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JUDGMENT IS DELIVERED AT 2.15 PM ON 9 DECEMBER 2025.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 42/2024  
[2025] NZSC 188**

BETWEEN CHRISTINE FLEMING  
Appellant

AND ATTORNEY-GENERAL  
First Respondent

JUSTIN JAMES COOTE  
Second Respondent

**SC 44/2024**

BETWEEN PETER HUMPHREYS  
Appellant

AND ATTORNEY-GENERAL  
First Respondent

SIAN JIMENEZ HUMPHREYS  
Second Respondent

Hearing: 29–30 April 2025

Further  
Submissions: 26 May 2025

Court: Winkelmann CJ, Ellen France, Williams, Kós and Miller JJ

Counsel: P J Dale KC, M A Jeffries and M K Mahuika for Appellant in  
SC 42/2024  
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S V McKechnie, B A Heenan, T J Bremner and L J Goodwin for  
First Respondent in SC 42/2024 and First Respondent in  
SC 44/2024  
L T Meys for Second Respondent in SC 42/2024 and Second  
Respondent in SC 44/2024  
M S Timmins and P A Mitskevitch for Te Kāhui Tika Tangata |  
Human Rights Commission as Intervener

Judgment: 9 December 2025

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**JUDGMENT OF THE COURT**

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- A Ms Fleming’s appeal (SC 42/2024) is allowed.**
- B The Employment Court declaration as to Ms Fleming’s employee status is reinstated.**
- C The question of determination of the quantum of remedies for Ms Fleming is remitted to the Employment Court.**
- D Mr Humphreys’ appeal (SC 44/2024) is allowed.**
- E The Employment Court declaration as to Mr Humphreys’ employee status is reinstated.**
- F The first respondent must pay the appellant in SC 44/2024 costs of \$50,000 plus usual disbursements. We allow for second counsel.**
- G Subject to Order F, costs in SC 42/2024 and SC 44/2024 are otherwise reserved. If parties cannot agree on costs, counsel are to file memoranda (maximum of 5 pages) on costs; counsel for Ms Fleming by 5 February 2026 and each of the respondents by 19 February 2026.**
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**REASONS**

(Given by Ellen France J)

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## Introduction

[1] The appellants, Christine Fleming and Peter Humphreys, each care on a full-time basis for their respective adult disabled children, Justin Coote and Sian Humphreys.<sup>1</sup>

[2] Over the relevant period, Ms Fleming received a benefit paid by Work and Income | Te Hiranga Tangata (WINZ) and stayed at home to care for Justin. In 2018, on becoming aware of the availability of funding via the Funded Family Care scheme under the auspices of the Ministry of Health | Manatū Hauora (the Ministry), Ms Fleming made an application for funding under that scheme. She did not accept the offer of funding made by the Ministry and remained a recipient of the benefit until 2021. Since then, she has been funded under the Individualised Funding scheme which, in 2020, replaced the Funded Family Care scheme.

[3] For about six years, funding for Sian’s care by Mr Humphreys was provided under the Funded Family Care scheme. Funding then continued under the Individualised Funding scheme.

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<sup>1</sup> In this judgment we refer to Justin and Sian by their first names as was the approach taken in the written submissions of both appellants and the second respondents.

[4] Ms Fleming and Mr Humphreys each brought proceedings in the Employment Court claiming that, in their full-time care for their children, they were “homeworkers” and in that capacity were employees of the Ministry. Section 6 of the Employment Relations Act 2000 (the ERA) makes it clear that the definition of “employee” includes a “homeworker”.<sup>2</sup> A homeworker is in turn, relevantly, defined in the ERA as “a person who is engaged [or] employed ... by any other person ... to do work for that other person” in a home.<sup>3</sup>

[5] The Employment Court found that Ms Fleming<sup>4</sup> and Mr Humphreys<sup>5</sup> were employees as they were both homeworkers.<sup>6</sup> The Court also concluded that the correct calculation of wages for Ms Fleming would reflect her hours of work, applying the test for what constitutes work as set out in *Idea Services Ltd v Dickson*.<sup>7</sup> That case dealt with whether a community service worker was “working” for the purposes of the Minimum Wage Act 1983 when on a “sleepover” in a community home. The issue of assessment of work for which Mr Humphreys would be paid was not formally before the Court, given the way his case was pleaded.

[6] The Attorney-General successfully appealed to the Court of Appeal from the decision of the Employment Court in relation to Ms Fleming.<sup>8</sup> The Court of Appeal concluded she was not an employee of the Ministry. Ms Fleming had not accepted the Ministry’s offer of funding under Funded Family Care but, rather, chose to continue to receive the WINZ benefit. The Employment Court was wrong to treat the circumstances surrounding Ms Fleming’s care of Justin, including the Ministry’s awareness of her ongoing care, as constituting “engagement” under the ERA. That awareness was not sufficient to comprise the event or series of events resulting in an

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<sup>2</sup> Section 6(1)(a)(i).

<sup>3</sup> Section 5 definition of “homeworker” para (a).

<sup>4</sup> *Fleming v Attorney-General (sued on behalf of the Honourable Carmel Sepuloni (in her capacity as the Minister of Social Development and Minister for Disability))* [2021] NZEmpC 77, (2021) 18 NZELR 67 (Chief Judge Inglis) [EC judgment, Ms Fleming].

<sup>5</sup> *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 NZELR 668 (Chief Judge Inglis) [EC judgment, Mr Humphreys].

<sup>6</sup> Employment Relations Act 2000 [ERA], s 6(1)(b)(i) and s 5 definition of “homeworker”.

<sup>7</sup> *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522; and see EC judgment, Ms Fleming, above n 4, at [98].

<sup>8</sup> *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 245 (French, Brown and Courtney JJ) [CA judgment].

employment relationship, as required by this Court's decision in *Lowe v Director-General of Health*.<sup>9</sup>

[7] The Court of Appeal also discussed Ms Fleming's claim for lost wages and holiday pay after the date on which pt 4A of the New Zealand Public Health and Disability Act 2000 (the Public Health and Disability Act) had been repealed and under which the Funded Family Care scheme was operated. The Court of Appeal did not consider it could be assumed that *Idea Services* applies "to workers who both live and work in their own home", as both Ms Fleming and Mr Humphreys do.<sup>10</sup>

[8] The Attorney-General succeeded in part in the appeal relating to Mr Humphreys. The Court of Appeal agreed with the Employment Court that, while he was in receipt of Funded Family Care, Mr Humphreys was engaged by the Ministry to provide full-time care for Sian. The Ministry had approved Funded Family Care on the basis that Mr Humphreys would be the family carer for Sian, and he accepted the offer of funding made by the Ministry under the scheme. The Funded Family Care scheme was premised on there being an employment agreement between the family carer and the disabled person. But Sian, like Justin, did not have the capacity to be an employer of her carer with the resultant obligations of that status. Neither Sian, nor Justin, had a welfare guardian appointed under the Protection of Personal and Property Rights Act 1988. The Court of Appeal said that, in these circumstances, approving a family member as the family carer and agreeing to fund that person's services was capable of meeting the *Lowe* test for engagement and did so here.

[9] The Court found, however, that Mr Humphreys ceased to be an employee at the point his funding was provided via the Individualised Funding scheme. The latter was a different scheme and, unlike Funded Family Care, did not require an employment relationship between Sian and Mr Humphreys.

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<sup>9</sup> *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691. An application for recall was dismissed: *Lowe v Director-General of Health, Ministry of Health* [2017] NZSC 191, [2017] ERNZ 909. See discussion on *Lowe* below from [67]–[84].

<sup>10</sup> CA judgment, above n 8, at [119].

[10] The Court of Appeal did not consider that the test in *Idea Services* applied to an assessment of hours worked by Mr Humphreys as a homemaker, determined by its conclusion on the same question in relation to Ms Fleming.<sup>11</sup>

[11] Leave to appeal was granted to both appellants because of the importance of the approach to the meaning of the term “homemaker” in this context and to determine the relevance of the United Nations Convention on the Rights of Persons with Disabilities (the Convention) to the construction of the term “homemaker”.<sup>12</sup> Leave was also granted as to the correct test for “work” where the services in issue are provided in the home.<sup>13</sup> Accordingly, the approved questions in relation to Ms Fleming are whether the Court of Appeal was correct:

- (i) to determine that Ms Fleming was not “engaged, employed or contracted” by the Ministry ... as a “homemaker” under s 5 of the [ERA]; and
- (ii) as to the test for “work” when work is conducted by homeworkers who work overnight in their home.

[12] In relation to Mr Humphreys, the approved question is whether the Court of Appeal was correct to decide he was not “engaged” by the Ministry as a homemaker under s 5 of the ERA for the period when he was in receipt of funding under the Individualised Funding scheme. For the periods for which he was a homemaker, the same question as to the nature of the test for “work” ultimately arises as for Ms Fleming.

### **A brief overview of the background**

#### *Justin and Sian*

[13] Both Justin and Sian have life-long disability needs which mean that they require constant supervision and around-the-clock care. Their particular situations are

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<sup>11</sup> See above at [7].

<sup>12</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

<sup>13</sup> *Fleming v Attorney-General* [2024] NZSC 132 (Winkelmann CJ, Ellen France and Kós JJ).

discussed in the Courts below and we draw on that discussion in briefly summarising the position.<sup>14</sup>

[14] Justin was born in 1981. He is physically disabled as a result of a chromosomal condition. The principal consequence of his condition is physical frailty. This has affected his ability to take care of himself. Justin also has a moderate intellectual disability. Sian was born in 1988. She was diagnosed with a congenital condition as a young child. Sian does not have verbal language and, while not physically frail, needs constant care. Amongst other matters, she needs someone to accompany her outside and has no road safety awareness.

*The development of the Funded Family Care scheme*

[15] Prior to the decision in *Ministry of Health v Atkinson*, it was government policy that disability support services funding could not be used to pay for care provided to disabled people by family members with whom they lived.<sup>15</sup> The Court of Appeal in *Atkinson* found that this policy was discriminatory. Non-family carers were paid for caring for disabled persons but family carers, providing the same care, were not. Family carers were accordingly treated less favourably because of their family status, contrary to s 19 of the New Zealand Bill of Rights Act 1990. Part 4A of the Public Health and Disability Act, now repealed,<sup>16</sup> was enacted in response to the *Atkinson* decision.

[16] The purposes of the Public Health and Disability Act included the following:<sup>17</sup>

... to provide for the public funding and provision of ... disability support services, ... in order to pursue the following objectives:

(a) to achieve for New Zealanders—

...

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<sup>14</sup> EC judgment, *Ms Fleming*, above n 4, at [1]–[3]; EC judgment, *Mr Humphreys*, above n 5, at [1]–[2] and [11]; and CA judgment, above n 8, at [22]–[26] and [166]–[167].

<sup>15</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [1]. There were exceptions to the policy under which some family caregivers were paid. However, the Court of Appeal considered the High Court was correct to describe the policy “as a blanket one of non-payment of family members”: at [160]. The Court also noted the “lack of clarity about the exceptions”: at [178].

<sup>16</sup> See further discussion below at [24].

<sup>17</sup> Section 3(1).

- (ii) the promotion of the inclusion and participation in society and independence of people with disabilities:
- (iii) the best care or support for those in need of services ...

[17] The fiscal constraints on this purpose were acknowledged in s 3(2), which specified that these objectives were “to be pursued to the extent that they are reasonably achievable within the funding provided”.

[18] Part 4A provided, generally, that a family member could not be paid for the provision of disability support services unless permitted by “an applicable family care policy”.<sup>18</sup> The purpose section of this Part also emphasised fiscal constraints. Section 70A provided as follows:

- (1) The purpose of this Part is to keep the funding of support services provided by persons to their family members within sustainable limits in order to give effect to the restraint imposed by section 3(2) and to affirm the principle that, in the context of the funding of support services, families generally have primary responsibility for the well-being of their family members.

[19] Section 70A(2) explained this goal was to be achieved by, among other matters, prohibiting payment to a family member other than via an applicable family care policy, and prohibiting any complaints based on discrimination.<sup>19</sup> Funded Family Care was the Ministry’s policy adopted under pt 4A, and thus an applicable family care policy.

[20] Funded Family Care was introduced in 2013. The terms on which family carers were to be paid were primarily set out in the Funded Family Care Notice 2013 (the Notice),<sup>20</sup> issued under s 88 of the Public Health and Disability Act, and in the Funded Family Care Operational Policy (the Operational Policy).<sup>21</sup> The Notice set out the funding arrangements required to enable payment by the Ministry for care by a family member. The Notice, drawing from the first edition of the Operational Policy, said Funded Family Care was:<sup>22</sup>

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<sup>18</sup> Section 70C(a); and see s 70B(1) definition of “family care policy”.

<sup>19</sup> See also s 70E.

<sup>20</sup> “Funded Family Care Notice 2013” (26 September 2013) 131 *New Zealand Gazette* 3670 [Funded Family Care Notice].

<sup>21</sup> Ministry of Health | Manatū Hauora *Funded Family Care Operational Policy* (2nd ed, March 2016).

<sup>22</sup> Funded Family Care Notice, above n 20, at cl 10 (footnote omitted).

[e]ssentially ...

- (a) for personal care and household management services;
- (b) provided by a family carer to a disabled person who meets the eligibility criteria;
- (c) provided to the disabled person up to a maximum of 40 hours a week; and
- (d) paid at the rate of the minimum wage for adults.

[21] The Operational Policy set out the various requirements associated with Funded Family Care. These included identification and assessment of the eligibility and needs of a disabled person for publicly funded health and disability services by a Needs Assessment and Service Coordination (NASC) organisation.<sup>23</sup> The NASC assessment also identified needs for which there were already what the Ministry termed “natural supports”.<sup>24</sup> The latter generally referred to assistance provided by family or friends.

[22] The Operational Policy made it clear that funding is allocated for 52 weeks of the year and that a NASC organisation “can allocate” an “eligible disabled person no more than 40 hours of personal care and household management services per week”.<sup>25</sup> As the Court of Appeal noted, while NASC organisations are independent of the Ministry, they operate under Ministry policies and delegated statutory authority and are agents of the Ministry.

[23] As we shall discuss, the various Service Specifications made under the policy set out the particulars of the services for which funding was available.<sup>26</sup>

[24] The Funded Family Care scheme was disestablished in 2020 and pt 4A was repealed.<sup>27</sup> The Individualised Funding scheme became the means by which family carers could obtain funding for their care of their disabled children. The Attorney-General in her submissions describes this as a “bulk funding” scheme, as did the Court of Appeal, although that phraseology is not apparent in the formal

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<sup>23</sup> Funded Family Care Operational Policy, above n 21, at [2.2].

<sup>24</sup> At [2.3].

<sup>25</sup> At [4.1].

<sup>26</sup> See below at [93]–[94].

<sup>27</sup> New Zealand Public Health and Disability Amendment Act 2020, s 4.

documentation about the scheme in the evidence.<sup>28</sup> The term is used to reflect the fact that provision was made for the disabled person to have an annual budget which could be used to purchase support services with flexibility about how the budget was allocated.

[25] Under Individualised Funding, family carers could either be employed by a Home and Community Support Services provider or a disabled person could choose to manage their own funding and engage family members directly. This was an existing scheme but, with the disestablishment of Funded Family Care, the Individualised Funding scheme was changed to allow funding for care provided by resident family members.

[26] As with the Funded Family Care scheme, the amount of funding under the Individualised Funding scheme was determined via the NASC organisation's needs assessment and service coordination process. Those, like Sian, who were already receiving Funded Family Care funding were not required to be reassessed. As the Court of Appeal noted, under this scheme disabled persons were encouraged to have an agent to manage the care services being purchased with Individualised Funding. A host provider provided the funding structure and assistance with managing the allocation of funds.

#### *The position of the two appellants*

[27] Until Justin turned 18, Ms Fleming was in receipt of a domestic purposes benefit. When he turned 18, in 1999, Justin began receiving a benefit, now called the Supported Living Allowance. Ms Fleming, as the Court of Appeal noted, "after some difficulty", received a separate benefit so that she could remain at home to care for Justin.<sup>29</sup> That benefit was the Domestic Purposes Benefit, described as relating to the care of another person, which is now called the Supported Living Payment for caring for another person.

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<sup>28</sup> CA judgment, above n 8, at [255]; and see below at [59].

<sup>29</sup> CA judgment, above n 8, at [24].

[28] As we have noted, Ms Fleming sought a needs assessment to obtain funding under Funded Family Care, after becoming aware of that possibility in 2018. She rejected the limited hours offered. She thought, which was not correct, that she would be worse off financially under Funded Family Care. She also did not understand the basis on which Justin would or could be her employer. She accordingly elected to continue receiving the Supported Living Payment. That was the position for Ms Fleming until 2021, from which point Justin’s care has been funded under the Individualised Funding scheme, without prejudice to her appeal.

[29] As we have said, Mr Humphreys received Funded Family Care until that scheme was disestablished, and he then obtained funding under the Individualised Funding scheme.<sup>30</sup>

### **What the Courts below decided**

#### *The Employment Court*

[30] The Employment Court dealt with Ms Fleming’s and Mr Humphreys’ cases separately.

#### Ms Fleming’s case

[31] The Employment Court first addressed the argument that it had no jurisdiction to consider whether there were employment relationships under either Funded Family Care or Individualised Funding. This was an argument raised by the Attorney-General.

[32] The Employment Court rejected the argument that pt 4A of the Public Health and Disability Act and the Funded Family Care policy were a legislative carve-out of the Employment Court’s jurisdiction to determine employment status. A similar argument was raised in relation to Individualised Funding.

[33] Turning then to whether Ms Fleming was an employee, and specifically whether she was “engaged” as such, the Employment Court discussed this Court’s

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<sup>30</sup> See above at [3].

judgment in *Lowe*.<sup>31</sup> The Employment Court proceeded on the basis that, under *Lowe*, an ingredient of engagement was “selection”.<sup>32</sup> The Employment Court noted the reference in *Lowe* to the fact that the meaning of “engaged” was “substantially affected by context”.<sup>33</sup> The Court said this:<sup>34</sup>

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. 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.

[34] The Employment Court did not consider the majority in *Lowe* required “any particular formality in terms of process or as suggesting that the hirer needs to play an active” rather than a passive role. Instead, “the focus is on awareness”.<sup>35</sup> The Employment Court continued:<sup>36</sup>

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. In other words the Ministry did not need to actually know that it was formally engaging Ms Fleming as a homemaker for the purposes of the [ERA] for that to be the reality of the situation.

[35] As to those realities, Chief Judge Inglis emphasised that the Ministry was aware of the work Ms Fleming was undertaking as primary carer, this by the ongoing needs assessments carried out on behalf of the Ministry by one of its agents and following the rules and procedures set by the Ministry. The first NASC assessment for Justin took place in 1997 and there were others at reasonably regular intervals after that. Chief Judge Inglis also noted that the Ministry “periodically checked in” with

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<sup>31</sup> *Lowe*, above n 9.

<sup>32</sup> EC judgment, Ms Fleming, above n 4, at [71] citing *Lowe*, above n 9, at [44] per Arnold and O’Regan JJ.

<sup>33</sup> EC judgment, Ms Fleming, above n 4, at [72] citing *Lowe*, above n 9, at [36] per Arnold and O’Regan JJ.

<sup>34</sup> EC judgment, Ms Fleming, above n 4, at [72] (footnote omitted).

<sup>35</sup> At [74].

<sup>36</sup> At [74] (footnote omitted).

Ms Fleming to ensure that the caregiving work she was doing for Justin was still being undertaken and to an appropriate standard.<sup>37</sup>

[36] The Employment Court considered that the next two aspects of the test, that is, whether Ms Fleming was engaged in the course of the Ministry's trade or business to do work for the Ministry, were easily met. The majority in *Lowe* had considered these issues were settled by *Cashman v Central Regional Health Authority*.<sup>38</sup> In *Lowe* the parties had agreed that if Ms Lowe was engaged, it would have been in the course of the Ministry's trade or business, that is, the monitoring and purchase of health and disability services, and the engagement would be to carry out work for the Ministry. Ms Fleming's case involved the same trade or business.

[37] Finally, there was no issue about the final limb of the test, that is, the requirement the work be undertaken in a dwellinghouse. Chief Judge Inglis noted in this respect that Justin requires supervision 24 hours each day. He lives in the family home, where he sleeps and spends the majority of his time. Ms Fleming is also based in the home. There was no realistic possibility of her doing the work she does anywhere else.<sup>39</sup>

[38] While noting Ms Fleming may not have intended to be an employee of the Ministry, the Court concluded that she had become one, as a result of how the definition of "homeworker" applied in this case.<sup>40</sup>

#### Mr Humphreys' case

[39] The Employment Court found Mr Humphreys was engaged by the Ministry as a homeworker to care for Sian. He was accordingly an employee of the Ministry for the purposes of the ERA. In reaching this conclusion, Chief Judge Inglis noted Mr Humphreys' case was focused on declaratory relief regarding his employment status.

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<sup>37</sup> At [79].

<sup>38</sup> At [82] citing *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA) and *Lowe*, above n 9, at [16] per Arnold and O'Regan JJ; and see *Lowe*, above n 9, at [95] per Elias CJ and Glazebrook J.

<sup>39</sup> EC judgment, Ms Fleming, above n 4, at [85].

<sup>40</sup> At [86].

[40] As was the case for Ms Fleming, the Court rejected the Ministry’s argument the Court did not have jurisdiction. The Court also dismissed the argument Sian was deemed by statute to be in an employment relationship with her father. The finding was that Sian did not have capacity to employ her father and that Parliament had not deemed such an artificial employment relationship to exist.

[41] In considering whether, on the *Lowe* analysis, Mr Humphreys was a homemaker, the Court said this:<sup>41</sup>

[74] In this case the evidence established that the Ministry *knew* that Mr Humphreys was applying to be paid to take care of his daughter in the family home. It *knew* that Sian needed care and could not be left unsupervised, and it *knew* that, if that care was not being provided by her family, it would be responsible for providing it. The Ministry, because of its obligations to disabled persons, had an interest in knowing what Sian needed and how her needs were being met; and it informed itself of these things via various mechanisms it had put in place. What Mr Humphreys was doing allowed Sian to remain in the community. That was and is of benefit to the Ministry, and was and is consistent with meeting its obligations under both the [Public] Health and Disability Act and the Convention.

[42] The Ministry, a party in the originating proceedings, had submitted that one of the purposes of Individualised Funding was to allow a disabled person the chance of engaging support workers independently. The Court was, however, satisfied that in Mr Humphreys’ case, given “the nature and extent of the Ministry’s involvement in and knowledge of arrangements for Sian’s care”, the Ministry selected Mr Humphreys and engaged him in terms of s 5 of the ERA.<sup>42</sup>

[43] On the question of the “work” for which Mr Humphreys was entitled to be paid, the Court considered the test in *Idea Services* was apt.<sup>43</sup>

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<sup>41</sup> EC judgment, Mr Humphreys, above n 5 (emphasis in original, footnote omitted).

<sup>42</sup> At [83].

<sup>43</sup> At [102].

## *The Court of Appeal*

### Ms Fleming's case

[44] The Court of Appeal approached the appeal on the basis that whether Ms Fleming was a homemaker turned on the interpretation and application of *Lowe*.<sup>44</sup> The Court of Appeal considered that the Employment Court was not wrong in its interpretation of *Lowe* but that the Court erred in its application of that test.<sup>45</sup> The Employment Court incorrectly treated awareness by the Ministry of the facts relevant to Justin and his care as comprising engagement.

[45] The Court accepted that the approach to the meaning of the word “engagement” following *Lowe* was to be contextual.<sup>46</sup> The Court of Appeal also noted that the word “engaged” was used flexibly and that engagement could occur in ways that were less direct than selecting an individual. The Court continued, however, that more than awareness was necessary and there was in fact here no specific point at which a change in Ms Fleming's circumstances could be identified. It was necessary to have some means of pinpointing the transition from not being engaged to being engaged.<sup>47</sup>

[46] The Court of Appeal then addressed whether the Employment Court was right to find that there was an obligation on the State arising from the Convention to care for disabled people over the age of 18. The Court of Appeal said that this question engaged art 19 of the Convention, which provides for a right to live independently and to be included in the community.

[47] The Court of Appeal noted that a statute was to be interpreted consistently with any relevant international obligation. But, the Court said, the Employment Court had not treated the obligations under the Convention as assisting with the interpretation of “engaged”. Rather, the Court had seen the Convention as part of the relevant context to show that Ms Fleming had, as a matter of fact, been engaged. The Court of Appeal saw this as a permissible use of the Convention but differed from the

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<sup>44</sup> *Lowe*, above n 9.

<sup>45</sup> CA judgment, above n 8, at [57], [60] and [70].

<sup>46</sup> At [54].

<sup>47</sup> At [66]–[67].

Employment Court as to the effect of it.<sup>48</sup> The Employment Court had erred in determining the effect of the Convention.

[48] First, the Employment Court had overstated the nature of the obligations. In this respect, the Court said that under the Convention a disabled person does not become the responsibility of the state. Rather:<sup>49</sup>

... even on a holistic view, the State is required to provide support mechanisms that would allow a disabled person (supported by their family) to live independently, and in a manner of their choosing. This is not the same as imposing on the State direct responsibility for the care of a disabled adult.

[49] Secondly, the Court did not see art 19 as prescriptive in terms of how the support services were to be delivered. As there were several mechanisms possible for that purpose, the fact of the state's obligation to provide the support services "could not, in itself, indicate engagement by a family carer as a homemaker rather than funding through some other mechanism".<sup>50</sup> Similarly, the Court of Appeal considered that the Employment Court had overstated the effect of *Ministry of Health v Atkinson*.<sup>51</sup>

[50] Next, the Court of Appeal concluded that the Employment Court was wrong to find that the provision of care by Ms Fleming was "work" as set out in the leading authority, *Idea Services Ltd v Dickson*.<sup>52</sup> The Court of Appeal said that whether a person was "working" was a fact-specific question. The judgment in *Idea Services* identified factors that could assist in that factual inquiry.<sup>53</sup>

[51] The effect of later, English, authorities was that, while *Idea Services* had been shown to be efficacious in many circumstances, it could not be assumed to apply to homeworkers.<sup>54</sup> And in fact, the application of *Idea Services* has not been to those working in their home.

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<sup>48</sup> At [83].

<sup>49</sup> At [84].

<sup>50</sup> At [85].

<sup>51</sup> At [86]; and see *Atkinson*, above n 15.

<sup>52</sup> *Idea Services*, above n 7.

<sup>53</sup> CA judgment, above n 8, at [103].

<sup>54</sup> At [110] and [119] citing *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8, [2022] 1 All ER 497, overruling *British Nursing Assoc v Inland Revenue (National Minimum Wage Compliance Team)* [2002] EWCA Civ 494, [2002] IRLR 480.

[52] The Court of Appeal continued that a family carer who lives with a disabled person providing full-time care during the day and intermittent care over the night period is in a different position to those who must work, or be available for work, away from their own home. The Court explained:<sup>55</sup>

Unlike the situation of Mr Dickson [in *Idea Services*], for example, who was subject to the control and direction of his employer, family carers in the position of Ms Fleming and Mr Humphreys are not subject to any active control or oversight and not constrained by the Crown's terms and conditions as regards what they did outside normal working hours. Further, many steps taken by a family carer might equally be viewed as being taken in their capacity as guardian or homeowner.

[53] The Court also concluded that the Employment Court had erred in finding that Ms Fleming had a personal grievance.<sup>56</sup>

[54] The next part of the Court of Appeal judgment in relation to Ms Fleming dealt with aspects for which leave to appeal has not been granted.

#### Mr Humphreys' case

[55] In terms of Mr Humphreys' case, the Court of Appeal noted that the way in which the Funded Family Care policy had been set up required an employment agreement to be entered into. In particular, on the Court's interpretation of the Notice, Sian was not eligible for funding under Funded Family Care. That was because acceptance of the terms on which that care was to be offered had to be "genuine acceptance by a person with the capacity to understand the offer or a welfare guardian authorised to make decisions" for them.<sup>57</sup> If the person had neither then acceptance of the terms offered, necessary to access funding, would not be present.

[56] Sian did not have capacity to understand and agree to the terms being offered, nor did she have a welfare guardian. However, in any event, the Ministry had funded Sian's care. That raised questions about the basis on which her care was paid for. Another issue was whether the Ministry was in fact prohibited by s 70C of the

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<sup>55</sup> CA judgment, above n 8, at [120].

<sup>56</sup> At [135(c)].

<sup>57</sup> At [214].

Public Health and Disability Act from funding her care, as under s 70C payment was only as permitted by the Funded Family Care policy.<sup>58</sup>

[57] The Court resolved these questions by concluding that, although the Employment Court had erred in applying the approach under s 6(2) and (3) of the ERA to the inquiry into whether Mr Humphreys was a homemaker, he was in fact a homemaker. That was because once the Ministry had approved funding for Sian on the basis that Mr Humphreys would be her family carer and that offer was accepted, his status had changed from unpaid caregiver to family carer under the scheme. There was a distinct process to be followed before funding could be provided and on acceptance there was an event as required on the application of *Lowe*. There was also a level of consensus and certainty as to the work to be done and the terms on which it would be provided.<sup>59</sup>

[58] The Court's conclusion was as follows:

[244] We acknowledge that engagement (or contracting) of the family carer as a homemaker by the [Ministry] was not the intended outcome under the s 88 Notice. However, it was open to the [Ministry] to decline the funding, either altogether or pending an order under the [Protection of Personal and Property Rights Act] being obtained. It did not do so. It went ahead and funded Ms Humphreys' care by Mr Humphreys. We accept that it did so because it misunderstood or misinterpreted the s 88 Notice. Nevertheless, all the elements needed for engagement or contracting were satisfied.

[59] The Court of Appeal found that the position was different once funding was provided via Individualised Funding. The Court of Appeal emphasised that the Individualised Funding scheme was a "bulk-funding" scheme.<sup>60</sup> How the disabled person or their nominated agent decided to spend the funding was a matter for them.

[60] The Court said that Mr Humphreys understood he could be employed by a Home and Community Support Services provider but he chose not to do that. He was not happy with the level of instruction the Home and Community Support Services provider was willing to give and he thought he would have to pursue a case against his employer in relation to bathroom modifications he wanted to undertake. He did

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<sup>58</sup> See above at [18].

<sup>59</sup> CA judgment, above n 8, at [243] and [241]–[244].

<sup>60</sup> At [255].

not consider that was fair on the Home and Community Support Services provider. When he chose Individualised Funding for Sian, he also knew that she could not be his employer because she lacked capacity.

[61] While there was no prohibition on a nominated agent also being a support carer, the Court said that Mr Humphreys must have known that taking on both roles would leave him without an employer in any real sense. The difference under this scheme was that there was a means by which a family carer could be employed under a genuine employment agreement to provide the care. The Court continued:

[258] It is possible that the [Ministry's] decision to agree to Mr Humphreys being the nominated agent was based on a misapprehension that Mr Humphreys could be both agent and support carer. However, it was clear that Mr Humphreys was "selected" as Ms Humphreys' agent, on the basis that it was he who would manage the funds and provide the support care (on an unspecified basis). Moreover, we are satisfied that it was clear to Mr Humphreys that his "engagement" by the [Ministry] was as Ms Humphreys' agent, not more.

### **Ms Fleming's appeal**

[62] The issues on Ms Fleming's appeal are as follows:

- (a) Issue one: The correct approach to the definition of a "homeworker".
- (b) Issue two: Application to Ms Fleming's case.
- (c) Issue three: The meaning of "work" — is *Idea Services* applicable?

[63] As the third issue raises the same matters in relation to Mr Humphreys' case, we deal with that issue as it affects both appellants at the end of our judgment.

#### *Issue one: The correct approach to the definition of a "homeworker"*

[64] Whether Ms Fleming is an employee turns on whether she meets the definition of "homeworker" in the ERA. The submissions on this point raise the question of whether the Court of Appeal was correct to draw a distinction between Ms Fleming and Mr Humphreys in terms of their status. That turns on the significance and characterisation of Ms Fleming's decision to decline the Ministry's offer under the

Funded Family Care policy because of the hours offered, and to continue to receive a benefit instead.<sup>61</sup>

### The statutory definitions

[65] It is helpful to begin with the definition of an employee in s 6 of the ERA. Section 6 defines an “employee” in these terms:<sup>62</sup>

- (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 homemaker; 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.
- (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.

[66] “Homemaker” in turn is defined in s 5 as follows:

- (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

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<sup>61</sup> See above at [27]–[28].

<sup>62</sup> Emphasis omitted.

- (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 ...

[67] The definition of “homeworker” has been the subject of consideration in the authorities, including in the decision of this Court in *Lowe*.<sup>63</sup>

[68] Ms Lowe worked as a relief carer for disabled or elderly people in their homes under a government programme referred to as the Carer Support Scheme. Under the Scheme, the Ministry either reimbursed the primary carer for the sum paid to the relief carer, to the amount the Ministry was willing to pay, or made payment directly to the relief carer. The issue before this Court was whether Ms Lowe was “engaged” by the Ministry or the District Health Board (DHB), or by the primary carer(s).

[69] The Court concluded, by a majority, that Ms Lowe was not “engaged” by the Ministry or the DHB but, rather, that the engagement was with the respective primary carer. Arnold and O’Regan JJ reached that view because “the selection” of the person being engaged was “undertaken by the primary carer” and the relevant work “undertaken ... is undertaken for the primary carer without reference to the Ministry or the DHB”.<sup>64</sup>

[70] William Young J agreed with the outcome but for differing reasons. William Young J found the requirements in s 5 of the definition of “homeworker” were to be read as a whole. He said there was a contractual relationship between the Ministry and Ms Lowe but the primary carer, not the Ministry, engaged the relief carer and did not do so as an agent for the Ministry. Rather, the Ministry’s role was to subsidise the cost of the primary carer engaging the relief carer. It followed that the “trade or business” of the Ministry did not include the provision of relief care and that work was not undertaken “for” the Ministry.<sup>65</sup>

[71] Elias CJ and Glazebrook J, dissenting, found that Ms Lowe was employed, engaged or contracted by the Ministry to provide relief care. Alternatively, they would

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<sup>63</sup> *Lowe*, above n 9.

<sup>64</sup> At [65].

<sup>65</sup> At [85].

have held that Ms Lowe’s services were secured by the primary carers acting as agents of the Ministry or the DHB.

#### Submissions on *Lowe v Director-General of Health*

[72] In the course of the hearing, counsel for Mr Humphreys asked the Court to consider overruling *Lowe*. Essentially, the submission was that the approach to the term “engagement” adopted in *Lowe* was unduly semantic and undermined the purpose of the provision, namely, to protect the employment rights of vulnerable workers contracting to undertake work for others in a home.

[73] The parties in the present appeals were given an opportunity to provide further submissions on whether we should depart from *Lowe*. Neither appellant saw *Lowe*, ultimately, as problematic for their case but counsel for Ms Fleming submitted there was a lack of certainty as to the majority position given the two separate sets of reasons in the majority, and counsel for Mr Humphreys maintained it was wrongly decided and should be overruled. In developing this point, Mr Cranney submitted that the concept of “selection” referred to in the reasons of Arnold and O’Regan JJ has no place given the context and indeed is not a concept that is front of mind in the employment field. He said it suggests a calling together of a group of persons from whom one is then “selected” to work. The Attorney-General did not consider there was a basis for overruling *Lowe*.

#### *Lowe* and the approach to the “homeworker” definition

[74] As we explain, we can address Ms Fleming’s appeal on a basis we see as consistent with the text and purpose of the definition of “homeworker” and the approach in *Lowe*. It is accordingly not necessary for us to deal in this case with the submissions that we should depart from *Lowe*.

[75] However, it is useful to make some brief observations to clarify the effect of the majority position in *Lowe*. We note, first, that there is force in Mr Cranney’s submission that it would be preferable to keep to the statutory wording. But, in any event, the reference to “selection” was directed to the factual setting of *Lowe* where the question was which one of the possible candidates, the Ministry, DHB or the

primary carer, was engaging Ms Lowe. That is a distinguishing feature from Ms Fleming’s case and highlights that a fact-specific analysis is necessary.

[76] Second, *Lowe* does not stand for the proposition that there must be an “event” or series of events by which a person is transformed from one status to another as the Court of Appeal in the present case suggests.<sup>66</sup> Rather, the reasons of Arnold and O’Regan JJ are best read as requiring that the evidence be sufficient to show engagement.<sup>67</sup> The reasons of Arnold and O’Regan JJ read overall do not discount the possibility that a combination of events may adequately evidence engagement. Engagement may arise constructively.

[77] The reasoning also encompasses the prospect that there will be points along the way where something less than formal selection will comprise the requisite event or events evidencing engagement. But, the reasons make clear, there must be an awareness of the circumstances that establish engagement. There are legitimate policy concerns underlying this approach. “Engage” should not be given a meaning that is so broad that it results in oppressive or unreasonable outcomes. That is why the very fact-specific analysis to which we have referred is necessary.

[78] We add that the idea that a combination of events may be sufficient to evidence engagement is consistent with the reference in other parts of the judgment to the fact that “engaged” is a flexible term.<sup>68</sup> It is also consistent with the protective purpose of the “homeworker” provision referred to by both Arnold and O’Regan JJ and the dissenting Judges.<sup>69</sup>

[79] Further, in the present case, importantly, a construction which allows for the possibility a combination of events may be sufficient to evidence engagement is also supported by the relevant provisions of the Convention, a point emphasised by Te Kāhui Tika Tangata | the Human Rights Commission in its submissions. The purpose of the Convention is to “promote, protect and ensure the full and equal enjoyment” of rights and freedoms by disabled people and to “promote respect for

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<sup>66</sup> CA judgment, above n 8, at [58].

<sup>67</sup> *Lowe*, above n 9, at [63]–[64].

<sup>68</sup> See at [35]–[36] and [39] per Arnold and O’Regan JJ.

<sup>69</sup> At [11]–[12] and [34] per Arnold and O’Regan JJ, and [90]–[93] per Elias CJ and Glazebrook J.

their inherent dignity”.<sup>70</sup> The general principles of the Convention in art 3 include “[r]espect for inherent dignity [and] individual autonomy”, non-discrimination and “[f]ull and effective participation and inclusion in society”.<sup>71</sup>

[80] Article 12 provides for equal recognition of disabled people before the law, and states parties have an obligation to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”.<sup>72</sup> Under art 19, states parties recognise the right of disabled people “to live in the community” with equal choices, and agree to “take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right” by ensuring various steps are taken.<sup>73</sup>

[81] It follows that we do not see it as inconsistent with *Lowe* to allow for the possibility that a combination of events may adequately evidence engagement, at least where there is an ongoing care relationship.

[82] Because the focus in *Lowe* was on whether the relief carers were engaged by the Ministry or the DHB rather than by the primary carer, *Cashman v Central Regional Health Authority* was not seen as determinative on the question of the meaning of “homeworker” by Arnold and O’Regan JJ in *Lowe*.<sup>74</sup> We note here that the Court of Appeal in *Cashman* concluded Mrs Cashman and her fellow appellants, who provided home care services under written contracts with the Central Regional Health Authority (the RHA) and, later, a private company to whom the RHA had contracted certain responsibilities, were homeworkers as defined in the Employment Contracts Act 1991. It was accordingly clear that the “homeworker” definition was not limited

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<sup>70</sup> Article 1.

<sup>71</sup> Article 3(a)–(c).

<sup>72</sup> Article 12(3).

<sup>73</sup> For example, this includes by ensuring disabled people are able “to choose their place of residence and where and with whom they live on an equal basis with others”, have access to support services, and so on: art 19(a)–(c).

<sup>74</sup> *Lowe*, above n 9, at [17]; and see *Cashman*, above n 38, at 13–15.

to pieceworkers working in their own home.<sup>75</sup> Among other distinguishing features, issues of a lack of selection or knowledge did not arise in *Cashman*.<sup>76</sup>

[83] William Young J, by contrast, saw observations in *Cashman* as relevant to the extent that they pointed to the fact the application of the definition necessitated “a pragmatic assessment of the relationship in question and in particular whether, allowing for the homeworker definition, it can sensibly be regarded as employment”.<sup>77</sup>

[84] We consider that last observation is very much on point in terms of the present case. In these types of cases, there may in fact be no formal contract for services. But, as *Cashman* recognises, a person who is a “homeworker” is deemed, without more, to be in an employment relationship.<sup>78</sup>

[85] The other general point we make about the approach to the definition of “homeworker” is that we agree with the Employment Court that assistance in this case can be drawn from *Cowan v Kidd* in determining whether Ms Fleming had been engaged.<sup>79</sup> The Court of Appeal, by contrast, considered that the Employment Court had erred in relying on *Cowan v Kidd*. That was because *Cowan v Kidd* was decided under s 6(1)(a) of the ERA which contains a specific direction in s 6(2) to the court to consider “the real nature of the relationship” in deciding whether a person is employed under a contract of service. There is no such specific direction in the context of the “homeworker” definition.

[86] In our view, whether or not the direction in s 6(2) discussed in *Cowan v Kidd* itself applies, it cannot be the case that the court under s 6(b)(i) can ignore the real nature of the relationship or adopt a form-over-substance approach. That would go against the purpose of the “homeworker” provision which is to provide protection for persons who otherwise would not have the protections to which employees are entitled

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<sup>75</sup> As described in *Lowe*, in the Green Paper that preceded the introduction of the definition of “homeworker”, “[t]he concept of homeworker was ... confined to those working in their own homes, primarily as pieceworkers”: *Lowe*, above n 9, at [170] per Elias CJ and Glazebrook J. However, the concept as carried into s 5 of the ERA was broader: see at [90]–[94] per Elias CJ and Glazebrook J.

<sup>76</sup> *Cashman*, above n 38, at 13–15.

<sup>77</sup> *Lowe*, above n 9, at [84].

<sup>78</sup> *Cashman*, above n 38, at 13.

<sup>79</sup> *Cowan v Kidd* [2020] NZEmpC 110, [2020] ERNZ 319.

in terms of health and safety, payment for work, and so on.<sup>80</sup> Ignoring the real nature of the relationship being considered would also not fit with the broader statutory context.

[87] The point taken from *Cowan v Kidd* by the Employment Court in Ms Fleming's case was that the existence or otherwise of an employment relationship is objectively assessed and can be present even though one or both parties are "subjectively unaware of their status as employer or employee".<sup>81</sup> In *Cowan*, the Employment Court said that if a contractual analysis had been applied to the parties' relationship Mr Cowan, who was asserting he was an employee, would fail. That was because there was no certainty as to terms and neither party set out to have Mr Cowan as an employee of Kidd Partnership. But, the Employment Court went on to note, "s 6 looks beyond a strictly contractual analysis and requires the Court to consider the real nature of the relationship".<sup>82</sup>

[88] The parties' relationship was not intended by either of them to be one of employment. Rather, Mr Cowan was a friend helping out with the other friend's business. A large part of what Mr Cowan did was in the nature of work and was similar to that being done by other employees. The principal difference was the lack of a formal agreement and no pay. The Employment Court held that the employment relationship had evolved alongside the parties' friendship. The tasks were done for the benefit of the Kidd Partnership and with the expectation of reward.

[89] To summarise, reflecting both the text and purpose, the authorities indicate that "engagement" in the homeworker definition is a term that is to be construed broadly, in context, and that a combination of events may evidence engagement. There may well be points along the way where something less than formal selection will comprise the requisite event or events, an approach which appropriately assists the court in assessing the substance of the arrangements rather than their form.

[90] We turn then to apply these principles to Ms Fleming's case.

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<sup>80</sup> See above at [78].

<sup>81</sup> EC judgment, Ms Fleming, above n 4, at [74].

<sup>82</sup> *Cowan*, above n 79, at [31].

*Issue two: Application to Ms Fleming's case*

[91] It is necessary at this point to say a little more about the facts.

[92] Ms Fleming applied for Funded Family Care in October 2018. Her eligibility for payment under the scheme was confirmed. Her work was approved. Justin was assessed as requiring supervision 24 hours a day, every day. But Ms Fleming was offered payment terms based on an allocation of 15.5 hours per week. She exercised her right of review of that decision but was unsuccessful. The allocation offered was eventually increased to 22 hours. Ms Fleming did not accept that offer but said she would accept payment based on the maximum allowable, that is, 40 hours.

[93] The maximum allowable payment of 40 hours was provided for in the Notice.<sup>83</sup> But, in determining the amount to be offered to Ms Fleming, the Ministry relied on its contractual arrangements with the NASC organisation and its associated internal policies to offer the lesser amount. To explain how this works, we need to discuss first what is referred to as the Tier Two Service Specification.<sup>84</sup> This document is to be read with the Tier One Service Specification.<sup>85</sup> The Tier One Service Specification sets out several disability support service principles reflecting, among other matters, commitments under the Convention.

[94] The Tier Two Service Specification states that the relevant services for which funding is available “may include Personal Care, sleepover/night support; and Household Management”.<sup>86</sup> These services are further defined as follows:<sup>87</sup>

#### **6.6.1 Household Management**

Services which assist a Person with a disability to maintain, organise and control their household/home environment, enabling them to continue living within their own environment.

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<sup>83</sup> Funded Family Care Notice, above n 20, at cls 10(c) and 16; and see above at [20].

<sup>84</sup> *Disability Support Services: Tier Two Service Specification — Home and Community Support Services* (v 1.1, July 2020) [Tier Two Service Specification].

<sup>85</sup> *Disability Support Services: Tier One Service Specification* (v 1, August 2015).

<sup>86</sup> Tier Two Service Specification, above n 84, at cl 2.

<sup>87</sup> See also the description of “Purchase Units” in cl 12.

### 6.6.2 Personal Care

Assistance with activities of daily living that enables a Person with a disability to maintain their functional ability at an optimal level.

### 6.6.3 Sleepover Care or Night Support

A Service where the Support Worker or Other Staff Member is required to sleep at the home of the Person in order to provide intermittent care throughout the night.

[95] The evidence on behalf of the Ministry explained the way in which parameters for the calculations of support were set. The Ministry developed a “Support Allocation Template” to help NASC organisations calculate the number of hours required. The Funded Family Care Support Allocation Template essentially required NASC organisations to divide up the personal care and household management tasks to be undertaken by the carer and allocate the minutes per day and total minutes per weeks to each of the tasks. It is sufficient to set out an excerpt from the template as follows:

**Funded Family Care Support Allocation Template**

Personal Care tasks	Mins per Day	Total Mins per Week	Comments	Household Management tasks	Mins per Day	Total Mins per Week	Comments
...	...	...	...	...	...	...	...
Feeding/eating/hydration		0					
Meal preparation (if special prep required or not living in family home)		0					
Mobility/positioning		0					
Medication management/oversight		0					
Preparation for bed		0					
Intermittent night support		0					
<b>TOTAL PC</b>	0.0	0.0		<b>TOTAL HM</b>	0.0	0.0	
Total PC (Weekly Hours)		<b>0.0</b>		Total HM (Weekly Hours)		<b>0.0</b>	
Total HM (Weekly Hours)		<b>0.0</b>					
<b>Total FFC Hours</b>		<b>0</b>					

[96] It is apparent that the 40-hour maximum was the primary control reflecting both the fiscal constraints in pt 4A and the objective in pt 4A to ensure that the primary

responsibility for the well-being of individuals falls to their families. The latter point is seen in the absence of funding for what are described as “natural supports”, generally referring to care by families and friends.<sup>88</sup> The next limit is the requirement that services comprise household management, personal care and sleepover care. Beyond that, the policies provided for the further breakdown of those services into activities to which blocks of minutes are allocated.

[97] The Court of Appeal considered the approach to funding for family care in these circumstances and, in particular, the effect of the Tier Two Service Specification in *Chamberlain v Minister of Health*.<sup>89</sup> That case was a challenge to the Ministry’s funding decision on the basis it was unlawful as not consistent with the relevant family care policy. The Court was focused on the lawfulness of the Ministry’s long-standing practice not to treat supervision as household management or personal care. Mrs Moody, the family carer in that case, was only allocated funding for direct, hands-on disability-related support needs, not for overnight care. The Court of Appeal considered the Ministry’s approach was not lawful.

[98] The Ministry’s response was to provide for funding for intermittent night care. The end result, as is accepted on behalf of the Ministry, is that although in the present case Justin needs supervision 24 hours a day, seven days a week, the blocks of minutes for which funding is provided do not include any time spent supervising him except to the extent there is funding for intermittent night care.

[99] The case for Ms Fleming is that the effect of *Chamberlain* is that personal care must include looking after or supervising those for whom constant care is required so, for example, the person being cared for does not go outside and get injured. The Ministry’s offer to Ms Fleming did not reflect these needs and was therefore an unlawful offer. For the second respondents, Mr Meys says that the Ministry in its offer to Ms Fleming went outside the scope of the Notice contrary to *Chamberlain* and relied on subsidiary arrangements and policy to offer the lesser amount.

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<sup>88</sup> See above at [21] and below at [103].

<sup>89</sup> *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771.

[100] The Attorney-General challenges the conclusion that the Funded Family Care policy is inconsistent with *Chamberlain* and also says, in any event, that is not something this Court can consider. Rather, it would be a matter for Ms Fleming to bring new proceedings challenging the policy by way of judicial review. The Attorney-General submits the Employment Court accepted this in the following passage in the judgment relating to Ms Fleming:<sup>90</sup>

[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 [ERA].

[101] We deal with the last point relating to jurisdiction, first. If the Attorney-General is right then, by making an offer which is not calculated in accordance with the policy, the Ministry effectively compels Ms Fleming into the position of a volunteer. In this way she is brought within a stated exception to the definition of an “employee” and so is excluded from the benefits of employment status, albeit by applying for funding she has made it clear she no longer wishes to be a volunteer.<sup>91</sup> That is so when it has been determined she meets eligibility requirements and is otherwise entitled to payment in terms of the policy. That outcome cannot be right. In determining the substance of the arrangements between them, the Ministry cannot have it both ways. That is, to rely on the fact payment can only be made in terms of the policy but then to essentially ask the Employment Court, which under s 189 of the ERA is a court of equity and good conscience, to ignore the fact the offer made did not reflect the Ministry’s obligations.

[102] We turn then to the submission that there is no inconsistency with *Chamberlain*. It is true that the Court of Appeal in that case did not consider its approach would require “major” change, a point relied on by the Attorney-General.<sup>92</sup>

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<sup>90</sup> EC judgment, Ms Fleming, above n 4.

<sup>91</sup> ERA, s 6(1)(c).

<sup>92</sup> *Chamberlain*, above n 89, at [72].

But when the decision is read as a whole, it is clear the Court considered that supervision in the context of care of a family member which was necessary to meet the purposes of funding — such as enabling the family member to continue to live at home — could come within personal care. Calculation of funding for someone in the position of Justin who requires care 24 hours a day, seven days a week, must reflect that possibility.

[103] The Court in *Chamberlain* accepted Mrs Moody, as the family carer, could not expect Ministry funding for her son’s full-time care. But that did not mean no funding for supervision. This was not one of the excluded services and payment was consistent with obligations under the Convention. Further, having looked at the principles in the annotated version of the Operational Policy, the Court said this:<sup>93</sup>

[82] A distinction appears to emerge from these principles. On the one hand there are services directed to meeting *essential needs*, which are funded; on the other there is provision of *natural supports*, which are not funded. The question of whether general supervision and intermittent care falls within the former category of eligibility is answered by asking whether that service is essential to maintaining the person with disabilities’ mental and physical health in the home environment. If the starting premise is that the person’s best interests are served by continuing to live in the home environment, and if a service is necessary to support that situation, it must qualify as essential given the overarching purposes of the legislative regime. It would include night-time attendances where such services are provided.

[104] Against this background, as we see it, the result for Ms Fleming is that, by making an unreasonable (if not unlawful) offer to her in circumstances where she would have accepted an offer reflecting the maximum allowable, the Ministry has effectively compelled her to continue working but as a volunteer. Another way of putting this point is that where there is, as there was here, an on-going care relationship on a voluntary basis which evolved into something said to engage the obligation to remunerate, as evidenced by Ms Fleming seeking her entitlements under the policy, there was sufficient to signal that change to the Ministry. The Ministry responded with what was, at the least, a wrongly calculated offer that she was not bound to accept. Ms Fleming, meanwhile, continued to assert her “engagement” by exercising her rights through her review of the funding decision and her subsequent legal challenge.

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<sup>93</sup> Emphasis in original.

[105] Viewed objectively in context, and looking at the real nature of the arrangements, this was sufficient to comprise an appreciation of responsibility by the Ministry — in *Lowe* terms, an “event”. In these circumstances, Ms Fleming should not be bound by her decision to remain on the benefit. The contextual matters we now outline need to be looked at as a whole because it is the particular combination of factors relevant here that drives our conclusion.

[106] First, the Ministry was aware through the regular NASC assessments that Ms Fleming was caring for Justin and the engagement was subject to ongoing monitoring on the part of the Ministry via its agent. It is clear from the Notice that the NASC organisations are the Ministry’s agents and, as such, they have responsibilities for monitoring quality control of the services provided. Clause 11 of the Notice described that Funded Family Care was provided through “a ... partnering relationship among the disabled person, family carer, Ministry, and Ministry’s agents”, of which NASC organisations are one.<sup>94</sup> The NASC organisations’ responsibilities expressly included monitoring the delivery of Funded Family Care and auditing service arrangements.<sup>95</sup> The Ministry’s responsibilities, in turn, included “arranging for assessment, ... monitoring and auditing”.<sup>96</sup>

[107] Second, the Ministry set the terms on which the engagement was to occur so, apart from the need to establish the total hours for which funding would be paid, there was no dispute about the terms of the engagement.

[108] Third, Ms Fleming was undertaking work the Ministry would otherwise have had at least some obligations to undertake if she refused or was unable to do this work. We do not need to reach any conclusions about the scope of the state’s obligations to care for adult disabled persons. That is because it was accepted on behalf of the Ministry at the hearing that if Ms Fleming declined the offer but then decided not to care for Justin anymore, the State would have had to provide some care for him.<sup>97</sup> The Attorney-General distinguishes that obligation from one under which the Ministry

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<sup>94</sup> Funded Family Care Notice, above n 20.

<sup>95</sup> Clause 11(e)(ii) and (iv); and see also cl 23.

<sup>96</sup> Clause 19(g).

<sup>97</sup> In *Atkinson*, the Court of Appeal noted that one of the Ministry’s witnesses accepted that if a disabled person and/or their family “put their hand up” and sought disability support services “those needs would be met, as long as that was reasonable”: *Atkinson*, above n 15, at [65].

has to pay Ms Fleming to care for Justin in the circumstances she has chosen. The validity of that distinction aside, it is not a complete answer here where we are determining the Ministry's appreciation of what the position was, which must be influenced by its understanding of its responsibilities.

[109] The final important contextual matter is the absence of clear-cut language in the policy to achieve the result contended for on the part of the Ministry. We consider that is significant in this setting where the case raises important issues about the overlap between the obligations of an employer, the state, and those of the family. This was a point touched on at the hearing, for example, during the submissions for Ms Fleming about the possibility that tikanga might provide another lens through which these matters could be viewed. (We interpolate here that, as counsel for Ms Fleming on this aspect anticipated, we have not found it necessary to engage with tikanga.)

[110] These issues were also discussed in *Atkinson* by reference to the Ministry's submission that allowing payment of family members for their care of their children would be a breach of the social contract.<sup>98</sup> The legislature, by the enactment of pt 4A, has moved beyond that proposition by enabling payment for family carers. But it is clear that the intention, via pt 4A, the Notice and the Operational Policy, was to seek to draw a line between the respective obligations as between employer and family member. However, at the point where that line-drawing seeks to exclude a person who would otherwise be a homeworker from their rights under the ERA, the line needs to be crystal clear particularly given the terms of the policy recognise the rights under the Convention. General language, as used in the policy here, will not do to achieve the result contended for. There is, for example, nothing express to support the proposition that personal care cannot include supervision.

### *Conclusion*

[111] In these circumstances, we find that the Court of Appeal erred in allowing the appeal against the finding of the Employment Court that Ms Fleming was a homeworker.

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<sup>98</sup> At [168] and [175].

[112] We discuss the question of whether what Ms Fleming did was “work” after our consideration of Mr Humphreys’ appeal as to the effect of his transition to Individualised Funding.<sup>99</sup>

### **Mr Humphreys’ appeal**

[113] The following issues arise in Mr Humphreys’ appeal:

- (a) Issue one: Did Mr Humphreys cease to be a “homeworker” under the Individualised Funding scheme?
- (b) Issue two: Whether in caring for Sian, Mr Humphreys was “working”.

#### *The impact of transition to Individualised Funding*

[114] The appellant’s case is that the reasoning of the Court of Appeal about Mr Humphreys’ status under Funded Family Care applies equally to the position under Individualised Funding. The same conclusion, that is, that Mr Humphreys was a homeworker, should have followed. In particular, it is said that the Individualised Funding scheme — like Funded Family Care — proceeds on the basis that the disabled person has the capacity to do the things envisaged under the scheme. To illustrate, for example, Mr Humphreys notes that the Individualised Funding Service Specification assumes that the disabled person will have had “a discussion with the NASC to determine if Individualised Funding is a suitable option for them”, and has the capacity to take on the identified “employment responsibilities”.<sup>100</sup> The employment responsibilities referred to include management of ACC levies, KiwiSaver, and the quality of services provided. As the Court of Appeal found in relation to Funded Family Care, Sian does not have the capacity to fulfil these responsibilities.

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<sup>99</sup> See below from [133].

<sup>100</sup> Ministry of Health *Service Specification (Individualised Funding)* (DSS-IFA v1.8, July 2020) at cl 3.2.3.

[115] In support of this submission, it is argued that the documentation supplied to Mr Humphreys about the changes from Funded Family Care gave the impression he was just continuing on in his role and the change was simply as to the funding.

[116] The argument that Individualised Funding is simply a continuation of the same approach as taken under Funded Family Care is also made by counsel for the second respondents. Counsel also argues that the Ministry did not follow the statutory processes applicable to a restructuring proposal, namely, consultation, feedback and disclosure.<sup>101</sup>

[117] In supporting the decision of the Court of Appeal, the Attorney-General says first, that Individualised Funding is a different and much more flexible scheme. The Individualised Funding scheme provides a funding structure enabling family carers to be engaged by the disabled person or by their nominated agent. The introduction of an agent fixes the lack of capacity issue identified by the Court of Appeal as critical in relation to Mr Humphreys' status under the Funded Family Care scheme. Mr Humphreys chose to be both Sian's agent and her carer albeit that combination of roles was not one encouraged by the Ministry.

[118] The Attorney-General resists the notion that the introduction of Individualised Funding for resident family carers was simply a continuation of the pre-existing homeworker status. The Attorney-General, as we have foreshadowed, emphasises the greater flexibility and autonomy given to the disabled person and their agent under Individualised Funding with the resultant absence of Ministry knowledge or control over what is happening. The end result is that there is no "event" as required by the *Lowe* decision.

[119] In rejecting Mr Humphreys' arguments on the first point, the Court of Appeal placed reliance on the fact that the Individualised Funding Service Specification contemplated the management of Individualised Funding by someone on behalf of the

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<sup>101</sup> Referring to ERA, ss 69OJ and 69OK and s 69OI definition of "employee protection provision", *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57, (2023) 19 NZELR 620 and *Birthing Centre Ltd v Matsas* [2024] NZCA 139, [2024] ERNZ 248.

disabled person. The Court referred to cl 7.1 of the Service Specification which provides that:<sup>102</sup>

If it is agreed that the Person wishes to manage their own supports, the NASC will discuss the option of Individualised Funding with them. If the Person wants to use Individualised Funding and is able to manage a budget and direct how Support Services will be provided (or have someone in the support network who can take on this responsibility), then a referral can be made for Individualised Funding.

[120] The Court accepted the position at general law was that a person without capacity to contract is unable to validly appoint an agent as “capacity to contract by means of an agent is co-extensive with the capacity of the principal alone to make the contract”.<sup>103</sup> The difference here was that the “nominated agent” contemplated by the Service Specification was not one necessarily appointed by a principal with capacity but rather, someone that is “able to make decisions on behalf of” the disabled person.<sup>104</sup> Mr Humphreys was the nominated agent of his daughter and entitled to manage the aspects of the funding arrangements even though Sian did not have capacity to appoint him in the usual way. The host provider was also entitled to deal with Mr Humphreys on this basis.

[121] We agree with the submission for Mr Humphreys that this is not a realistic assessment of the position under Individualised Funding. That is apparent also from the facts of Mr Humphreys’ case which support the conclusion that Individualised Funding was, here, simply a continuation of the status quo for Mr Humphreys and for Sian. As the written submissions for Mr Humphreys put it:

As it applies to persons without capacity, the system is set up so that the carer – in this case Mr Humphreys – forms a relationship with the Ministry through the Host, brought about by the series of events in which the carer is engaged (or continues to be engaged).

[122] Mr Humphreys is right that the Service Specification assumes a capacity to undertake various tasks vis-à-vis the appointment of an agent. It also must be right

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<sup>102</sup> *Service Specification (Individualised Funding)*, above n 100.

<sup>103</sup> CA judgment, above n 8, at [253] citing Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (23rd ed, Sweet & Maxwell, London, 2024) at [2-006] and GE Dal Pont *Law of Agency* (4th ed, LexisNexis, Chatswood, 2020) at [3.2].

<sup>104</sup> *Service Specification (Individualised Funding)*, above n 100, at 14 (see definition of “nominated agent”).

that it cannot be assumed that Mr Humphreys can make these decisions on behalf of Sian when there has been no guardian appointed under the Protection of Personal and Property Rights Act. We also agree with the submission for Mr Humphreys that the fact there is a potential alternative pathway to employment with a third party is not relevant here. It cannot change the basic proposition that it is unrealistic to treat Mr Humphreys as the nominated agent.

[123] The relevant factual finding in the Employment Court also supports this conclusion. The Court found that there had been no change in what Mr Humphreys was doing in relation to the care provided to Sian both as to its nature and extent, albeit there were changes to the overarching model.<sup>105</sup>

[124] It is helpful also to look further at the documentation sent to either Sian or Mr Humphreys in relation to what was described as the “transition” to Individualised Funding. That documentation supports the notion that little changed from the perspectives of Mr Humphreys and Sian in the move to Individualised Funding and some of the material is also consistent with Mr Humphreys’ submission that the Ministry was assuming Sian had capacity to be involved in the process.

[125] The first of the relevant letters, dated 30 March 2020, was in fact sent to Sian, it began “Dear Client”. That letter noted the changes to Funded Family Care “payments” that would be happening in April 2020. It is true that the letter went on to note that the changes included “removing the requirement for an employment relationship between a disabled person and their resident family member under the Ministry’s Funded Family Care policy”. But the overall focus suggests the position would be as Mr Humphreys contends, that is, he would just continue to do the work and the Ministry would pay him. The letter concluded by noting that payments under the new hourly rate would “automatically start on 14 April”.

[126] The next relevant letter, dated 28 May 2020, was addressed to both the recipient of Funded Family Care and their carer. This letter noted that Funded Family Care was being disestablished and the support “provided by your family carer can continue through one of two arrangements”:

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<sup>105</sup> EC judgment, Mr Humphreys, above n 5, at [28].

- (a) Family members can be employed by a Home and Community Support Service ... to provide your care, or
- (b) You or your agent can access Individualised Funding ... and engage family member(s) to provide support directly.

The letter went on to say that the recipient or their agent could choose an arrangement best suiting the recipient's circumstances.

[127] The letter explained that Sian would be "transitioned on [her] current allocation of support" and there was no need for a reassessment by her NASC organisation. The associated information in that letter for people currently receiving funding under Funded Family Care prepared by the Ministry again refers to transitioning to the new system and that "it is the process for paying family carers that is changing with the removal of the [Funded Family Care] notice". On the same page, reference was made to the fact that "[t]he disabled person as the budget holder will be the recognised employer under employment law".

[128] The impression given was that things were continuing on as they had been and that the person being cared for had a role which, perpetuating the assumption that proved problematic under Funded Family Care, they had the capacity to fulfil.

[129] The Attorney-General submits that we should look at the statements in these letters in light of the fact that, at that point, the Ministry was not aware that there was an employment relationship in play between the Ministry and family carers under Funded Family Care. We do not see that as changing the focus on the maintenance of continuity including as to Sian's capacity.

[130] The Court of Appeal said that Mr Humphreys knew and understood that he could be employed by a Home and Community Support Services provider. He chose not to be employed under that model for the reasons discussed above.<sup>106</sup> But, the Court said, when Mr Humphreys selected Individualised Funding for Sian, he also knew that she could not be his employer because of her lack of capacity. While there was no prohibition on a nominated agent also being a support carer, the Court found

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<sup>106</sup> Above at [60].

that Mr Humphreys “must have known that assuming both roles would leave him without an employer in any real sense”.<sup>107</sup>

[131] We agree with the appellant that it is not clear quite how Mr Humphreys would have known that this was the position. But, even if he did, it does not alter the basic proposition that Sian lacked the capacity to nominate him as her agent.

[132] Accordingly, for two reasons, first, the perpetuation of the proposition Sian had capacity to instruct an agent and, second, the presentation of what was occurring as more in the nature of a transitional arrangement, we consider there was no difference for Mr Humphreys in the switch to Individualised Funding. In other words, there was nothing to change his status from that of homeworker as the Courts below both found while he was under Funded Family Care. If necessary, we would also have had to consider whether the Ministry was required to comply with the usual safeguards in the ERA if seeking to change his employment status. For these reasons, the Court of Appeal was wrong to allow the Attorney-General’s appeal on this aspect of the case.

### **The meaning of “work” — Ms Fleming and Mr Humphreys**

[133] On the basis that Ms Fleming is an employee by virtue of being a homeworker, the question then arises as to her entitlement to lost wages. The Minimum Wage Act provides that:<sup>108</sup>

... every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from [their] employer payment for [their] work at not less than that minimum rate.

[134] “Worker” under that Act means the same as “employee” in s 6 of the ERA, so homeworkers are included.<sup>109</sup> The word “work” is not defined. As we have noted, the Employment Court found that Ms Fleming’s entitlement to minimum wages should be decided by reference to the approach taken to the meaning of “work” in

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<sup>107</sup> CA judgment, above n 8, at [256].

<sup>108</sup> Section 6(1).

<sup>109</sup> Section 2 definition of “worker”.

*Idea Services*.<sup>110</sup> The Court of Appeal, by contrast, took the view that the approach in *Idea Services* was not applicable to a homeworker. That was because of the absence of constraints of the kind affecting other employees and because many of a family carer's activities could equally be seen as steps taken in their capacity as guardian or homeowner. The Court also relied on the fact there had been a reversal of approach in the overseas case law referred to in *Idea Services*.

[135] Largely the same issues arise in relation to Mr Humphreys' appeal, albeit that his pleading is limited to seeking a declaration that he is an employee. Issues as to the calculation of wages will come later for him.

[136] The first issue arising under this heading relates to the applicability, or otherwise, of *Idea Services*. The question is whether, as the appellants, the second respondents and Aotearoa Disability Law Inc submit, the factors identified to assist in determining what constitutes work set out in *Idea Services* remain relevant. By contrast, the Attorney-General supports the approach of the Court of Appeal, submitting that what comprises work for an employee under a contract of services imposes constraints and responsibilities on the employee that are not present for a homeworker. Further, the Attorney-General says, while *Idea Services* is not irrelevant, other factors than those identified in that case may potentially be relevant in this novel situation. It is also necessary to consider whether the Court of Appeal was right that the change in approach in the comparable authorities in the United Kingdom means *Idea Services* should not apply to homeworkers.

[137] The other issue is about how Ms Fleming's claim for lost wages should be addressed.

#### *The application of Idea Services Ltd v Dickson*

[138] *Idea Services* dealt with the meaning of "work" for the purposes of s 6 of the Minimum Wage Act. Mr Dickson was employed by Idea Services Ltd as a community service worker providing care and support for disabled people living in community homes. At times he was required to do what the parties called "sleepovers". On those

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<sup>110</sup> See above at [5].

occasions, Mr Dickson was required to be at the community home overnight so he could deal with any issues arising.

[139] The Employment Court had concluded Mr Dickson was working whilst on a sleepover and so entitled to be paid at the minimum wage rate.<sup>111</sup> In reaching this conclusion, the Employment Court addressed three factors:<sup>112</sup>

- (a) the constraints placed on the freedom the employee would otherwise have to do as the employee pleases;
- (b) the nature and extent of responsibilities placed on the employee; and
- (c) the benefit to the employer of having the employee perform the role.

[140] The greater the extent to which each factor applied (for example, the greater the constraints), the more likely it was Mr Dickson was working. The Employment Court decided all three factors applied to a significant degree. This was “work” for the purposes of s 6 of the Minimum Wage Act.<sup>113</sup>

[141] The Court of Appeal in addressing *Idea Services Ltd*’s appeal endorsed the approach of the Employment Court, noting that it “appropriately” responded to “the wide variety of work that can be undertaken and the circumstances in which it may take place”.<sup>114</sup> Further, it reflected the fact that what was ordinarily considered “work” had changed, and will change, over time. The Court also agreed with the application of the three factors to Mr Dickson’s circumstances, rejecting the submission the approach was unduly “nebulous”.<sup>115</sup> The Court noted the approach was consistent with that adopted in overseas jurisdictions.<sup>116</sup>

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<sup>111</sup> *Idea Services Ltd v Dickson* (2009) 6 NZELR 666 (EmpC).

<sup>112</sup> At [64]–[71].

<sup>113</sup> At [71].

<sup>114</sup> *Idea Services*, above n 7, at [9]. This Court granted leave to appeal from the Court of Appeal decision: *Idea Services Ltd v Dickson* [2011] NZSC 55. One of the two approved questions was “[w]hether sleepovers constitute ‘work’ under s 6 of the Minimum Wage Act 1983”. The case was, however, settled prior to the hearing in this Court.

<sup>115</sup> *Idea Services*, above n 7, at [10]–[12].

<sup>116</sup> At [12] and [17]–[23].

[142] In upholding the decision of the Employment Court, the Court of Appeal also discussed the “significant” constraints on Mr Dickson whilst on a sleepover, the “important responsibilities” put on him, and the resultant “substantial benefit” to the employer.<sup>117</sup> By way of illustration, we note there were restrictions on Mr Dickson’s ability to leave the group home or to have visitors, it was necessary for him to remain ready to be woken, and there was also a requirement there be no disturbances to those in the home. In addition to being “constantly available”, there were other obligations such as to maintain the security of the property.<sup>118</sup>

[143] As the submissions for Mr Humphreys put it, and as the Court of Appeal accepted, the Court in *Idea Services* was not intending to set out a bright line test but, rather, it provides some factors to assist the court in making its assessment of the particular facts.<sup>119</sup> While it may be that at some point the Court will wish to review the appropriateness of these factors, for present purposes they are sufficiently flexible so as to remain helpful in the context of assessing the work done by a homeworker.<sup>120</sup> In this respect, the Employment Court in addressing Mr Humphreys’ case referred to a number of different types of employment situations considered since *Idea Services* where the time spent on particular activities was determined to be “work”.<sup>121</sup> The Chief Judge referred, for example, to cases dealing with medical professionals at home and on call,<sup>122</sup> freezing workers “donning and doffing” their safety clothing prior to and after joining the chain,<sup>123</sup> and boarding school matrons sleeping at a boarding school and on call to respond to students.<sup>124</sup>

[144] As we have noted, the Court of Appeal in the present case drew a distinction between the absence of control by the Ministry over the appellants and the sorts of constraints on Mr Dickson. In other words, the Court did not see the first of the factors

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<sup>117</sup> At [10].

<sup>118</sup> At [5] and [12].

<sup>119</sup> CA judgment, above n 8, at [103].

<sup>120</sup> We do not therefore need to address the submission for Aotearoa Disability Law, contested by the Attorney-General, that there is no basis for taking a different approach to what constitutes “work” depending on how the employment relationship arose.

<sup>121</sup> EC judgment, Mr Humphreys, above n 5, at [104].

<sup>122</sup> *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127, [2017] ERNZ 749.

<sup>123</sup> *Ovation New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2018] NZEmpC 151, [2018] ERNZ 455. An application for leave to appeal to the Court of Appeal was declined: *Ovation New Zealand Ltd v Te Kuiti Meat Processors Ltd* [2019] NZCA 146.

<sup>124</sup> *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.

in *Idea Services* as relevant to family carers in the home. This is a point developed by the Attorney-General in her submissions. In particular, the Attorney-General says the ability to exercise such control is co-extensive with a contract of service — a proposition which is contested by Aotearoa Disability Law. The Attorney-General also notes, for example, that there were a range of constraints on the school matrons in the decision relied on by the Employment Court, namely, *Law v Board of Trustees of Woodford House*.<sup>125</sup>

[145] The constraints in that case came from the relevant employment agreements, the schools’ own rules, and what the Court in that case described as “informal constraints” reflecting the circumstances of a boarding house, such as the need to speak quietly and so on.<sup>126</sup> The specific constraints included not being able to leave the boarding house while on a sleepover, not consuming or being under the influence of alcohol and drugs, and restrictions on the use of the internet. Importantly, for present purposes, the constraints were not limited to those under the terms of the contract.

[146] We agree that there will be factual differences. As the Employment Court said in *Law*, the inquiry is “intensely factual”.<sup>127</sup> But once it is accepted, as it is in the NASC assessments, that both Justin and Sian require 24-hour supervision, it cannot be said there are no constraints on the activities of the appellants. They are constrained by the need to care for Justin and Sian, for example, in their ability to leave their homes and to sleep uninterrupted — particularly where Ms Fleming is, for relevant purposes, in sole charge of caring for Justin. Ms Fleming in her evidence made the point that even when she does not have Justin with her “I am still on call”, reflecting the fragility of Justin’s health. She said that fragility also means his condition can change very quickly, for example, during the night, thereby requiring ongoing attendances.

[147] These aspects also need to be considered in light of the observation of the Court of Appeal in *Idea Services* that “work” is not to be interpreted to mean

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<sup>125</sup> *Law*, above n 124.

<sup>126</sup> At [111].

<sup>127</sup> At [168].

“physical and mental exertion”.<sup>128</sup> As the Court said, few at “work” have to “physically or mentally exert themselves at every moment of their work day”.<sup>129</sup>

[148] Further, there are ongoing NASC assessments in relation to the needs of Justin and of Sian, and the Ministry did reserve to itself an auditing and review function. In Mr Humphreys’ case, Chief Judge Inglis rejected the notion the Ministry was the funder only and otherwise “hands-off”.<sup>130</sup> Indeed, the Employment Court’s finding was that the Ministry “sat firmly in the driver’s seat”.<sup>131</sup>

[149] Finally, it is clear that if either appellant were to have taken on full-time employment elsewhere, then they would not have been entitled to Funded Family Care.

[150] As noted above, the Court of Appeal in the present case also made the point that a number of steps taken by family carers may equally be seen as taken in their capacity as guardian or homeowner.<sup>132</sup> The Attorney-General similarly draws a distinction by way of example between the case of Mr Dickson who would not have been responsible for the security of the community property were it not for his employment, and the appellants who are responsible for the security of their home by virtue of being homeowners.<sup>133</sup>

[151] We see this aspect as going to the calculation of the hours of work, rather than indicating that what is done is not work at all. That must be so given Parliament has legislated for homeworkers to be deemed employees, the very purpose of this provision having been to protect individuals working in their own homes from exploitation.<sup>134</sup> This indicates the performance of work in the home can be “work” under the Minimum Wage Act. As Mr Wysocki in his evidence for the Attorney-General accepted, if a person in the second respondents’ position, had “an accident” and needed to be “cleaned up”, a third-party carer would be paid for that

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<sup>128</sup> *Idea Services*, above n 7, at [13].

<sup>129</sup> At [13].

<sup>130</sup> EC judgment, Mr Humphreys, above n 5, at [47].

<sup>131</sup> At [48].

<sup>132</sup> See above at [52].

<sup>133</sup> Some of the employees in *Law* were effectively in their home although that was accommodation provided by their employer: *Law*, above n 124.

<sup>134</sup> See above at [78] and n 75.

work. It is not readily apparent why, once it is accepted that the appellants are homeworkers, the same should not apply to them.

[152] This part of the argument does bring to the fore important underlying policy considerations at play here.<sup>135</sup> The State, via the Notice and associated policy, has accepted responsibilities to care for those in Justin and Sian’s position — among our most vulnerable in the community. But the responsibility taken on is not open-ended, reflecting notions of proportionality between state and family responsibility.<sup>136</sup> Ms Fleming and Mr Humphreys both willingly accept that the model is one of pooling state and family resources to ensure appropriate standards of care are achieved. Exactly where the balance lies in a particular case will, as cases like *Law* make clear, involve a factual inquiry.

[153] Finally, in terms of the second and third factors in *Idea Services*, it is plain the appellants have responsibilities for the care and safety of their children. Nor can it really be contended the Ministry receives no benefit from the appellants’ care of their children when the Ministry would otherwise have at least some responsibilities for ensuring these adult disabled persons were being cared for.<sup>137</sup>

#### *The impact of the change in the United Kingdom jurisprudence*

[154] The Court of Appeal in this case noted that in *Idea Services* the Court had identified *British Nursing Assoc v Inland Revenue (National Minimum Wage Compliance Team)* as illustrative of what was involved in the concept of “work” in the minimum wage area.<sup>138</sup> However, the Court of Appeal said that, since *Idea Services*, *British Nursing* had been overturned in *Royal Mencap Society v Tomlinson-Blake* both in terms of its reasoning and effect.<sup>139</sup>

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<sup>135</sup> See above at [109]–[110].

<sup>136</sup> There are analogies with the analysis undertaken in *Atkinson*, above n 15, at [137]–[139] and [143]–[184]. As noted, the Court of Appeal in that case found family carers were discriminated against on the basis of family status in terms of s 19 of the New Zealand Bill of Rights Act 1990. The discrimination was not justified under s 5 of the Bill of Rights, which provides that the protected rights are subject only to reasonable and justified limits prescribed by law.

<sup>137</sup> See above at [108].

<sup>138</sup> *British Nursing*, above n 54.

<sup>139</sup> *Royal Mencap*, above n 54.

[155] The Court of Appeal in the present case took the view that this meant it was necessary to review the basis on which *Idea Services* could be said to apply to homeworkers who worked overnight in their home. The Court of Appeal considered that the reasoning in *British Nursing* should be put to one side.<sup>140</sup> That position is supported by the Attorney-General, who says that follows because *British Nursing* informed the development of the test in *Idea Services*.

[156] On this point, we agree with the submission for Aotearoa Disability Law, namely, that the overseas cases on similar minimum wage legislation, such as *British Nursing*, were used by the Court of Appeal in *Idea Services* more in the nature of a crosscheck rather than being central to the development of the test.<sup>141</sup> In any event, as Mr Cranney noted, the Court in *Idea Services* also discussed two cases of the Court of Justice of the European Union — *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* and *Landeshauptstadt Kiel v Jaeger* — which remain good law.<sup>142</sup>

[157] The decision in *Royal Mencap* reflects the particular legislative framework in the United Kingdom. The National Minimum Wage Regulations 1999 dealt explicitly with both work within the home and availability for work, including sleeping. The Court in *Royal Mencap* concluded it was plain from the legislative history of the Regulations that it was intended that sleeping workers would be entitled to receive an allowance but not the normal minimum wage, unless they were “awake for the purpose of working”.<sup>143</sup> The Regulations accordingly provided a person was not doing “time work” (for which the minimum wage rather than an allowance was payable) if asleep but also not doing time work unless awake for the purposes of working. Hence, to qualify as time work, the worker had to actually answer a call before their activity would comprise work for the purposes of the normal minimum wage.

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<sup>140</sup> CA judgment, above n 8, at [119].

<sup>141</sup> The Court referred also to the Scottish Court of Session decision in *Scottbridge Construction Ltd v Wright* [2003] IRLR 21 (IH), which was overruled in *Royal Mencap* together with *British Nursing: Royal Mencap*, above n 54, at [62] per Lady Arden SCJ.

<sup>142</sup> Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963 (involving doctors at hospitals on call overnight); and Case C-151/02 *Landeshauptstadt Kiel v Jaeger* [2003] ECR I-8389 (involving a doctor on call but who was able to sleep while at the hospital).

<sup>143</sup> *Royal Mencap*, above n 54, at [40]–[44] per Lady Arden SCJ. See the National Minimum Wage Regulations 1999 (UK), reg 15; and their successor regulations the National Minimum Wage Regulations 2015 (UK), reg 32.

[158] Lady Arden SCJ made the point that the answer for both appellants in *Royal Mencap* turned on the meaning of the relevant Regulations. Lady Arden also found that the drafter of the Regulations had removed the possibility that a person qualified for the minimum wage simply because that person could be woken up and asked to work. It was on this basis that the Court determined that *British Nursing* should be overruled.<sup>144</sup>

[159] Against this background, we are content to proceed on the basis that the factors in *Idea Services* provide assistance in determining whether the appellants are working for the purposes of the Minimum Wage Act.

### *Application*

[160] As we have discussed, we consider the appellants are subject to constraints and responsibilities and that what they do is of benefit to the Ministry as their employer. They are working when caring for Justin and Sian, at least for some of that time. An analogy can be drawn with the conclusion of the Employment Court in *Law* that “the proactive preventative routine activities of the matrons” on sleepovers meant that, although being able to sleep lightly at times, “the plaintiffs must nevertheless be considered in law to have been working during those times”.<sup>145</sup> This is of course consistent with the approach in *Chamberlain*.<sup>146</sup>

[161] The Employment Court, in discussing the remedies for Ms Fleming, noted that any claim for lost wages and holiday pay could only relate to the period after pt 4A was repealed. Part 4A was otherwise a bar to such claims. The Employment Court also considered Ms Fleming’s claim for lost wages was not limited by the 40 hours specified in the Notice as that related to her status.

[162] The Court of Appeal did not address what the Court saw as the alternative test to that in *Idea Services* and nor the calculation of lost wages. That is explicable

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<sup>144</sup> Lord Carnwath SCJ, with whom Lord Wilson SCJ agreed, reserved his position in relation to some of Lady Arden’s discussion of *British Nursing*, although he agreed it was no longer authoritative: *Royal Mencap*, above n 54, at [78]. Lord Kitchin SCJ also agreed that *British Nursing* should be overruled: at [83].

<sup>145</sup> *Law*, above n 124, at [108].

<sup>146</sup> *Chamberlain*, above n 89, at [82].

because the Court of Appeal did not find Ms Fleming was a homemaker and Mr Humphreys sought only a declaration as to his status. The Attorney-General sought greater clarity in relation to the terms for Mr Humphreys but that would not be appropriate given his pleading.

[163] We heard no argument on the calculation for Ms Fleming. As we have said, resolution of the issue requires factual inquiry. In these circumstances, we consider the calculation of lost wages and holiday pay for Ms Fleming should be remitted back to the Employment Court for further consideration. We make the following observations on this issue in order to assist resolution by the parties.

[164] First, as a matter of fact, it is accepted that Justin needs full-time care for the 24-hour period each day of the week. In these circumstances it is difficult to see, on application of the factors in *Idea Services*, how Ms Fleming would not be “working” a 40-hour week. On this basis, Ms Fleming would have minimum entitlements as a result of her work during that period. Any proposition that some lesser figure reflects her work is not an attractive one on these facts. The policy and the terms we have found to constitute the engagement of Ms Fleming also suggest that proposition does not represent the reality of her care for Justin.

[165] Second, in terms of principle, there is a need, as we have discussed,<sup>147</sup> to maintain proportionality between state and family responsibility. The Attorney-General also raises associated issues of affordability. Reflecting these considerations, where there is no challenge to the lawfulness of the 40-hour maximum and Ms Fleming was willing to be engaged on that basis,<sup>148</sup> the 40-hour maximum may be viewed as at least providing an albeit rough measure of where the balance might be struck in this case.<sup>149</sup>

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<sup>147</sup> Above at [152].

<sup>148</sup> Ms Fleming’s counsel acknowledged that 40 hours was seen as appropriate and would have been acceptable when Ms Fleming applied for Funded Family Care. Mr Meys also made the point Ms Fleming was entitled to accept 40 hours and reject the lesser figures (the offers of 15.5 or 22 hours).

<sup>149</sup> The Bill of Rights analysis in *Atkinson*, above n 15, which we have referred to above n 136, could provide another means of analysis, but we heard no argument on that point so we take it no further. We add that there was provision in the policy for an extension beyond the 40 hours, which Mr Humphreys obtained, and which may be appropriate to reflect the extent of work undertaken in those cases where an extension was obtained.

## **Disposition**

[166] Ms Fleming’s appeal (SC 42/2024) is allowed.

[167] The Employment Court declaration as to Ms Fleming’s employee status is reinstated.<sup>150</sup>

[168] The question of determination of the quantum of remedies for Ms Fleming is remitted to the Employment Court.

[169] Mr Humphreys’ appeal (SC 44/2024) is allowed.

[170] The Employment Court declaration as to Mr Humphreys’ employee status is reinstated.<sup>151</sup>

[171] The first respondent must pay the appellant in SC 44/2024 costs of \$50,000 plus usual disbursements. We allow for second counsel.

[172] Subject to [171], costs in SC 42/2024 and SC 44/2024 are otherwise reserved. If parties cannot agree on costs, counsel are to file memoranda (maximum of 5 pages) on costs; counsel for Ms Fleming by 5 February 2026 and each of the respondents by 19 February 2026.

### Solicitors:

M A Jeffries, Auckland for Appellant in SC 42/2024

Oakley Moran, Wellington for Appellant in SC 44/2024

Simpson Grierson, Wellington for First Respondent in SC 42/2024 and SC 44/2024

Neilsons Lawyers, Auckland for Second Respondent in SC 42/2024 and SC 44/2024

P A Mitskevitch, Wellington for Te Kāhui Tika Tangata | Human Rights Commission as Intervener

Smith Dunn, Auckland for Aotearoa Disability Law Inc as Intervener

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<sup>150</sup> EC judgment, Ms Fleming, above n 4, at [96]; and see ERA, s 6(5)(a).

<sup>151</sup> EC judgment, Mr Humphreys, above n 5, at [100].