any medical treatment.

[57] There are of course many cases where a rights-based analysis is necessary, but, as the Court of Appeal made clear in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*, a s 6 analysis only applies where on one interpretation of a provision, there is an inconsistency with a protected right or freedom.[15]

[58] In this case, then, it is in my view necessary to start with orthodox principles of interpretation under the Legislation Act 2019, and only turn to the New Zealand Bill of Rights Act if an inconsistency arises.

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[15] *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437, [2014] ERNZ 90 at [212].

Analysis

[59] Version one of the definition of "care and support worker", read alongside the definition of "home or place of residence", addressed the possibility of a person "going to" the home or place of another person, unless the home or place of residence was that of a family member. This meant that for a family member going to the home or residence of the person to be cared for, the Vaccinations Order did not apply.

[60] Version one did not refer to a person providing care and support services to a family member residing in the carer's own home or place of residence.

[61] Version two, enacted only a few days later, removed the reference relating to movement. It applied to any person providing care and support services in a home or place of residence. On the face of it, the definition appears to be broader and potentially included CSN.

[62] However, were this definition to apply to a care and support worker living with a disabled person such as CSN, the worker could, if not vaccinated, be unpaid for their services. This would be the case even though it would be foreseeable that such a worker might well have to continue performing their essential duties.

[63] I accept Ms Fechney's submission that, on the face of it an interpretation which leads to this result is absurd and cannot have been intended.

[64] The interpretative principle against the presumption of absurdity was discussed by the full Court in *Hixon v Campbell*.[16] In summary, if the consequence of an interpretation is absurd and unjust, a Court should not so interpret the relevant word or phrase. This principle has been approved by the Court of Appeal.[17] In such circumstances, it is appropriate to cross-check such an interpretation as part of the purposive approach to the interpretation of all statutes, as alluded to above.

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16 *Hixon v Campbell* [2014] NZEmpC 213, [2014] ERNZ 535 at [110]–[112].

17 *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA). See also *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [61].

[65] First, the history. I do not consider that too much weight can be placed on the first version. As already mentioned, it is not obvious that a person in CSN's circumstances was in fact covered under that version, since it related to a worker "going to" the home or place of residence of another person, not being at the home or place of residence of a family member. The original definition set up an oddity, in that it excluded a class of family members, those who travelled to work, but not another class where such a worker did not have to travel. The second version removed the concept of travelling to a home or place of residence, and thus the need to carve out family carers working at home. The question which then arises is whether it was thereby intended all family carers working at home would be covered.

[66] There is at least an inference that at the forefront of the Minister's consideration when promulgating the second version, was any entity described as a "residential care facility, retirement village and rest home" in the definition of "home or place of residence". In the first version, the definition would have caught workers travelling to such an institution, but not workers who resided in such an institution. The second version in effect addressed this problem.

[67] The definition of "home or place of residence", which did not change, made no reference to a domestic home or place of residence of a caregiver who was required to support a family member.

[68] I turn now to context. One of the defined objects of the Vaccinations Order was to prevent or limit the risk of the outbreak or spread of COVID-19. There was some debate at the hearing as to whether an expansive definition of care and support worker would promote that stated purpose.

[69] Mr Drake submitted that one of the reasons for the change to the definition was so that unvaccinated carers would then isolate themselves from the disabled person, or that the carer would be encouraged to be vaccinated. Ms Fechney in reply said these were not legitimate purposes; cl 3 of the Vaccinations Order made it clear, she said, that the provisions were intended to deal with the *transmission* of COVID-19. It is inherently unlikely that the intended purpose was to require such persons to isolate from a disabled person and possibly have to leave their own home, so as to restrain

the transmission of COVID-19; or that such a device was thought to be appropriate to encourage – or coerce – care and support workers to be vaccinated.

[70] I accept Ms Fechney's submission that interpreting the definition broadly, so it covered a caregiver engaged to provide support to a family member in their family home, does not align with the stated purpose of the Vaccinations Order. Such a broad approach could not have been intended. The purpose of the Vaccinations Order was to prevent and limit the risk of outbreak or spread of COVID-19.

[71] There are two other matters of context. The first relates to the purpose provisions of the COVID-19 Act, particularly those which indicate whether any public health response is "proportionate"; and allows "social, economic, and other factors to be taken into account where it is relevant to do so".[18] Care and support workers are often vulnerable economically, as discussed in many authorities.[19] Forcing such a person to maintain support for a disabled person, without receiving the payment to which they would otherwise have been entitled, would foreseeably exacerbate their vulnerability. In my view, these contextual realities are relevant to interpretation. An expansive interpretation of the definitions relating to care and support workers would not be proportionate, or take into account their economic circumstances.

[72] Secondly, there must be an acknowledgment of the Convention. As the Court of Appeal stated in *Terranova Homes*, it is now settled law that there is an interpretative presumption that Parliament does not intend to legislate contrary to New Zealand's international obligations.[20]

[73] There are a number of provisions of the Convention to which reference may be made. In the preamble, state parties acknowledged that:[21]

> ... the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with

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18 COVID-19 Public Health Response Act 2020, s 4(c) and 4(ca).

19 *Fleming v Attorney-General* [2021] NZEmpC 77, [2021] ERNZ 279 [*Fleming*]; *Humphreys v Humphreys* [2021] NZEmpC 217 [*Humphries*]; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 [*Atkinson*].

20 *Terranova Homes*, above n 14, at [227]; *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69 at [92]; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 298.

21 The Convention, above at para [51].

> disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities.

[74] Article 19 provides for living independently and being included in the community, which includes the right of all persons with disabilities to have an opportunity to choose their place of residence and where and with whom they live, having access to a range of "in-home, residential or other community support services, including personal assistance necessary to support living and inclusion in the community …".[22]

[75] Article 28 recognises that those with disabilities are entitled to an adequate standard of living "for themselves *and their families*".[23]

[76] The State is the primary duty-bearer under the Convention.[24]

[77] The extent of state duties, in light of the Convention, was discussed by the Court of Appeal in *Chamberlain v Minister of Health*.[25] After noting the relevance of the Convention to interpretation of a family care policy,[26] the Court of Appeal went on to conclude with regard to that particular policy:[27]

> …
>
> 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. …

[78] Thus, the Convention requires state parties to support not only a disabled person, but also their family carers. These considerations support an interpretation that does not cut across the clear obligations contained in the Convention.

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22 Article 19(a) and 19(b).
23 Article 28(1) (emphasis added).
24 *Fleming,* above n 19, at [36].
25 *Chamberlain v Minister of Health* [2018] 2 NZLR 771.
26 At [31]–[34].
27 At [82] (emphasis added).

[79] Mr Drake noted that there is no direct reference in the Accident Compensation Act 2001 to the Convention, but he accepted that ACC as an agent of the State had obligations to a covered claimant who was disabled, as articulated in that instrument.

[80] The Vaccinations Order went some way to acknowledging this, in the definition of "care and support services". As set out above, this includes a range of services as may be funded by the Ministry of Health, or a DHB, as well as ACC.[28] These are provided to a person not only for the purposes of supporting rehabilitation under the ACC legislation, so that the person may achieve and sustain their maximum level of participation in everyday life, but to also assist the person to continue to live in the person's home or in the community.

[81] Drawing these threads together, I consider that a broad interpretation of the definition cannot have been intended. The definition of "home or place of residence" does not refer to the domestic home or residence of a carer who resides with the person receiving care and support services, such as a family member. Express reference to such a home or place of residence would have been necessary if cover of such a worker was intended.

[82] To summarise, for three reasons I am satisfied that the definition of "care and support worker", must be read in light of the definition of "house or place of residence", a term which does not refer to care being administered in a caregiver's domestic home or place of residence.

[83] The first is that a broad interpretation of the definition would not be consistent with the purposes set out in cl 3 of the Vaccinations Order, nor with the broader statements of purpose discussed earlier in the COVID-19 Act.

[84] Second, a broad interpretation would result in an absurd outcome, which cannot have been intended since no express reference was made to a caregiver's own residence.

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[28] At [43].

[85] Third, to adopt a broad interpretation would thwart the obligations of the Convention, and for this reason cannot have been intended since no express reference was made to the fact of support being given in a caregiver's own home.

[86] Because I consider orthodox principles of interpretation leads to a clear conclusion, there is not an inconsistency with the right to refuse medical treatment under the New Zealand Bill of Rights Act, so that it is not necessary to analyse the position further under s 6 of that Act.

[87] It follows from this analysis that CSN was not a care and support worker under the Vaccinations Order.

Issue two: did CSN continue to be an employee?

Submissions

[88] Ms Fechney submitted that CSN had from early 2020 been engaged as a homeworker, employed by RDNS. She said there was no controversy that this was the position up until late November 2021. The real issue related to whether the employment relationship continued thereafter.

[89] With regard to the definition of homeworker, Ms Fechney submitted that CSN had been engaged, employed, or contracted by, RDNS. She undertook work for RDNS. The work was completed in a dwellinghouse. At all times there was, in reality, an employment relationship. Correctly interpreted, the Vaccinations Order was not a barrier to a finding that CSN was a homeworker.

[90] Mr Drake said that RDNS did not dispute that CSN had been an employee until the termination of her employment. However, were the Court to accept CSN's argument that she continued as a homeworker under the provisions of s 5 of the Act, then the key issue the Court would need to consider was who employed, engaged, or contracted her from late November 2021. RDNS was not that person. The ultimate responsibility for CSN providing care and support services for her disabled adult son lay with the State, whether through ACC or another mechanism.

[91] Mr Drake then referred to two judgments which he said provided the appropriate means of analysis. The first was *Fleming*, which found that a mother providing care and support services to her disabled son was a homeworker, entitled to a declaration under s 6 that she was an employee of the Minister of Health.[29]

[92] Mr Drake said the following passage from *Fleming*, as to the meaning of the term "engaged" as it appeared in the s 5 definition of homeworker, was appropriate:[30]

> [T]he meaning of "engage" for the purposes of s 5 is substantially affected by context. The relevant context is that Ms Fleming's selection as Justin's permanent carer arose from a confluence of circumstance. She had been his primary carer since he was born. From the time he became an adult, his health, well-being and ability to participate in the community became (from a legal perspective) the responsibility of the State.

[93] In that case, the Court went on to conclude on the evidence that the Minister should be regarded as having "engaged" Ms Fleming.[31]

[94] The second case to which reference was made was *Humphreys*, another decision of this Court.[32] Mr Humphreys, who provided care to his disabled 33-year-old daughter, sought a declaration that he was an employee of the Ministry of Health. Adopting a similar analysis, the Court accepted he had been engaged by the Ministry as a homeworker to provide care for his daughter.[33]

[95] Mr Drake argued that in light of these authorities, the following analysis was appropriate:

(a) ACC had statutory responsibilities for overseeing DSO's entitlements and allocating funding according to the legislative scheme.

(b) It knew that DSO required care, as was confirmed by evidence that an ACC recovery partner had been involved.

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29 *Fleming*, above n 19.
30 At [72] (footnotes omitted).
31 At [79]–[80].
32 *Humphreys,* above n 19.
33 At [47]–[48].

(c) ACC knew that CSN was undertaking the caregiving work which DSO required.

(d) ACC periodically checked in with CSN to make sure she was still undertaking caregiving work, that it was being done to an adequate standard, and that it provided support so that the work could continue.

(e) The work CSN was doing, and which ACC was aware of, allowed DSO to remain in the community. That circumstance was of benefit to ACC and was consistent with the meeting of its obligations.

[96] Mr Drake submitted in summary that applying these authorities, the person who "employed, engaged, or contracted" CSN must be the State in some shape or form. Put simply, RDNS was not the State, and could not be responsible for CSN as an employee, or deemed employee, after the employment relationship terminated on 23 November 2021.

Legal framework

[97] As Chief Judge Inglis noted in both *Fleming*[34] and *Humphreys*,[35] cases of this kind may require consideration of both the s 5 definition of "homeworker", as well as the ordinary definition of "employee" in s 6 where a range of relevant indicia may be considered. For the purposes of the present case, I will consider each.

Legal requirements of s 5

[98] Section 5 of the Act provides the following definition of "homeworker":

> **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
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> ...

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34 *Fleming*, above n 19, at [87].
35 *Humphreys*, above n 19, at [91].

[99] The leading authority as to the scope of "homeworker" is, *Lowe v Director-General of Health*.[36] Although the factual context of the case differs significantly from that of the present proceeding, the thorough analysis of the term by the Supreme Court is of assistance.

[100] The Supreme Court noted that the definition of homeworker was an extension of the concept of employment to include homeworkers so as to protect those who were vulnerable because they work remotely from each other and therefore cannot organise, and who may otherwise be subject to exploitation.[37]

[101] In the present case, the following questions arise when considering the s 5 definition:

(a) From November 2021 to April 2022, was CSN "engaged, employed, or contracted" by another person, and if so, who?

(b) Was CSN engaged in the course of the other person's trade or business?

(c) Was the engagement to do work?

(d) Did the work take place in a dwellinghouse?

[102] This case does not require consideration as to whether any relevant contractual relationship was that of a vendor/purchaser, a point arising under subsection (b) of the definition of homeworker; such an assertion was not raised in this case.

[103] In *Lowe*, the Supreme Court discussed each of these elements of the definition of "homeworker". In this case, however, the key issue relates to engagement. The remaining elements of the definition are not controversial.

[104] The majority of the Supreme Court in *Lowe* found "engaged" to be a flexible and ambiguous word, the meaning of which is substantially affected by context.[38] The majority made it clear that whether or not a worker has been "engaged" for the

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36 *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691, [2017] ERNZ 560.
37 At [34].
38 At [36].

purposes of the s 5 definition will be fact-specific, requiring an event to have occurred where a relationship is created between the hirer and the engaged person.[39]

Analysis as to s 5

[105] The starting point is common ground. CSN was undoubtedly "engaged, employed and contracted" by RDNS prior to the date on which notice of termination of her employment was given.

[106] RDNS's decision to terminate employment was, as already noted, based on the premise that CSN had chosen not to be vaccinated and was therefore caught by the Vaccinations Order.

[107] This was because RDNS considered her circumstances fell within the definition of "care and support worker" under that Order.

[108] However, given my earlier analysis of this term, I must conclude the conclusion reached by RDNS was erroneous. CSN was not a "care and support worker" as defined. In reality, her engagement should not have been terminated. There is no evidence to suggest her IEA would have been terminated for any other reason.

[109] The fact the termination was erroneous goes some way to concluding that CSN's engagement, in reality, continued. The notice of termination was defective and cannot be relied on to consider whether the engagement, employment or contract continued.

[110] CSN continued to work, that is, provide care-giving services for her son, just as she had previously, meeting the high standard spelt out in her job description. She had little choice. Her son's health may well have been disrupted if she had not done so.

[111] Moreover, she expected to be paid for that work by RDNS. She was not, which caused significant financial stress. The possibility of her discontinuing care of her son

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39 At [63].

so as to undertake paid employment elsewhere was not practical, or perhaps even feasible, in the circumstances.

[112] Furthermore, RDNS did not terminate its contractual obligations with Access, in respect of DSO, for several months.

[113] For so long as it remained financially responsible for DSO's paid support, CSN's engagement should have been regarded as a continuing obligation. But for the erroneous termination, that would have been acknowledged.

[114] I turn to the submission made for RDNS to the effect that ACC should be regarded as having "engaged" CSN in the period from November 2021 to April 2022.

[115] Although ACC had the ultimate statutory responsibility for overseeing DSO's entitlements, and knew that he required care, it also knew that the contractual relationship that its provider, Access, had with RDNS, remained on foot.

[116] ACC was well aware of the fact that RDNS was not providing DSO his full hours of care because of the issue concerning vaccination – the relevant ACC Recovery Partner discussed the circumstances with his family and with RDNS.

[117] It considered that the problems which arose were primarily a matter for the family and RDNS to work through.

[118] RDNS itself must be regarded as accepting it carried the responsibility for DSO's funded care, because it continued to work with CSN, to pay GWA, and chose not to end the contract to provide care and support services to DSO until late April 2022.

[119] In the circumstances, I am unable to conclude that ACC somehow became directly responsible for paying CSN for the work she was undertaking.

[120] A point was raised for RDNS to the effect that it had not received funds with which it could pay CSN. No doubt that was because RDNS made no claim for such payment in the circumstances as they were understood to be.

[121] There is no evidence to suggest that RDNS would not have been reimbursed had CSN's employment agreement not been terminated. That fact is demonstrated by the fact that GWA provided support to DSO after the date of termination, for which payment was made by RDNS as verified by his timesheets. There is no evidence to suggest RDNS was not then reimbursed.

[122] ACC's evidence was that it had not withheld funding for DSO's care at any stage and would not do so.

[123] I conclude that in reality CSN continued to be engaged by RDNS from late November 2021 to April 2022.

[124] The remaining criteria which arise under the s 5 definition, as set out earlier, are not controversial. Just as had been the case before the purported termination, RDNS was operating a trade or business; CSN undertook work as required under her IEA; and the work took place in a dwellinghouse.

Legal requirements of s 6

[125] I turn now to s 6 which relevantly states:

> **6 Meaning of employee**
>
> (1) In this Act, unless the context otherwise requires, employee—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> (b) includes—
>
> (i) a homeworker; or
>
> (ii) a person intending to work; but
>
> (c) excludes a volunteer who—
>
> (i) does not expect to be rewarded for work to be performed as a volunteer; and
>
> (ii) receives no reward for work performed as a volunteer; and
>
> (d) excludes, in relation to a film production, any of the following persons:
>
> (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:
>
> (ii) a person engaged in film production work in any other capacity.

(1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

…

[126] The principles that flow from s 6 are well known. The leading authority is *Bryson v Three Foot Six Ltd*, where emphasis was placed on the requirement to examine the real nature of the relationship.[40]

[127] In *Courage v The Attorney-General*, Chief Judge Inglis made a number of observations about s 6 in light of the guidance provided by the Supreme Court in *Bryson*,[41] and by the same court in the more recent case of *FMV v TSB*.[42]

[128] She noted that in *FMV* the Supreme Court had emphasised that a contractual approach may not be applied to an analysis of employment relationships.

[129] Then she went on to say:[43]

> So while s 6(1)(a) makes it clear that an employment relationship is founded on a contract of service, it is a relational contract involving a very different set of dynamics. *That means that a strict contractual focus on identifying the existence and nature of the contract, such as might be adopted in respect of arm's length business partners, is inapt*. Rather, the answer to the ultimate question emerges from a fact specific inquiry.

[130] After referring then to submissions received as to the discussion of s 6 in *Bryson*, she observed:[44]

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40 *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721, [2005] ERNZ 372 (SC).
41 *Courage v The Attorney-General* [2022] NZEmpC 77 at [134]–[139] and [153].
42 *FMV v TSB* [2021] NZSC 102, [2021] 1 NZLR 466 at [45]–[52].
43 At [133] (emphasis added).
44 Emphasis added.

> [137] *Bryson* confirmed that the proper focus of the inquiry is to review all relevant matters in order to discern the "real nature" of the relationship; exploration of that issue may or may not reveal a contract of service between the parties. While the Supreme Court judgment suggests that the written terms of the agreement (if there is one) should be examined first, there is no suggestion that this should ever be the end of the inquiry; "all relevant matters" should always be considered. And it is clear from both the statute and the case law that the *Court's attention (for the purposes of the s 6 inquiry) is to be properly focussed on the real nature of the relationship, not on establishing the terms or basis of the parties' agreement, or what one or the other or both parties might believe the relationship to be, or want it to be*.
>
> [138] A similar contractual argument to the one advanced by the Gloriavale defendants was rejected by the full Court in *Prasad v LSG Sky Chefs New Zealand Ltd*.[45] The proposition there was that the elements of contractual formation must be established prior to the Court embarking on the s 6 exercise. *The Court emphasised that s 6 drove the required analysis, not the common law on contractual formation*. Whether there was an employment relationship was not a question to be answered by contemplation of whether there was a contract and, if so, assessing what kind of contract that was. Such an approach was described as putting the cart before the horse.[46] Rather, the answer was to be ascertained by working backwards. The intention of the parties is clearly a factor, but it does not have any primacy. This was said to be consistent with the explanatory note to the Employment Relations Bill 2000, which made it clear that *the Employment Relations Act was designed to provide a better framework for employment relations, and to recognise that employment relationships were not simply contractual, economic exchanges*.[47]

[131] Another well-known observation which is relevant in the present case is that an "intensely factual" analysis may be necessary to the real nature of the relationship.[48]

[132] The observations are, in my view, apt in the present case.

Analysis under s 6

[133] As the citations just referred to emphasise, the required analysis of whether there is an employment relationship does not necessarily turn on a strict analysis of the contractual position. A broad fact-based inquiry is to be undertaken.

[134] As already discussed, the main point made for RDNS is that the employment relationship ended because notice of termination was given. It is argued that because ACC was the primary duty bearer under its legislation, it then became the employer.

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45 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835.
46 At [34].
47 Employment Relations Bill 2000 (8-1) (explanatory note) at 1.
48 *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 at [16]; *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61 at [3].

[135] The reality is different. To repeat: from 23 November 2021, CSN continued to care for her disabled son, providing for his substantial complex needs, as she had always done. It is clear from her evidence that her responsibilities were onerous, but as his mother, she considered no one else knew her son as she did, and she naturally had an ongoing responsibility to maintain his care. She met the required standards of her IEA.

[136] The legal position was that DSO had a statutory entitlement for paid support under the ACC legislation. Given the nature of his injuries, he had been assessed as needing the substantial support which hitherto CSN and GWA delivered.

[137] ACC had contracted the necessary provision of support to Access, who in turn, contracted with RDNS to provide paid support. None of that changed in November 2021.

[138] Notwithstanding the purported termination of her IEA, CSN continued to provide the care she had previously been paid to undertake.

[139] Given the infrastructure which ACC had established and given the fact that RDNS remained an integral part of the arrangements, CSN had a reasonable expectation of payment. But for the perception that CSN could no longer be legally employed since she was unvaccinated, it is most likely payment would have continued.

[140] As discussed earlier, ACC did not assume direct responsibility for DSO's care, and it should not be regarded as becoming the employer so long as RDNS was still in the picture.

[141] During the period in issue, RDNS attempted to introduce other carers to provide allocated care hours. However, CSN exercised her legal right as DSO's welfare guardian to decline this offer. It appears she took the view that she did not want to extend the bubble in which she and her son resided, with assistance from her brother, to further persons who might transmit COVID-19, whether or not they were vaccinated.

[142] As Ms Fechney put it, CSN considered that the safest means of maintaining DSO's health and safety, was to limit all his contacts. Given her understanding of the needs of her son, she cannot be criticised for taking this position.

[143] Moreover, the offer made by RDNS has to be understood in light of its erroneous understanding of the application of the Vaccinations Order.

[144] For so long as RDNS continued to carry responsibility for the provision of funding of the care and support services, its obligation to pay CSN as the nominated support worker also continued.

[145] In summary, all relevant indicia point to the fact that the employment relationship continued. CSN was working in accordance with the terms and conditions of her IEA. She reasonably expected to be paid by RDNS. But for its incorrect interpretation of the Vaccinations Order, it would most likely have done so. Having regard to these realities, I am satisfied that RDNS continued to be CSN's employer.

Result

[146] I conclude that whether analysed under s 5, or under s 6 of the Act, CSN remained in an employment relationship with RDNS between 23 November 2021 and 27 April 2022. There is a declaration accordingly.

Non-publication

[147] Ms Fechney submitted that a permanent order of non-publication of the name of the plaintiff is appropriate. RDNS did not oppose the application.

[148] In developing her application, Ms Fechney submitted that in a case such as the present, the important principle of open justice did not require the disclosure of the plaintiff's identity. The facts needed to be transparent, and that would meet the requirements of open justice.

[149] She said that the matter is contentious, and one which could run a risk of public opprobrium if CSN's name were to be published. She pointed out that in a number of

cases of the present kind, litigants have been granted non-publication, both in the High Court,[49] and in this Court.[50]

[150] Finally, Ms Fechney argued that the observations in *JGD v MBC Ltd* were apt, where the Court stated that it does not sit comfortably within the legislative framework that a party may approach the Authority or Court for vindication of their employment rights, and at the same time, attract publicity which has a likelihood of inflicting further damage, either on an existing employment relationship, or one that creates a barrier to future employment.[51]

[151] I accept these submissions. I make a permanent order of non-publication of name and identifying details of the plaintiff, as well as her brother and son. Their names have been anonymised accordingly.

Costs

[152] I reserve costs. CSN is entitled to these. The parties should attempt to agree this issue in the first instance. If necessary, any application may be made within 21 days, with a response given within a like period thereafter.

B A Corkill
Judge

Judgment signed at 2.05 pm on 11 July 2022

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49 For example, *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [21]–[25].
50 For example, *VMR v Civil Aviation Authority* [2022] NZEmpC 5 at [291]–[299].
51 *JGD v MBC Ltd* [2020] NZEmpC 193, [2020] ERNZ 447.