IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 77
EMPC 340/2019

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
BETWEEN	CHRISTINE FLEMING Plaintiff
AND	THE ATTORNEY-GENERAL sued on behalf of THE HONOURABLE CARMEL SEPULONI in her capacity as THE MINISTER OF SOCIAL DEVELOPMENT and MINISTER FOR DISABILITY First Defendant
AND	THE ATTORNEY-GENERAL sued on behalf of THE HONOURABLE ANDREW LITTLE in his capacity as MINISTER OF HEALTH Second Defendant
AND	JUSTIN JAMES COOTE by his litigation guardian Luke Meys Third Defendant

Hearing:	14-18 December 2020 and 22-23 February 2021 (Heard at Auckland)
Appearances:	P Dale QC and M Jeffries, counsel for plaintiff S McKechnie, T Bremner and S Kuper, counsel for first and second defendants L Meys, counsel (litigation guardian) for third defendant P Cranney and A Kent, counsel for the New Zealand Council of Trade Unions as intervener J Hancock, E Vermunt and F Everard, counsel for the Human Rights Commission as intervener
Judgment:	26 May 2021

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Justin Cootes was born in 1981. He is severely mentally and physically disabled and has been since birth. He has a complex mix of disabilities and has been assessed as having "very high needs". Such is the extent of his disabilities that a litigation guardian was appointed to represent his interests in these proceedings.

[2] Ms Fleming is Justin's mother. She gave evidence (which was not challenged and which I accept) that her son cannot be left alone and requires supervision seven days a week, 365 days a year. Medical specialists have confirmed that his condition will not improve as he ages.

[3] Justin lives with Ms Fleming. She is his primary caregiver and has been for the last 40 years. Ms Fleming attends to his wide range of needs, including during the night for toileting; she washes and feeds him; she administers the range of medication he has been prescribed; she organises activities for him during the day and she monitors him for changes in his physical and psychological well-being. There is no dispute that, if Ms Fleming was unable or unwilling to do what she does, Justin would need to go into full time residential care.

[4] It is clear from the evidence that the Crown, through the Ministry of Health, has been aware of Justin's disability and the care provided to him by his mother for many years, and at least from the time he became an adult.

[5] The government provides a range of support, including financial support, for people in Justin's, and Ms Fleming's, position. The support mechanisms have varied over time. One of the support mechanisms, which was in place until late last year, was Family Funded Care. The Funded Family Care Operational policy sat alongside a Gazette Notice issued by the (then) Minister of Health which itself was made under the New Zealand Public Health and Disability Act 2000 (the Health and Disability

Act).[1] Under Funded Family Care, a person with high or very high needs could apply for funding to enable a family caregiver to provide care for them. A funding cap of 40 hours per week applied. A Crown witness, Mr Parkinson (a senior policy analyst with the Ministry of Health's Disability Directorate), explained that the cap reflected a recognition that 40 hours per week represented a "safe" level of work, both for the caregiver and the person they were providing care for.[2]

[6] Funded Family Care purported to impose an employment relationship on the family caregiver and the disabled person as a precondition of funding under that model. In Ms Fleming's case this would have resulted in her being the employee of her severely intellectually disabled son; and her severely intellectually disabled son would have been her employer. The Gazette Notice set out a (non-exhaustive) raft of employer obligations under the heading "Responsibilities of the disabled person", and the sub-heading "Complying with employment requirements." Justin would have been required to discharge each of these obligations, including "complying with all laws as an employer" (footnoted in the Notice to include "obligations such as those under the Employment Relations Act 2000, Health and Safety in Employment Act 1992, Holidays Act 2003, Wages Protection Act 1983, and all other laws relating to being an employer"); resolving any employment relationship problems; ensuring that his mother took appropriate annual leave and holidays; that she received the correct rate of pay (as well as any overtime); and that her health and safety was adequately protected.

[7] Ms Fleming was initially unaware of the ability to apply for funding under Funded Family Care until a disability advocate, Ms Carrigan, drew it to her attention in 2018. Ms Fleming filled out an application on behalf of her son and went through the required assessment process.

[8] The assessment process (Needs Assessment Service Co-ordination (NASC)) is undertaken by an agent of the Ministry of Health, applying guidelines developed by the Ministry. The Taikura Trust is an approved agent and carried out a NASC assessment in relation to Justin for the purposes of the application in 2018, although

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1 New Zealand Public Health and Disability Act 2000, s 88.
2 See also Ministry of Health *Funded Family Care Operational Policy* (2016) at 3.

several NASC assessments had already been completed by that time. Justin was assessed by NASC as needing 24 hour supervision for his safety and well-being. Ms Hawea, the Chief Executive of the Trust, agreed in cross-examination that this was a clear statement about what was required if someone was going to care for Justin.

[9] Once a NASC assessment has been completed, a host provider becomes involved. The host is responsible for providing information to the disabled person, including advice about setting up the arrangement, which includes preparation of an individual service plan. The plan sets out each of the tasks associated with the disabled person's disability in relation to needs. The plan, once approved, triggers payment by the Ministry of Health to the disabled person.

[10] Hosts are agents of, and receive funding from, the Ministry of Health.[3] They are expected to apply Ministry of Health guidelines and policies. Funded Advisory Support Services Limited (FASS) is a subsidiary of Manawanui, which is an approved host. FASS would have been the host in relation to Justin's care, but Ms Fleming decided not to proceed.

[11] While the 2018 NASC assessment had recognised that Justin required 24 hour supervision, the level of funding that was alighted on in relation to Justin's care was initially 15 hours per week, later reviewed to 15.5 hours and later reviewed again to 22 hours per week. As the completed form (Funded Family Care Support Allocation Template) makes clear, the allocation focussed on two sets of tasks, and the assessed time required for each: personal care tasks and household management tasks. What the template does not do is capture the nature and degree of supervision identified in the NASC assessment for Justin. The template document post-dated the Court of Appeal's judgment in *Chamberlain*,[4] a point I return to later.

[12] Ms Hawea explained the allocation tool and its relationship to the NASC assessment in cross-examination by Mr Dale QC, counsel for Ms Fleming:

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3 See "The Funded Family Care Notice 2013" (26 September 2013) 131 *New Zealand Gazette* 3670 at [11].

4 *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771.

Q. …Justin requires 24/7 supervision for his safety and wellbeing. So, that's obviously, isn't it, a clear enough statement about what is required if someone is going to care for Justin?

A. I'm agree with that.

…

Q. – but the outcome [of the allocation tool] is two hours a day for a man that needs full-time attention. That's absurd, isn't it?

A. Well if you're applying supervision to the 24/7, then I can see how those things don't compute but this tool relates to personal care and household management.

…

Q. By the time Ms Fleming gets out of bed at 8 o'clock to look after her son, a full-time occupation, by a quarter past 10, she's doing it on an unpaid basis, isn't she?

A. If she was calculating the hours in that way, yes.

Q. You are giving her by your allocation two and a bit hours a day for someone that needs 24/7 care and most of it, your organisation is saying she has to provide for nothing?

A. But Mr Dale, he doesn't require 24 – personal care and household management for 24 hours of the day.

Q. Well your form suggests otherwise, doesn't it?

A. I don't understand.

Q. It says he needs 24/7 care?

A. I disagree, I believe it says he needs supervision 24 hours, seven days a week.

Q. What interest do you have in defending this position? Because I suggest to you it is utterly unrealistic?

A. Well, I disagree. The nature of the NASC role is to balance the meeting of people's disability support needs with the reasonable allocation of public funds. That isn't going – that's not an easy task to balance and people do find the way that happens at times at odds with what individuals believe that should be, how that should be conducted.

…

Q. You apply a policy that confines the available Funded Family Care to family members because the Ministry of Health wants you to for fiscal and policy reasons?

> A. I acknowledge that fiscal considerations are definitely part of the NASC role. They're not the only consideration. They also, we also have to balance people's needs and the Ministry provides guidelines and tools for us to do that.
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> Q. I'm betting when I read your contract with the Ministry of Health, it provides that you are obliged to apply Ministry of Health guidelines and policies. Would that be right?
>
> A. We are, yes we are.
>
> Q. And one of them is the narrow definition of "personal care and household management"?
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> A. One of those are the guidelines and policies yes, for allocating personal care and household management.

[13] As I have said, Ms Fleming did not complete the application process. Accepting 22 hours of funding would have been less than the amount she was receiving on a benefit provided by the Ministry of Social Development. Her experience of stand-down times with benefit applications, and the lack of certainty in relation to ongoing NASC assessments if she and Justin went down the Funded Family Care route, meant that she was reluctant to proceed further. In a nutshell, she would have been worse off financially and in an uncertain state if the funding levels changed over time. However, she gave evidence that she would have proceeded with the application process if 40 hours of funding had been provided, despite considering that the requirement under the Policy that she be Justin's employee was "nonsense".

[14] Mr Wysocki, Manager of the Office of the Deputy Director-General within the Disability Directorate, and the most senior representative from the Ministry of Health who appeared to give evidence in these proceedings, described the employer model imposed under the Gazette Notice as "genuine" and explained that conferring employer status on someone in Justin's position was seen by the Ministry to be consistent with upholding his personal autonomy, human rights and dignity. And another witness who gave evidence for the Crown suggested that a declaration that the Ministry of Health, rather than the disabled person, was the employer would contravene the Convention on the Rights of Persons with Disabilities (the Convention).

[15] I agree with the Human Rights Commission, which was granted leave to intervene and be heard, that there are difficulties with the Ministry's approach. It

remained unclear to me how imposing significant legal obligations on Justin, in order to secure funding for care provided by his mother, and which he was unable to discharge because of the nature and extent of his disabilities, is consistent with the laudable objectives identified by the Crown.

[16] Two things may be noted at this point. First, that it was candidly accepted by Mr Parkinson that:

> [t]he disabled person as employer was the most fiscally conservative option put to Cabinet. Simply put, Cabinet decided that the Ministry was not in a position to essentially take on 1600 new employees.

[17] Second, that a budget of $23m was allocated for Funded Family Care. By April 2015 the Ministry of Health reported a significant underspend - only 12 per cent of the 1600 eligible for funding had applied. It is apparent that many saw the imposition of an employment relationship as off-putting.[5]

[18] Late last year the government dispensed with the Family Funded Care model.

[19] Individualised Funding is another model which is in place, and has been for some time. Individualised Funding has been subject to ongoing reforms. The Individualised Funding model now provides a range of options, including that a disabled person assessed by NASC as having high or very high needs may employ a resident family member as a caregiver (again with a cap on 40 hours per week).

[20] Under the Individualised Funding model the Ministry of Health continues to sit at the apex with two of its agents sitting underneath - NASC and the Individualised Funding host. Hosts are contracted by the Ministry of Health to support people in using Individual Funding; the disabled person or their agent is responsible for all aspects of employment, including Accident Compensation levies, employment contracts, leave and tax requirements and Kiwisaver; budget management and the quality of the services provided. Payment is made by the Ministry of Health to the host who then on-pays to the family caregiver (employee) on the provision of time sheets.

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5 Judy Paulin, Sue Carswell and Nicolette Edgar *Evaluation of Family Funded Care* (Ministry of Health Disability Support Services, April 2015) [The Artemis Report] at 37-38.

[21] It is common ground that an application for funding could have been made under the Individualised Funding model in relation to Justin's care and that this could have been done under the employment model, with Justin employing his mother as his carer. There are two other alternatives under the model. The first is that Justin's agent could have employed a family caregiver. The difficulty with that is that Ms Fleming is Justin's agent and she could not employ herself. The second is that the Ministry's agent, Manawanui, could take on the role of employing Ms Fleming. Under either of these two scenarios, it is compulsory to purchase Employer Protection Insurance and the agent/client is required (under the service agreement) to ensure that all health and safety precautions relating to the provision of support are met.

[22] In the event, no application for Individualised Funding has been made by or on Justin's behalf. Evidence was given that enquiries were made of NASC in September 2020, relating to whether it would be worthwhile moving to Individualised Funding, and Ms Fleming decided that it would not be.

Outline of the respective cases

[23] I understood Ms Fleming's case to boil down to the following. Regardless of whether an application for funding had been advanced under either Funded Family Care or Individualised Funding, the reality was that she was an employee of the Ministry of Health; she had been working providing care for Justin for an extended period of time; the Crown was aware that she had been doing that work; the work was for the Crown's benefit; and she was entitled to be remunerated for it. It was further said that the Crown's actions were such that penalties ought to be imposed against it; and damages and compensation awarded, together with lost wages and benefits. In addition, a range of declarations are sought against both the Minister of Health and the Minister for Disability Issues. A particular focus of complaint was the Crown's alleged failure to substantively respond to the Court of Appeal's criticisms of its approach in *Chamberlain*.

[24] The Crown says that the Employment Court has no jurisdiction to enter into any inquiries as to the requirement for an employment relationship between the severely disabled person (as employer) and their family carer (as employee) under

Funded Family Care or Individualised Funding. In relation to Funded Family Care, that is because the imposition of an employment relationship was imposed via Gazette Notice issued by the then Minister of Health under s 88 of the Health and Disability Act. The Gazette Notice, and the requirements imposed under it, are off-limits to the Employment Court. Even if there is room for the Court to inquire into the nature of the relationship, there was no basis for finding that an employment relationship existed between the Ministry of Health and the family caregiver (assuming that a funding application had been advanced in this case). A similar argument was raised in relation to Individualised Funding which had, as one of a range of options available to Ms Fleming/Justin, the ability for them to enter into an employment relationship with one another.

[25] If the Crown is correct, the Court's exclusive jurisdiction conferred by s 6(5) of the Employment Relations Act 2000 (the Act) to determine whether a person is an employee having regard to the real (as opposed to described) nature of the relationship would be rendered nugatory.

Justin does not have capacity to employ his mother (or anyone else)

[26] I return to the detail of the parties', and interveners', respective arguments below. It is however convenient to note at this point that I do not accept that Justin could have entered into, or had imposed on him absent express statutory provision, a binding employment relationship with his mother.

[27] Severe disability is not the disqualifying factor to taking on employer status - mental capacity is. Counsel were unable to identify any authority for the proposition that a person who lacks mental capacity can enter into an enforceable employment relationship agreement. That is hardly surprising.

[28] Employment rights and obligations Parliament has put in place under a suite of minimum standards legislation are aimed at supporting effective employment relationships and protecting employees from both witting and unwitting abuse. A breach exposes an individual employer (Justin, on the Crown's case) to the imposition of penalties of up to $50,000 and recovery and compliance action, including by a

Labour Inspector,[6] and unlimited financial claims for breach of contract and personal grievances.[7] Defaulting employers may be imprisoned, fined and their property sequestered.[8] The short point is that with employer status comes weighty responsibilities which, if they are breached, can give rise to significant legal consequence. Such statutory obligations are supplemented by numerous common law requirements.

[29] The Ministry of Health's NASC Guidelines state that, if the disabled person lacks capacity to fully comprehend or fulfil all of their responsibilities under the Family Funded Care model, they must have a chosen advocate, welfare guardian or circle of support to "assist" them with fulfilling "their" responsibilities. The point was reiterated by the Crown in evidence, during which it was accepted by Mr Wysocki that the Ministry of Health had no expectation that Justin would actually exercise any of the obligations of employer; rather, he would need an agent or an advocate to represent him and support him in meeting them.

[30] The difficulty with this is that the employment relationship is personal in nature.[9] An employer can, and often does, obtain assistance in discharging some of its tasks, for example, payroll. Employers cannot, however, devolve their ultimate responsibility for discharging their obligations; nor can employees. If it were otherwise it would be a simple matter for both parties to pass the buck, and seek to take the benefits of the relationship while minimising exposure to legal risk. An employer could, for example, engage a company to discharge the payroll function and deny liability for a subsequent failure to pay; an employee could unilaterally substitute labour. Neither is permissible within the framework of an employment relationship. All of this is relevant to the Crown's submission that Justin could take on the role of employer via supported decision-making. The point is that the buck stops with the employer, Justin. It is Justin, not those providing support, who would be liable for penalties, damages, compensation, sequestration of property and imprisonment in the

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6 Employment Relations Act 2000, s 142G.
7 Employment Relations Act 2000, ss 123 and 162(a).
8 Employment Relations Act 2000, ss 140(6) and 142R.
9 *Rasch v Wellington City Council* [1994] 1 ERNZ 367 (EmpC) at 383, where it was held "Such contracts are not assignable; an employee without his or her fully informed consent cannot be put by one employer into the service of another. I have already explained that employment contracts are personal to the parties."

event that his obligations as an employer were not appropriately discharged. In any event, it appears that what would be required in Justin's case is not, as the Crown suggested, supported decision-making, but rather substituted decision-making. The latter was considered out of bounds by the United Nations Committee on the Rights of Persons with Disabilities.[10]

[31] In discussing the imposition of an employment relationship in the context of family care, little focus was placed by the Crown on the impact of such a relationship on the employee (family caregiver). In this regard it remained unclear how Ms Fleming's rights as an employee, including to have regular rest and meal breaks, annual and statutory holiday leave, and safe hours of work (40 hours per week having been identified as "safe" by Crown witnesses), were expected to be protected or how she might realistically pursue a personal grievance, breach of contract or minimum rights claim against her severely disabled son.

[32] I accept that the international obligations that have been entered into are relevant, but I do not accept that they lead to the end point that the Crown contends for in terms of imposing an employment relationship on someone in Justin's position in order to secure funding for his care.

[33] As the Court of Appeal pointed out in *Chamberlain*:[11]

> [31] New Zealand is party to the Convention on the Rights of Persons with Disabilities and its Optional Protocol. Our interpretation of all relevant legal and policy instruments must account for New Zealand's international obligations.

[34] The overriding purpose of the 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.[12] The State

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10 Committee on the Rights of Persons with Disabilities *General Comment No.1 – Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

11 *Chamberlain*, above n 4 (footnotes omitted).

12 Convention on the Rights of Persons with Disabilities 2525 UNTS 3 (signed 30 March 2007, entered into force 3 May 2008); Optional Protocol to the Convention on the Rights of Persons with Disabilities 2518 UNTS 283 (signed 30 March 2007, entered into force 3 May 2008).

maintains primary responsibility to ensure that the rights of disabled people are protected and upheld, and:[13]

> [t]he implementation of [disability support] schemes should not, however, result in States relinquishing their primary responsibility to ensure access to appropriate support for persons with disabilities. On the contrary, States have a significant role to play in its management and monitoring.

[35] The point about the State retaining, and maintaining, responsibility is reflected in the International Labour Organisation (ILO) report: *Care Work and Care Jobs: For the Future of Decent Work.*[14] The ILO noted that care policies should ensure that the State has the overall and primary responsibility and that:[15]

> This dimension [State retaining overall and primary responsibility] is grounded on the principle of care as a social good. The leading role of the State includes setting benefits and defining the quality of services (eligibility, level, entitlements, funding, delivery, monitoring and evaluation); effectively regulating the market; and acting as a statutory and core funding entity, as well as a direct provider and an employer of care workers in the public sector.

[36] In other words, the State is the primary duty bearer under the Convention. The Ministry of Health designs the policies, sets the funding limits and then requires the disabled person to agree to the funding mechanism before the funding is released. The Office of Disability Issues, under the Ministry for Social Development, also has responsibilities under the Convention, as Mr Coffey, Director of the Office of Disability Issues, accepted.

[37] I agree with counsel for the Human Rights Commission that the delivery of services through an agency structure and imposed relationships should not be taken to obviate the State's responsibilities to disabled persons, particularly those (like Justin) who lack mental capacity.

[38] I agree too with the submission advanced by the Human Rights Commission that the imposition of a one-size fits all approach via a compulsory employment relationship between the disabled person and their family carer will not always be

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13 Catalina Devandas Aguilar *Report of the Special Rapporteur on the rights of persons with disabilities* UN Doc A/HRC/34/58 (20 December 2016) at [56].

14 Laura Addati, Umberto Cattaneo, Valeria Esquivel and Isabel Valarino *Care Work and Care Jobs: For the Future of Decent Work* (International Labour Organisation 2018).

15 At 117.

compatible with the principles of the Convention. For some disabled persons, particularly those with high and complex needs, it may not align with their circumstances.

[39] Employment relationships are important. They are not to be viewed as a convenient device to shift liabilities away from the key players or to paint a distorted picture of reality. That is why Parliament has conferred on this Court the exclusive jurisdiction to determine, on a case by case basis, whether a particular individual is an employee and (if so) of whom, and made it clear that the answer to that question emerges from a fact specific inquiry, rather than (for example) the way in which the relationship may have been characterised.

[40] There are many severely disabled people who are perfectly capable of undertaking the role of employer. Justin is plainly not one of them. He does not have capacity to understand or discharge the most basic obligations he would be required to shoulder as an employer, and as set out in the Gazette Notice.[16] The reality of Justin's level of capacity is reflected in the fact that a litigation guardian was appointed to act in his interests in these proceedings.[17]

[41] The end point that the Crown wishes to arrive at requires a leap of legal logic and common sense that I find myself unable to make.

[42] I also note a further point made by the Human Rights Commission in respect of effective participation by disabled persons in the delivery of services. This, as the Commission pointed out, required policies to be accessible. Ms Carrigan is an independent disability advocate with a long history of working with disabled persons and their families. She is plainly highly intelligent and knowledgeable but gave evidence (which I accept) that she had difficulty making her way through the system that had been created to support the people she works with. Much the same point was

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16 See *Chamberlain*, above n 4, at [48] noting the Crown's agreement that "many persons with disabilities are so impaired that they do not have the necessary capacity in law to employ another person."

17 Litigation guardians may be appointed for litigants who are incapacitated. An incapacitated person is defined as meaning a person who, by reason of mental (or other) impairment, is not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings or unable to give sufficient instructions to issue, or defend, or compromise proceedings: See High Court Rules 2016, r 4.29.

made three years ago by the Court of Appeal in *Chamberlain*.[18] As the Human Rights Commission notes, all of this has serious implications for effective participation in the delivery of services.

[43] The foregoing observations are general ones, made within the context of my subsequent findings as to jurisdiction.

The agreed issues for determination

[44] The parties agreed a series of issues in advance of the hearing. They are as follows:

(a) Does the Employment Court have jurisdiction to consider the employment relationship under Family Funded Care and Individualised Funding?

(b) Can the Court consider whether the Crown was entitled to require recipients of funded family care to accept an employment relationship to receive funding for the period from 2013 to 30 September 2020?

(c) If so, was the Crown so entitled?

(d) Can the Court consider whether the Crown is entitled to impose upon recipients of funding for the care of the disabled an employment relationship, either directly or by way of employment by a HCSS contracted provider or individualised funding as a condition of funding?

(e) If so, is the Crown so entitled?

(f) If Justin had received Family Funded Care:

(i) who would have been the employee?

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[18] *Chamberlain*, above n 4, at [12].

(ii) who would have been the employer?

(g) If Justin had received Individualised Funding (other than Individualised Respite Funding) and used the personalised budget to fund Mrs Fleming as his family carer:

(i) who would be the employee?

(ii) who would be the employer?

(h) What are the statutory and other legal obligations:

(i) of the employee?

(ii) of the employer?

(i) Does Mrs Fleming have a grievance for not having been appropriately funded since 1 October 2013?

(j) If so, is she entitled to receive compensation for lost funding as a result?

(k) Is the second defendant liable by way of penalty in respect of:

(i) the unlawful imposition of an employment relationship?

(ii) its conduct in respect of the plaintiff's application for funding?

Jurisdictional issues

Introductory comments

[45] The Employment Court's jurisdiction is ring-fenced by statute and is set out in s 187. As s 187(3) makes clear, the Court's jurisdiction is exclusive - except as provided in the Act, no other Court has jurisdiction in relation to any matter that is within the exclusive jurisdiction of the Court. In other words, no other Court is permitted inside the fence; this Court is not permitted outside the fence.

[46] The present claim is brought under s 6 of the Act. Section 6 confers exclusive jurisdiction on the Court to make a declaration as to whether a person is an employee and (by implication) of whom.

[47] The Crown's jurisdictional argument is essentially that there has been a legislative carve-out of this Court's jurisdiction via the enactment of Part 4A of the Health and Disability Act (Part 4A), the Minister's Gazette Notice and policy issued under it. I do not accept that argument for the reasons that follow.

Part 4A

[48] It is convenient to start with Part 4A. It was enacted following the Court of Appeal's judgment in *Atkinson* in 2012, finding that the Crowns refusal to pay parents to care for their adult disabled children was discrimination.[19] Parliament responded by introducing Part 4A the following year. Section 70C of Part 4A provided that:

> **70C Persons generally not to be paid for providing support services to family members**
>
> On and after the commencement of this Part, neither the Crown nor a DHB may pay a person for any support services that are, whether before, on, or after that commencement, provided to a family member of the person unless the payment is—
>
> (a) permitted by an applicable family care policy; or
>
> (b) expressly authorised by or under an enactment.

[49] Part 4A was repealed shortly before Ms Fleming's case was heard. However it was in force during part of the time her claim relates to. The effect of s 70C was that it prohibited Ms Fleming being paid to take care of Justin unless that payment was permitted by an applicable family care policy or was expressly authorised by statute.

[50] A family funded care policy was introduced by the Ministry of Health, and the then Minister of Health issued a Gazette Notice in 2013, called the Family Funded Care Notice 2013.[20] It expressly stated that the disabled person was the employer, and

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

20 "The Funded Family Care Notice 2013" (26 September 2013) 131 *New Zealand Gazette* 3670.

that the family carer was their employee. The listed responsibilities of the disabled person included "(h) employing the family carer" and "(j) complying with all laws as an employer".[21]

[51] The Minister's Gazette Notice was issued under s 88 of the Health and Disability Act. It provided that:

> **88 Arrangements relating to payments**
>
> (1) Where the Crown or a DHB gives notice of the terms and conditions on which the Crown or the DHB will make a payment to any person or persons, and, after notice is given, such a payment is accepted by any such person from the Crown or DHB, then—
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> (a) acceptance by the person of the payment constitutes acceptance by the person of the terms and conditions; and
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> (b) compliance by the person with the terms and conditions may be enforced by the Crown or DHB (as the case may be) as if the person had signed a deed under which the person agreed to the terms and conditions.
>
> (2) Any terms and conditions of which notice is given under subsection (1), unless they expressly provide otherwise, are deemed to include a provision to the effect that 12 weeks notice must be given of any amendment or revocation of the terms and conditions.
>
> (3) Every notice, and every amendment or revocation of a notice, must be published in the *Gazette* before the notice, amendment, or revocation takes effect; and, as soon as practicable, the Minister must present a copy to the House of Representatives.
>
> (4) No notice may be issued under this section that would bind Pharmac or NZBS.

[52] The first point is that Part 4A was directed at funding for care; none of the provisions in Part 4A imposed an employment relationship on the family carer and the disabled person. And, while s 88 referred to terms and conditions, those terms and conditions were plainly linked to funding. No reference is, for example, made to terms and conditions of employment. Rather, it was the Minister's Gazette Notice, and the Funded Family Care policy, that deemed the disabled person to be the employer and their family carer their employee. The policy placed a cap of 40 hours funding per week and provided that any approved hours within that 40 hour maximum were to be paid at the prescribed minimum hourly wage rate. Because Ms Fleming did not accept

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[21] At [20].

funding under Funded Family Care, she was not subject to the Gazette Notice, and issues raised by the Crown about this Court's ability to assess its force do not arise.

[53] The policy, and the way in which it was implemented, have been subject to unfavourable comment by the Courts, most recently the Court of Appeal in *Chamberlain* in 2018. I agree with the Crown that the lawfulness of the policy, and whether it is within or outside the scope of its empowering legislative provision, is a matter for the High Court (presumably on judicial review proceedings). I agree too that it is not for this Court to concern itself with a Parliamentary decision to impose a prohibition on funding or parameters around when funding might be made available. That does not, however, mean that this Court has no role to play in determining whether Justin was in an employment relationship with his mother for the purposes of the Employment Relations Act.

[54] The Court's jurisdiction to declare whether someone is or is not in an employment relationship is not without limits, as s 6 itself makes clear in relation to real estate agents, sharemilkers and film workers.[22] What is however notable is that, where Parliament has considered it appropriate to modify the employee status test in relation to particular categories of workers, it has done so expressly, and within the Act itself. Parliament has not made express provision within the Act in relation to family caregivers and their severely disabled adult children. Nor has Parliament made express provision within any other Act as to the employment status of such people.

[55] The point is that, if Parliament had intended to displace or limit the Court's exclusive jurisdiction in relation to family care givers, it likely would have done so via express legislative amendment to the Act, as it has done for other specific groups of workers. Employment rights and obligations are important, and an expansive interpretation of legislative provisions (such as Part 4A) which would otherwise lead to the exclusion of categories of workers from this Court's jurisdiction should be avoided.

[56] I do not read the provisions of Part 4A, either individually or collectively, as reflecting a Parliamentary intent that family caregivers are deemed to be employees

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22 Employment Relations Act 2000, s 6(1)(d) and s 6(4).

of their disabled adult children for the purposes of s 6 of the Act whether or not they accept funding. I accept, however, that statutorily imposed limitations on funding (such as provided for in Part 4A) are relevant to the suite of remedies which might otherwise flow from a declaration of employment status.

[57] To summarise, I do not see the statutory limitations on access to funding for family caregivers imposed by Part 4A as excluding this Court's jurisdiction to determine employment status. It does, however, limit the suite of remedies potentially available.[23]

[58] If I am wrong about the distinction between constraints on funding and employment status, other difficulties for the Crown's jurisdictional arguments arise. Section 70C did not exist prior to 21 May 2013 and did not exist after 30 September 2020.[24] That means that, in those periods, there is no jurisdictional impediment posed by s 70C to a finding that Ms Fleming was able to be paid by the Crown as an employee. It also means that, if s 70C provides a barrier to a declaration of employment status (which I do not accept), that barrier did not exist prior to its enactment and ceased to exist when Part 4A was repealed.

[59] I turn to consider whether Ms Fleming was and is an employee.

An employee?

[60] Section 6(2) provides that, in determining whether a person is employed by another person under a contract of service, the Court must determine the real nature of the relationship. In assessing the real nature of the relationship, the Court is directed to consider all relevant matters, including any matters that indicate the intention of the parties, and is not to treat as determinative any statement made by the persons describing the nature of their relationship. The latter point may be said to be relevant to the way in which the then Minister of Health described the relationship in the

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23 No party sought to rely on s 70C(b).

24 New Zealand Public Health and Disability Amendment Act 2013, s 4; New Zealand Public Health and Disability Amendment Act 2020, s 4.

Gazette Notice (namely specifying that the employment relationship was between the disabled person and their family caregiver).

[61] Section 6 makes it clear that the definition of employee includes a homeworker or person intending to work but excludes a volunteer who does not expect to be rewarded for work to be performed as a volunteer and receives no reward for work performed as a volunteer.[25]

[62] An employer is defined as meaning a person employing any employee, and includes a person engaging or employing a homeworker.[26] A homeworker is defined in s 5 as:

> (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 (…); 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.

[63] Counsel for Ms Fleming and Justin submitted that, applying the s 5 test, Ms Fleming was a homeworker employed by the Ministry of Health which had engaged her.

[64] I pause to note that the Crown made the point that the plaintiff had not specifically pleaded that she was a homeworker in any of her statements of claim. That is true, but she did claim that she was an employee, and a homeworker falls within that definition. The Human Rights Commission and Council of Trade Unions filed written submissions in advance of the hearing (which was subsequently adjourned part-heard for four months). Both organisations referred at length to the homeworker definition and the possibility that Ms Fleming fell within it. Other than noting the pleadings point during the course of oral submissions in closing, the Crown did not take the matter further and addressed the homeworker issue in submissions.

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25 Employment Relations Act 2000, s 6(1)(b)-(c).
26 Employment Relations Act 2000, s 5.

[65] The enactment of the s 5 definition of homeworker was driven by a Parliamentary concern to ensure adequate protection for a group of vulnerable workers. I agree with counsel for the Human Rights Commission that, in determining whether Ms Fleming is a homeworker and accordingly an employee, an interpretation of the homeworker provision consistent with its underlying protective purpose is appropriate.[27] I note too the observation made by the United Nations Special Rapporteur in 2010 that:[28]

> Domestic workers are often "physically invisible" to the general public. More importantly, much as in other gendered relationships, domestic work is deliberately made invisible to public scrutiny: A "private sphere" is socially constructed, where labour relationships are supposedly beyond State or social control.

[66] Also relevant in terms of the interpretative exercise are various articles of the Convention, including the right to live independently and be included in the community. In this regard art 19 places an obligation on States to ensure that persons with disabilities have access to a range of in-home residential and other community support services. Those obligations and the way in which they are to be met find statutory expression in the Health and Disability Act, and the policies sitting under it.

[67] Further, I note that in *Atkinson* the Crown sought to rely on the existence of a social contract between parents and their severely disabled children. The Court of Appeal observed that:[29]

> [168] As to the finding relating to the social contract, we agree with the reasoning of the High Court. The Court accepted that there was a community perception of a parental duty to look after their children up to a certain age "in the sense of providing them, within their means, food, shelter and clothing." That concept included ensuring children were educated and, as far as possible within the home, caring for them when ill or seeing they receive proper care. However, the Court saw it as a different matter altogether to extrapolate from that to a duty owed by parents to care for disabled children "for the duration of the life of those children, … no matter how severe that disability". We agree. *There is no support for the suggestion of a social contract to care for adult children who are disabled for the remainder of their lives on a full-time basis, subject to respite care.* In any event, the existence of such a contract is inconsistent with the Ministry's policy which effectively enables a parent to decline to care for his or her disabled adult child.

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27 *Lowe v Director-General of Health* [2017] NZSC 115, [2017] 1 NZLR 691 at [34].

28 Gulnara Shahinian *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences* UN Doc A/HRC/15/20 (18 June 2010) at [18].

29 *Atkinson*, above n 19 (footnotes omitted) (emphasis added).

[68] Against this background the following questions arise in terms of the s 5 definition in this case:

(a) First, is Ms Fleming engaged, employed or contracted by the Ministry of Health?

(b) Second, is she engaged in the course of the Ministry's trade or business?

(c) Third, is the engagement to do work for the Ministry?

(d) Fourth, does the work take place in a dwelling house?

(e) Fifth, if she is not engaged, employed or contracted by the Ministry of Health is she in substance engaged, employed or contracted by the Ministry of Health even though the contractual relationship is a vendor/purchaser relationship?

[69] The answers to each of these questions are informed by the Supreme Court's decision in *Lowe.* The Crown submitted that this Court is bound to apply the approach of the majority in that case. I accept that, while noting that there are a number of material differences in the facts of the two cases.

Question 1: was/is Ms Fleming "engaged"?

[70] The majority of the Supreme Court found "engaged" to be a flexible and ambiguous word.[30] They made it clear that active oversight or control was not a prerequisite, otherwise any homeworker would also very likely be an employee under the narrower ordinary s 6 definition.[31]

[71] The majority held that the normal meaning of engage contemplates the hirer making the selection of the person engaged. On the majority's analysis, the missing

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30 At [36]. See also Gordon Anderson *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at [4.4.1].

31 At [40]-[43].

ingredient in Ms Lowe's case was "selection".[32] In this regard neither the Ministry nor the District Health Board had had a role in selecting her as a relief carer and did not know about her work until after it was done and she had applied for payment. Relevant to the inquiry in *Lowe* was the background documentation, none of which pointed to any selection having taken place. Rather, it emerged from the facts that it was the primary carer who had selected Ms Lowe to undertake relief caring.

[72] Ms Fleming's situation is very different and, as the majority in *Lowe* observed, the meaning of "engage" for the purposes of s 5 is substantially affected by context.[33] 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.[34] He did not go into full time residential care because Ms Fleming continued to provide permanent care for him at home. Ms Fleming is in a very different position to, for example, an external relief carer (such as Ms Lowe) sourced by the primary carer. As I say, Ms Fleming was not sourced/selected in this sense. That does not, however, mean that she was not engaged by the Ministry to do the work it was responsible for delivering in order to meet its obligations.

[73] Relevantly, the majority in *Lowe* made it clear that whether or not a worker has been "engaged" for the 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. In this regard they found that:[35]

> We do not consider it possible to extend the ambit of the concept of engagement to the extent that it applies in circumstances where the person said to be the hirer is not even aware of the engagement having taken place until after the initial period of care has been concluded.

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32 At [44].
33 At [36].
34 *Atkinson*, above n 19, at [168]: Convention on the Rights of Persons with Disabilities 2525 UNTS 3 (signed 30 March 2007, entered into force 3 May 2008); Optional Protocol to the Convention on the Rights of Persons with Disabilities 2518 UNTS 283 (signed 30 March 2007, entered into force 3 May 2008).
35 At [63].

[74] That finding was made in the context of the arrangements for care that occurred directly between the primary caregiver and the relief caregiver. I do not read the majority's judgment as requiring any particular formality in terms of process or as suggesting that the hirer needs to play an active, as opposed to passive, role. Rather the focus is on awareness. Nor do I read the majority judgment as requiring the hirer to be aware of the legal impact of engagement, in terms of the nature of the relationship formed. The existence of an employment relationship is objectively assessed; it can exist despite one or both parties being subjectively unaware of their status as employer or employee.[36] In other words the Ministry did not need to actually know that it was formally engaging Ms Fleming as a homeworker for the purposes of the Employment Relations Act for that to be the reality of the situation.

[75] It is worth noting a further point at this stage. It is not uncommon for the Court to be confronted with a complexity of structures, policies and procedures which may appear (at first blush) to distance one party from another, thereby reducing their potential liabilities. The issue for the Court is to separate the wood from the trees, have regard to all of the circumstances and determine the real (rather than described) nature of the relationship.[37]

[76] I return to the realities of Ms Fleming's case. They markedly differ from Ms Lowe's situation. The Ministry was aware of the work Ms Fleming was doing as primary carer, including via ongoing needs assessments carried out on behalf of the Ministry by one of its agents and in accordance with rules and procedures set by the Ministry. The first NASC assessment for Justin occurred in 1997 and others were undertaken at reasonably regular intervals from that date.[38] The point as to the Ministry's awareness of the situation and its obligations was made by Mr Wysocki in cross-examination:

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[36] *Cowan v Kidd* [2020] NZEmpC 110, [2020] ERNZ 319. In that case the relationship between the parties was not intended by either of them to be one of employment but rather a friend helping out with the other friend's business. Most of what Mr Cowan did was in the nature of work and was similar to what other employees were doing, with the main difference being the lack of a formal agreement and no pay. The Court held that the real nature of the relationship was one of employment.

[37] See, for example, the discussion in *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835, including at [34].

[38] Further NASC assessments were before the Court dated 1998; 2002; 2004; 2005; 2010; 2013; 2017; 2018.

> Q. We all understand the social contract between a parent and a child, you have children you've got to look after them?
>
> A. Yes.
>
> …
>
> Q. … But the fact of the matter is that from the time, let's call it say 20 or 18, Justin turns 18, he has to be cared for and in this country the state has that obligation, doesn't it?
>
> A. Yes.
>
> Q. And it has known, from the time Justin was 18, that somebody has to be providing that support to him, right?
>
> A. Yes.

[77] The person providing the support was Ms Fleming, as each of the NASC assessments reflected.

[78] Ms Fleming also received funding via other support schemes put in place by the Ministry, including the Individualised Funding Respite program that allowed payment for Justin's weekly stay at the Gables. Finally, I note the wave of correspondence that Ms Carrigan sent to the Ministry and Ministers on Ms Fleming's behalf, and over an extended period of time, expressly referring to the nature of the work Ms Fleming was doing and why she was doing it.

[79] In summary:

- The Ministry has obligations to support people like Justin to stay in the community and lead a full and active life. The Ministry set up a system to provide support.

- Ms Fleming has always been, and continues to be, Justin's primary caregiver.

- The caregiving that Ms Fleming has provided over the years has enabled Justin to remain in the community and lead a full and active life, including since he became an adult.

- The Ministry knew, from at least 1997, that Justin required care: the NASC assessments from 1997 and over the following years confirm this.

- By the time Justin became an adult it was known that he had to be cared for and that the State had that obligation.

- The Ministry knew that Ms Fleming was doing the caregiving work that Justin required: the NASC assessments from 1997 and over the following years confirm this.

- The Ministry periodically checked in with Ms Fleming to make sure that the caregiving work she did for Justin was still being done, that it was being done to an adequate standard, and it provided support so that the work could continue: the NASC assessments from 1997 and over the following years confirm this.

- The work that Ms Fleming did, and which the Ministry was aware of, allowed Justin to remain in the community. That was and is of benefit to the Ministry, and is consistent with meeting its obligations under both the Health and Disability Act and the Convention.

- The work that Ms Fleming did, and which the Ministry was aware of, would otherwise have to have been done via other means, for example, full time residential care.

[80] I am satisfied on the evidence that the Ministry "engaged" Ms Fleming for the purposes of s 5 and that the first hurdle is overcome.

[81] I note for completeness that it was not argued that the nature of Ms Fleming's relationship with the Ministry was that of vendor/purchaser. Accordingly it is not necessary to deal with the relevance or otherwise of the "in substance so engaged" qualifier to engagement provided for in paragraph (b) of the definition.[39]

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[39] Touched on in *Lowe*, above n 27, at [38]-[39].

Questions 2 and 3: was/is Ms Fleming engaged "in the course of the Ministry's trade or business" to "do work for the Ministry"?

[82] Hurdles 2 and 3 can readily be dealt with. That is because the majority in *Lowe* considered that both issues were settled by earlier authority in *Cashman v Central Regional Health Authority*.[40] The parties had conceded that, if Ms Lowe was engaged, it would have been in the course of the Ministry's trade or business, the monitoring and purchase of health and disability services, and the engagement would be to do work for the Ministry. The present case involves the same trade or business. I conclude that if Ms Fleming was engaged (which I have found she was), she was engaged in the course of the Ministry's trade or business to do work for the Ministry.

Question 4: was/is the work undertaken in a "dwellinghouse"?

[83] The majority in *Lowe* made it clear that a strict approach to this leg of the inquiry was required, essentially finding that the employer must require the work to be undertaken in a dwellinghouse.[41] The minority would have adopted a broader approach - that it would be sufficient if the work did in fact take place in a dwelling house although it might not have been a requirement that it be undertaken there.[42]

[84] Relevantly, the majority did not conclusively state that there must be an express requirement that the work take place in a dwelling house. Such a requirement may be implied. That is unsurprising. If an explicit requirement were the test it would mean that liability could readily be side-stepped. That would, in turn, defeat the purpose of the homeworker definition, which is to protect a group of particularly vulnerable workers, recognised as lacking opportunity to organise with other workers and as having sufficient bargaining power to effectively negotiate contractual terms. In this sense the legislation is designed to do the heavy lifting for them.

[85] In the present case no issue in relation to the dwellinghouse limb of the test arises. Justin requires 24/7 supervision. He lives in the family home, where he sleeps

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40 *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA); *Lowe*, above n 27, at [16].
41 At [72]-[74].
42 At [169].

and spends most of his time. Ms Fleming is also based at the family home, where she sleeps and spends most of her time looking after Justin. There is no realistic possibility of Ms Fleming undertaking the work she does anywhere else. The Ministry, through its agents, was well aware of the arrangements and the reality of the situation. I have no difficulty concluding that the Fleming/Cootes family home is a dwelling house for the purposes of s 5 and that the work was, by necessity, conducted there.

[86] While Ms Fleming may not have really intended to be an employee of the Minister, I have concluded that she became one as a consequence of the homeworker definition, applied to the particular facts of this case. It will be apparent that I have concluded that Ms Fleming became a homeworker from at least the point in time that Justin became an adult; the Ministry was aware that he needed care and that Ms Fleming was providing it to him.

Ordinary s 6 test

[87] For completeness, I am not satisfied that Ms Fleming is an employee under the ordinary s 6 test. In reaching this conclusion I have considered the sort of indicia which are generally taken to point towards employee status.[43]

[88] Before touching on the relevant indicia, it is notable that the way in which they apply to the circumstances Ms Fleming finds herself in is illustrative of the policy objectives underlying the "homeworker" add-on to s 6. That is because being a homeworker makes it difficult to tick many of the boxes generally associated with employee status. Additional protection, having regard to the particular vulnerabilities of homeworkers, has been put in place by Parliament to address this.

[89] It is clear from the evidence that the Ministry holds the strings. It is not simply a funder - it exercises a significant degree of control over the caregiving process, including in terms of what its contracted agents are expected to do and how they are to do it. It also dips in and out of particular cases (for example, in relation to assessments it considers to have been wrongly arrived at) as it sees fit. It is now well

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[43] *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372.

accepted that distancing the key player organisation from the core relationship through, for example, agency agreements, may not serve to divorce the key player from obligations it would otherwise have as an employer.[44]

[90] However, it is equally clear from the evidence that, while the Ministry exercises a degree of control, as evident from the Family Care Notice, it is not detailed day-to-day control. The vast majority of the time it cannot see what Ms Fleming is doing. That is, in large measure, a natural consequence of the fact that the work is done in Ms Fleming's home. The same point can be made in relation to integration.

[91] There was no evidence that Ms Fleming took annual leave, sick leave or holidays, but I accept that that reflected the realities of the situation that Ms Fleming was in rather than being indicative of absence of an employment relationship. There was no written agreement that described her as having any sort of relationship with the Ministry/Minister.

[92] As counsel for the first and second defendants pointed out, Ms Fleming did not consider herself to be an employee of the Ministry. As I have already observed, whether one or both parties subjectively believe that they are or are not in an employment relationship is not the pivotal point. And while she may not have considered herself to be an employee, she did expect to be rewarded for her work. That clearly emerged from the evidence, reflected in (for example) her repeated attempts to secure payment, culminating in litigation. Plainly she neither wanted, nor expected, to work for free.

[93] While there are some factors which point towards an employment relationship, they do not do so strongly. In particular, the sort of integration and control generally associated with an employment relationship are lacking in this case. Overall, the facts point away from employment status applying the s 6(5), as opposed to the s 5 (homeworker), test.

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44 See *Prasad*, above n 37.

A concern about floodgates

[94] The Crown raised a concern about wide-ranging unintended consequences in the event that Ms Fleming was found to be an employee. I accept that the finding that Ms Fleming is a homeworker and, accordingly, an employee may have significant implications. However, the suite of employment laws is clear. It provides for a set of minimum standards which everyone in New Zealand is expected to comply with. While compliance with the law may be costly and/or inconvenient, that is not one of the factors that Parliament has directed the Court to consider in determining whether a person is or is not an employee.

[95] It will be apparent that my findings relate to Ms Fleming. As the Act makes plain, employment status (including homeworker status) is to be determined having regard to the particular circumstances of the case. In this case, those circumstances include that Ms Fleming is caring for an adult son, who requires constant supervision and who is severely mentally disabled.

Declaration of employment status and next steps

[96] Ms Fleming is a homeworker and is entitled to a declaration under s 6 of the Act that she is an employee. That leads to a number of issues as to what remedies she is entitled to. I accept that Part 4A provides a statutory shield to any claim for lost wages and holiday pay during the time that it was in force. Part 4A is both more recent and more specific than the relevant provisions of the Minimum Wage Act 1983 and the Employment Relations Act. The intent of it is clear and it cannot be easily read down.[45] If it were otherwise, Parliament's intent in enacting Part 4A would be thwarted.

[97] The order as to employment status sought by Ms Fleming in her third amended statement of claim runs from 1 October 2013. Part 4A came into force on 21 May 2013. That has implications in terms of remedies. Ms Fleming is, however, entitled to payment for lost wages and holiday pay as a homeworker after the date on which

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[45] See generally *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at ch 14.

Part 4A was revoked.[46] The correct calculation of those wages is not limited by the 40 hours specified in the Gazette Notice. While, as the Crown points out, the Court of Appeal expressly ruled out a requirement for family carers to be paid for the fact of sleeping over, that was in relation to funding under Funded Family Care.[47] I do not perceive that as having any material bearing on the appropriate wages due to Ms Fleming as an employee of the Minister of Health.

[98] The correct calculation of wages will appropriately reflect the hours of work performed by Ms Fleming, applying the well-established test for what constitutes work.[48] The correct calculation of wages will also need to appropriately reflect monies paid to Ms Fleming during the relevant periods when Part 4A was not in force.

[99] Ms Fleming also pursued a claim to compensation. This claim was directed at the way in which funding had been dealt with. I am satisfied that Ms Fleming has established a personal grievance for discrimination.[49] The reality is that Ms Fleming was an employee and received lesser treatment compared with other carers who did not have a familial connection to the disabled persons they cared for.[50] The discrimination has been ongoing. An order for compensation for non pecuniary loss under s 123(1)(c)(i) (for hurt, humiliation and loss of dignity) is appropriate in the circumstances, the quantum of which is reserved.

Penalties

[100] The plaintiff has sought the imposition of a penalty against the second defendant. I understood the plaintiff's argument to be that penalties should be imposed in respect of the Crown's imposition of an employment relationship as a precursor to accessing funding under the Family Funded Care policy for the care she provided to her son; in relation to its conduct in dealing with the application for funding and in respect of the way in which the Crown has responded to the Court of Appeal's judgment in *Chamberlain*.

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46 Subject to any restrictions imposed by Employment Relations Act 2000, s 142 (six year limitation period, other than for holiday pay).
47 *Chamberlain*, above n 4, at [72].
48 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] ERNZ 192.
49 As in *Atkinson*, above n 19.
50 Employment Relations Act 2000, s 104(1)(a).

[101] *Chamberlain* was a significant judgment and pointed out a number of difficulties with the way in which the Ministry of Health was approaching payments for family caregivers. It might, as Mr Dale pointed out, be expected that those concerns would have led to a prompt adaptation of the Ministry's approach. That did not prove to be the case. The evidence established that two things occurred. First, the Ministry had a meeting with NASC managers and during the meeting the judgment was discussed (it is not clear what, if any, take home message was provided by Ministry officials who attended the meeting) and second that the funding template was amended to refer to intermittent care. I agree with Mr Dale that the Court of Appeal had made it plain that supervision should be considered and that it was wrong as a matter of law to exclude it in assessing funding needs.[51]

[102] The Court's jurisdiction to award penalties is limited. It is set out in s 133 of the Act, including for breach of an employment agreement and for a breach of any provision for which a penalty is provided for, none of which appear directly relevant in this case. And while s 4A provides that a party to an employment relationship who fails to comply with the duty of good faith in s 4 is liable to a penalty, that is only where the established failure was deliberate, serious and sustained; or was intended to undermine bargaining, an employment agreement or an employment relationship.

[103] The difficulty for the penalty claim in this case is that the failure complained about was not deliberate (the Crown believing that there was no employment relationship between it and Ms Fleming). I am not satisfied that an adequate basis has been made out for the imposition of a penalty and I decline to do so. If jurisdiction extended to other actions, or inactions of the Ministry of Health, the position would likely have been different.

Mediation

[104] The Court is obliged to consider directing the parties to mediation or further mediation throughout the lifecycle of proceedings.[52] I consider that mediation might prove very useful for the parties in light of the issues thrown up by this judgment and

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51 *Chamberlain*, above n 4, at [82]-[83].
52 Employment Relations Act 2000, s 188(2)(c).

in light of broader issues relating to the calculation of remedies (such as, for example, payments made to Ms Fleming during the relevant periods of time). Insofar as the dispute principally relates to breaches of employment standards, mediation may be appropriate in the particular circumstances.[53] Before making a direction I wish to hear from the parties on the mediation proposal or, if they considered it might be more helpful, a judicial settlement conference with another Judge.

[105] Counsel should confer and file memoranda within 21 days of the date of this judgment.

Answers to questions

[106] The answers to each of the agreed issues raised by the parties, other than those relating to relief, will be apparent from my findings. In summary:

(a) Does the Employment Court have jurisdiction to consider the employment relationship under Family Funded Care and Individualised Funding? **Answer:** The Employment Court does have jurisdiction to determine whether a person is in an employment relationship when they have accepted funding under Funded Family Care and Individualised Funding.

(b) Can the Court consider whether the Crown was entitled to require recipients of Funded Family Care to accept an employment relationship to receive funding for the period from 2013 to 30 September 2020? **Answer:** No. That does not, however, prevent the Court from determining whether the employment relationship as described reflected the real nature of the relationship and, if it was an employment relationship, who the parties to it were.

If so, was the Crown so entitled? **Answer:** Not applicable.

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[53] Employment Relations Act 2000, s 188A(2).

(c) Can the Court consider whether the Crown is entitled to impose upon recipients of funding for the care of the disabled an employment relationship, either directly or by way of employment by a HCSS contracted provider or individualised funding as a condition of funding? **Answer:** As per (b).

(d) If Justin Cootes had received Family Funded Care who would have been the employee? **Answer:** Ms Fleming in light of the facts.

Who would have been the employer? **Answer:** The Minister of Health in light of the facts.

(e) If Justin had received Individualised Funding (other than Individualised Respite Funding) and used the personalised budget to fund Mrs Fleming as his family carer who would be the employee? **Answer:** Ms Fleming in light of the facts.

Who would be the employer? **Answer:** The Minister of Health in light of the facts.

(f) What are the statutory and other legal obligations of the employee? **Answer:** The usual statutory and other legal obligations of an employee.

What are the statutory and other legal obligations of the employer? **Answer:** The usual statutory and other legal obligations of an employer, other than in respect of pay for work done during the time Part 4A was in force.

(g) Does Ms Fleming have a grievance for not having been appropriately funded since 1 October 2013? **Answer:** Yes.

(h) If so, is she entitled to receive compensation for lost funding as a result? **Answer:** She is entitled to lost wages other than in respect of pay for work done during the time Part 4A was in force, and subject to any

limitations issues, and she is entitled to compensation for non pecuniary loss under s 123(1)(c)(i).

(i) Is the second defendant liable by way of penalty in respect of the unlawful imposition of an employment relationship? **Answer:** No.

(j) Is the second defendant liable by way of penalty for its conduct in respect of the plaintiff's application for funding? **Answer:** No.

[107] I reserve determination of the quantum of remedies (and costs) until the issue of mediation is resolved.

Christina Inglis
Chief Judge

Judgment signed at 8.45 am on 26 May 2021