Employment Court of New Zealand

Lowe v Director-General of Health [2015] NZEmpC 24 (2 March 2015)

Last Updated: 4 March 2015

IN THE EMPLOYMENT COURT WELLINGTON

[2015] NZEmpC 24

WRC 11/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JANET ELSIE LOWE Plaintiff
AND	DIRECTOR-GENERAL OF HEALTH, MINISTRY OF HEALTH First Defendant
AND	CHIEF EXECUTIVE, CAPITAL & COAST DISTRICT HEALTH BOARD Second Defendant

Court:	Judge M E Perkins Judge B A Corkill
Hearing:	Judge A D Ford 1-2 December 2014 (heard at Wellington)
Appearances:	P Cranney, counsel for the plaintiff J Holden and M Conway, counsel for the first defendant H Kynaston and J Howes, counsel for the second defendant S Meikle, counsel for Carers New Zealand Trust, Intervener
Judgment:	2 March 2015

JUDGMENT OF THE FULL COURT

Introduction

[1] The issue in this proceeding is whether Ms Lowe was a "homeworker" as defined in the Employment Relations Act 2000 (the ERA), when she provided relief care for individuals normally supported by unpaid primary carers. She performed

this work from 1994 on an intermittent basis. She received payments for the work

from either the Ministry of Health (the Ministry) on its own behalf, or alternatively by the Ministry on behalf of Capital & Coast District Health Board (C&CDHB).

[2] Ms Lowe says that either or both of the defendants were deemed to be her employer, and that they failed to comply with the

Minimum Wage Act 1983 and the Holidays Act 2003 so that she is owed wages.

[3] The Ministry and the C&CDHB contend that Ms Lowe does not fall within the definition of homeworker under the ERA, and that they owe her no legal obligations.

[4] The Employment Relations Authority (the Authority) determined that Ms Lowe was not a homeworker;1 she challenges that conclusion. Because a significant issue arises, Chief Judge Colgan determined that the challenge should be considered by a full Court. Carers New Zealand Trust, an entity which is described as having wide connections in the carer sector and with carer entities, was granted intervener status.

Background

[5] The New Zealand Government funds various disabilities services, which are accessed through multiple agencies so that people with disabilities may live at home in their communities rather than in residential facilities. According to an inquiry conducted by the Social Services Select Committee in 2008,2 people with disabilities mostly live in their own homes supported by family, friends and community groups.

[6] The challenge focuses on the allocation of Carer Support, the intention of which is to provide relief to unpaid primary carers. The Court was informed that in the year ending 30 June 2013, 23,400 clients were allocated support of this kind. Payments were made to approximately 35,000 support carers; 23,000 of these were paid for by the Ministry and 12,000 were paid for by District Health Boards. Approximately 27,000 of the support carers received their payments direct from a

shared payment agency within the Ministry which administers payments on behalf of

1 *Lowe v Director-General of Health, Ministry of Health* [2014] NZERA Wellington 24.

2. Social Services Committee Inquiry into the quality of care and service provision for people with disabilities (September 2008) at 18.

the Ministry and District Health Boards; for the remainder, the payment was made to the unpaid primary carer for forwarding on to the support carer.3

[7] A statement of facts agreed between the parties provides an introduction to the issues as they pertain to Ms Lowe. It stated:

The Carer Support regime

1. Eligibility for Carer Support is assessed by a Needs Assessment Co-ordination (**NASC**) organisation, which decides whether the client is eligible for Carer Support, whether Carer Support is an appropriate support option for the client and full-time carer, and the extent of the client's eligibility. The NASC informs the client and full time carer about their carer support allocation and how the system works. They also inform the Ministry how many days per year it has allocated to a full-time carer for support. Once the Ministry receives notification, it sends out the Carer Support form to the full-time carer for the full- time carer and support carer to complete and return when they claim for payment of Carer Support.

2. Payment of Carer Support is through Sector Operations, a shared payment agency that administers payments on behalf of the Ministry and all District Health Boards (**DHBs**). Generally, if a client is under

65 [years] of age, the payment is funded by the Ministry and if the client is over 65 it is funded by the relevant DHB.

3. The Ministry publishes a leaflet titled "How to Claim Carer Support".

As set out in this leaflet, a full-time carer can arrange for anyone to be a support carer so long as they are over 16 years and are not a legal

guardian, parent, spouse or partner of the client. A support carer also

cannot live at the same address as a client.

Relief care provided by Ms Lowe

4. Ms Lowe has on various occasions provided relief care for the following individuals who require care in their homes:

4.1 Keith Taylor

4.2 George Sanderson

4.3 Jack De Bruin

5. Ms Lowe also may have provided relief care for a further individual, Bob Forsyth. However Sector Operations does not have any record of payments that may have been made in respect of relief care provided by Ms Lowe for Mr Forsyth.

6. The full-time carers submitted support forms to the Ministry seeking payment in respect of the relief care carried out by Ms Lowe. Both the full-time carers and Ms Lowe signed the forms.

7. The payment was made directly to Ms Lowe in respect of some of the relief care she provided. In respect of other relief care provided

by Ms Lowe, the full-time carer was paid by the Ministry or the C&CDHB (administered by Sector Operations) and the full-time carer then paid Ms Lowe.

8. Where the Carer Support is funded by C&CDHB, the Carer Support Forms contain three different daily subsidy rates: the formal rate (applicable to GST registered carers), the informal rate (payable for family members) and the non-family rate. Where the Carer Support is funded by the Ministry the Carer Support forms contain two different daily subsidy rates: the formal rate (applicable to GST registered carers) and the informal rate. With regards to Ms Lowe, payment for relief care for George Sanderson and Jack De Bruin was funded by C&CDHB at the daily rate for a non-family member and for Keith Taylor payment for relief care was funded by the Ministry at the informal rate for a non-GST registered carer.

9. Ms Lowe was not contacted at any time by the Ministry, the C&CDHB or Sector Operations in relation to the carer relief provided. Ms Lowe did however contact the Ministry on occasion when she had not received prompt payment for carer relief services.

[8] Relevant documents were also provided, and evidence was given on behalf of each party which allows some aspects of the relevant arrangements to be explained in greater detail.

Submissions

[9] The essence of the submission made for Ms Lowe was, firstly, that arrangements entered into with a DHB amounted to a service agreement: money was paid under s 25 of the New Zealand Public Health and Disability Act 2000 (NZPHD Act) in return for the provision of services. It was also submitted that the substance of the arrangement was a "sale by labour by the caregiver", thus qualifying under the statutory definition of homeworker according to the principles identified by the

Court of Appeal in *Cashman v Central Regional Health Authority*.4

[10] Counsel for the Ministry and the C&CDHB emphasised that those entities had no role in selecting the support worker, and that there was no legal relationship

simply because a subsidy was provided. The Ministry was a funder; neither entity was an employer. There was no relevant services agreement under s 25 of the NZPHD Act. The arrangements were "vastly different" from those considered in *Cashman*. Nor did a payment of goods and services tax on an invoice submitted by a support carer mean there was a qualifying arrangement.

[11] The intervener submitted that Ms Lowe was a homeworker, pursuant to a contract between her and either the Ministry or C&CDHB through the agency of the full-time carer.

Ms Lowe's circumstances

[12] Ms Lowe has a long history in home support work. She was employed by the Children, Young Persons and Their Families Service as a Home Support Worker, and cared for an individual having psychiatric disabilities. She also worked for Wellink, a division of Richmond Services Limited, teaching people living skills with regard to supported housing. She managed a team of Home Support Workers through the Kapiti Women's Centre for two years. Since 1994, she has from time to time undertaken Carer Support work paid for by the Ministry. All of the people she has cared for in this way were aged over age 65.

[13] Evidence was provided to the Court regarding the four clients referred to in the agreed summary of facts. Records were able to be produced in respect of three of those, Mr Keith Taylor, Mr George Sanderson and Mr Jack De Bruin. Ms Lowe was paid by the Ministry in respect of some of the relief care she provided; for example, in the case of Mr Taylor. In other instances the Ministry paid her on behalf of C&CDHB, for example in the cases of Mr Sanderson and Mr De Bruin. In the case of Mr Sanderson, Ms Lowe was paid directly by the Ministry until about 2011. Because payments were not being made on time, the full-time carer then paid Ms Lowe and she was reimbursed by the Ministry on behalf of C&CDHB. Although no records are available in respect of the Carer Support provided by Ms Lowe to Mr Bob Forsythe and Mrs Olive Forsythe, we accept that the same processes applied in respect of them. Tax was not deducted for the payments Ms Lowe received; however, there is no suggestion that she performed the work on a self-employed basis.

The descriptions of Carer Support arrangements

[14] Carer Support is described by the Ministry as being a subsidy funded by the Ministry or a District Health Board which assists an unpaid full-time carer of a person with a disability to take a break from caring for that person. The full-time carer, (also described as a primary carer), is a person who provides a level of care that allows the client to continue to live in their home within the community. The support carer provides relief for a specific number of days per year based on assessed need.

[15] In the leaflet which is provided to primary carers when a client's needs have

been assessed,5 the following persons are expressly excluded as support carers:

Spouses, partners, and parents, including step-parents of a client cannot be paid to provide relief care for that client. Legal guardians and/or any other person[s] fulfilling the role of full-time caregiver also not eligible to be paid to provide relief care. The above listed people cannot be paid carer support even if they do not live at the same address as the client. Support carers cannot live at the same address as the client.

[16] The same document describes the process by which Carer Support can be claimed:

a) Once an assessment by a NASC has been undertaken, an initial claim form is sent by the Ministry to the full-time carer.

b) Additional forms are generated as claims are processed throughout the year, as long as allocated days remain.

c) After the Carer Support service has been provided, a claim form must be completed and signed by both the full-time carer and the support carer thereby confirming the accuracy of the information on the form.

d) The dates and hours (if applicable) of service, must be recorded, so as to provide a total of days or half days for which the claim is made.

e) Support carers must be aged 16 years and over.

5 Referred to at para 3 of the agreed statement of facts.

f) The applicable rate must be selected. An invoice is rendered based on the total number of half days or full days of service given; if the support carer is registered for GST, a tax invoice is required and a rate which includes GST must be selected.

g) The claim form is in the form of an invoice and must indicate whether payment is to be made to the full-time carer or to the support carer. The former will be appropriate where that person has already made the necessary payment in respect of services rendered to the support carer.

h) Claim forms must be submitted within 90 days of the last day of care, with the intention that payment is made within 10 days of receipt of a correctly completed claim form.

[17] Terms and conditions of payment are produced on the rear of the claim form. Two versions of these were produced in evidence. The first, which appears to have been applicable until early 2010, relevantly states:

a) Reimbursement for support care was given for a satisfactory level of care.

b) Where a false claim was identified, the Ministry could request an explanation as to the circumstances in accordance with a Health Carer Support protocol.

c) A copy of the Care Support policy (which we infer is a reference to the Carer Support Guidelines of April 2005) would be available on request from the Ministry.

d) Eligibility of Carer Support expired 12 months from the date of assessment, except where specifically stated otherwise.

[18] From 2010 onwards, terms and conditions were revised so as to relevantly stipulate:

a) A copy of the Carer Support Guidelines would be available on request from the Ministry.

b) If the details on the form are incomplete, additional information can be requested.

c) Where a potentially false claim is identified, the Ministry can delegate audit agents to investigate.

d) Audit agents can also carry out random audit checks and investigate claims or complaints.

e) False claiming could result in legal action to recover funds as well as criminal prosecution.

f) The completed claim form has to be lodged within 90 days of the last date of relief care, and correctly completed claim forms will be paid within 10 working days of receipt.

[19] The Carer Support Guidelines, which carers could request, elaborated on these arrangements. The following points should be recorded:

a) Carer Support is described as a service provided to allow for the essential relief of a full-time unpaid carer of a disabled person. The service offers the carer a break by contributing to the cost of an alternative carer to support the disabled person for a specified number of days based on assessed need.

b) Carer Support services are to be delivered in a supportive manner that respects the dignity, rights, needs, abilities and cultural values of the disabled person and their family/whanau/aiga.

c) Assessment of the carers' need for support is to be considered in conjunction with the needs assessment of the disabled person to be supported.

d) Carer Support must be provided in such a way that relief is actually given to the full-time carer.

e) Carer Support payments are a reimbursement towards the costs of providing relief support, and are not a salary or wage.

f) Other options are available such as respite care, attendance at a school camp or holiday camp, the payment of fees incurred by placing a disabled child in day care.

g) Full-time foster carers of children may also be eligible.

h) The full-time carer and disabled person may decide how to use any allocated support days. It is the individual's right to choose and, in most instances, coordinate relief support.

i) Carer Support allocations are reviewed annually; however, a change of

circumstances could result in the individuals' needs being reassessed.

j) Assessment of the carers need for support will be considered in conjunction with the needs assessment of the disabled person.

[20] Although the leaflet described the payment as a subsidy, the Carer Support Guidelines do not use such a description; neither do the claim forms/invoices which are sent out to carers.

Summary of arrangements

[21] In summary, there is direct evidence that two of the examples referred to by

Ms Lowe involved clients, Mr Sanderson and Mr De Bruin, who were aged over 65

– that is, they were older persons assessed as needing support due to an age-related condition. The care for Mr Taylor was funded directly by the Ministry rather than C&CDHB. This was because his entitlement to the support was due to a disability and was not age-related. Ms Lowe gave relief support in the client's residence on each occasion.

[22] On the basis of the evidence of usual practice, we conclude that in each instance there was an assessment by a NASC. In the case of Mr Sanderson and Mr De Bruin a NASC performed the needs assessment under contract with

C&CDHB; in the case of Mr Taylor, a NASC performed the needs assessment under contract to the Ministry. That assessment would have considered the allocation of a range of disability support services on the basis of the client's particular needs. This included relief support for the unpaid primary carer. In doing so, the NASC applied criteria approved by the Ministry.

[23] Where the needs assessment allocated was for Carer Support, the Ministry would send out a claim form to the primary carer specifying the number of support days. Terms and conditions were endorsed on that form. Where the client was over

65 years, this communication was on behalf of C&CDHB.

[24] In each relevant period, Ms Lowe and the primary caregiver completed and signed the claim form, submitting it to the Ministry. Sector Operations (a business unit within the Ministry and the shared-payment agency that administers payments on behalf of the Ministry and all DHBs), would make payment sometimes to the primary carer and sometimes to Ms Lowe as already mentioned.

[25] The business support team of C&CDHB would have received an electronic extract each month for authorisation of all contract payments made by Sector Operations on the DHB's behalf. Although the DHB was not in the first instance provided with the names of payees, that information could be obtained if required.

[26] There is no formal standard or protocol which regulates the provision of Carer Support services, unlike the position with regard to organisations that provide home and community support services where a sector standard has been promulgated;6 but payments are subject to the obligations already referred to as "terms and conditions". Thus, until early 2010, the care was to be "satisfactory". From 2010 the terms and conditions referred to the ability of the Ministry to delegate

audit agents to investigate potentially false claims, carry out random audit checks, and investigate claims or complaints. At all times the Carer Support Guidelines applied, which required services to be delivered in a supportive manner that respected the dignity, rights, needs, abilities and cultural values of the disabled person and their family. In addition, Ms Edwards, a Senior Manager from the

Service Integration and Development Unit of C&CDHB, stated that she presumed a complaint could be lodged with the C&CDHB about a support carer who is paid by the DHB.

[27] We conclude that the documents we have reviewed did provide for some oversight and control of the Carer Support service by the Ministry and C&CDHB. Those parties are entitled to and do ensure, for example, that claims are not fraudulent and that services are rendered for the time allocated for the assessed needs of the client in a particular manner.

Relevant legislative provisions

[28] The above circumstances now require consideration against the applicable legislative provisions and legal principles.

[29] Section 6(1)(a) of the ERA defines an employee as including a homeworker. Section 2 defines an employer as a person employing any employee, including a person engaging or employing a homeworker; and homeworker is in turn defined as follows:

Homeworker –

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

b) Includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.

[30] The Court of Appeal considered the definition of homeworker as defined in s 2 of the Employment Contracts Act 1991 (ECA) in *Cashman.*7 It arose in a context where provision of homecare services to older persons and persons with disabilities were provided by the Central Regional Health Authority (the RHA), which was responsible for purchasing health and disability services when homecare

workers provided services. In 1994 the RHA contracted the provision of homecare services

to a private company who assumed the responsibility for home support and carer

relief schemes in the Whanganui area, under contract with the RHA. The central issue was whether or not homeworkers were limited to persons working in their own dwellinghouse.

[31] The Court concluded that the intention of the extended definition was to deem as an employee anyone who was engaged in the course of some other person's trade or business to do non-tradesman's work in a dwelling, not necessarily their own. An engagement, employment or contract would fall within the definition if expressly or implied, provided that the place where the work was to be performed was to be a dwellinghouse.

[32] Then the Court stated:8

Nor does it follow that family members, neighbours or friends who are paid under a home support scheme to look after a sick or disabled person, but are not otherwise engaged in similar work for remuneration, will be regarded as homeworkers. The legislation must be applied in a commonsense way which takes account of the reality of a particular situation and does not treat a non-professional carer as a homeworker simply because some financial assistance is paid and received. It is only when it can be seen that the carer makes a living in whole or in material part from the provision of homecare that, as a matter of fact and degree in each individual case, the carer can be regarded as falling within the definition of a homeworker.

[33] The Court observed that the statutory functions of the RHA required it to see that in some manner health and disability services are provided; it had an ultimate responsibility to provide such services.

[34] Applying the plain and ordinary meaning of the language used in the ECA, against policy considerations which the Court analysed, the appellants were declared to be homeworkers working for the RHA. The RHA could be an employer as well as a funder.

The legislative framework for Carer Support

[35] The current legislative framework under which Carer Support payments are made has altered from that described in *Cashman*.

[36] The evidence is that in 1996, RHAs were amalgamated into the Transitional Health Authority which became the Health Funding Authority in the late 1990s. Its responsibilities – which included the provision of disability support – were transferred to the Ministry of Health following the enactment of the NZPHD Act. By 2003, responsibility for disability services for those with mental illness and

services for older people had been devolved to DHBs.9

[37] The functions of the Ministry with regard to the provision of Carer Support as described in this judgment (the support of persons with certain disabilities under age

65) are delivered by it under s 32(1)(e) of the State Sector Act 1988; that section confirms that the Chief Executive of a Department is responsible to the appropriate Minister for the performance of the functions, duties and exercise of powers devolved upon it. The exercise of those responsibilities is subject to the provisions of the Public Finance Act 1989, which govern the use of public money.

[38] Turning to the position of the DHB, s 23(1) of the NZPHD Act provides that each DHB has such functions as to ensure the provision of services for its resident population and other people as specified in its Crown Funding Agreement; and to actively investigate, facilitate, sponsor and develop cooperative and collaborative arrangements with persons in the health and disability sector; a DHB must promote the inclusion and participation in society and independence of people with disabilities. We consider the provision of support for certain persons over age 65 falls within the parameters of these provisions.

[39] We refer to the submission that the arrangements under review in this case were entered into as a service agreement under s 25 of the NZPHD Act by the DHB. The section describes a service agreement as an agreement under which one or more DHBs agree to provide money to a person in return for the person providing services or arranging for the provision of service. Section 25 agreements are one means by which a DHB may provide support to persons in need of help in respect of their disabilities, but that is not the only path by which such support may be delivered. A DHB may undertake any act which a natural person would, such as paying money to a third party. This is the legal basis by which Carer Support payments may be made

by a DHB. There is no evidence of a formal service agreement being entered into

9 Social Services Committee Report, above n 2 at 18.

with C&CDHB. We do not consider that an analysis founded on s 25 of the NZPHD Act provides assistance in this case.

Discussion

[40] All counsel referred to various statements made by the Court of Appeal in

Cashman to support their respective cases.

[41] Before expressing our conclusions as to the applicability of dicta in that case, it is necessary to compare the term as it appeared in the ECA with the term as it now appears in the ERA. We comment:

a) Whereas there was a compendious definition in the ECA, the definition has now been divided into two subparagraphs. We do not

consider that development to be significant. Practically identical language was used in each instance.

b) There is no indication in either the Parliamentary debates or the explanatory note to the Employment Relations Bill 2000 (which introduced the present definition) that any material change from the previous definition was intended. Indeed in the 2000 report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee, it was recorded that the proposed definition would maintain the definition in the ECA; and it referred to

the discussion in 'the relevant case law (*Cashman*)'.10

c) Given the congruity between the relevant definitions in the ECA and the ERA, the dicta in *Cashman* is relevant and must be considered in

this case.11

10 Employment Relations Bill 2000 (8-2), (select committee report) at 14.

11 For completeness, we note that the definition of the term "dwelling-house" has altered from time to time. When the ERA was first enacted, its definition in s 5 stated that the term meant any building or any part of a building to the extent that it was occupied as a residence. In the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002, the

definition of homeworker was amended by stating that the definition of dwellinghouse did not

apply to the definition of homeworker. However, this alteration was reversed by s 7 of the Employment Relations Amendment Act (No 2) 2004, which introduced the expanded definition of dwellinghouse which now appears in s 5 of the ERA. The original wording was in effect restored. None of this alters the conclusions we have reached as to the definition of the term homeworker.

[42] It is evident from the conclusions of the Court of Appeal that the section is to be construed broadly. Thus, the Court was satisfied that policy arguments favoured an interpretation that did not limit the section to traditional outworkers. The Court said:12

... homecare workers are in a vulnerable position of the kind contemplated by those responsible for promoting the extended definition in 1987 if they are ineligible to receive the protections afforded to employees under the Employment Contracts Act and allied statutes. Although their position is quite different from outworkers engaged in piece work they are similarly vulnerable and susceptible of manipulation if allowed to be treated as independent contractors ... they are very much ... the type of worker who needs the protection of the Act by being deemed an employee notwithstanding a contractual description of "independent contractor".

[43] The term was to be given its ordinary and natural meaning in light of that policy.

[44] There was no dispute in *Cashman* that the workers were subject to a contract. Therefore, it was unnecessary for the Court to consider the scope of the language which is central in this case; namely the reference to persons who are "engaged, employed or contracted" to do work for another person.

[45] The *Collins English Dictionary* definition of "engage," includes the

following:

... **1** to secure the services of. **2** to secure for use; reserve. **3** to involve (a

person or his or her attention) intensely. ... **6** (*intr*) to take part; participate.

...

[46] The scope of the term is broad; and may be different from employing or entering into a contract with a worker.

[47] The *Collins English Dictionary* definition of "employ," includes the

following:

employ 1 to engage or make use of the services of (a person) in return for money; hire. **2** to provide work or occupation for; keep busy. **3** to use as a means. ♦ *n* 4 the state of being employed (esp. in **in someone's employ**).

12. *Cashman*, above n 4 at 166. To similar effect see *T and T Worldwide Express (New Zealand) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 694.

[48] The first meaning of this definition applies to a person who is employed under a contract of service as defined in s 6(1)(a) of the ERA. There would be no need to use the word "employ" in the definition of "homeworker" if it was to have the same meaning. A wider meaning must have been intended.

[49] The words "engage" and "employ" were considered by the Court of Appeal in *New Zealand Dairy Workers Union Inc v Open Country Cheese Company Limited*13 which held that the use of these words in s 97(2) of the ERA required a conclusion that the intended meanings were wider than their legal technical senses.14

Whilst that case required consideration of those words in a wholly different context, it is nonetheless an illustration of Parliament

utilising broad language in the ERA if necessary. The use of three terms to describe a qualifying relationship for a homeworker reinforces the conclusion that Parliament intended that the definition should have a broad application.

[50] In the definition of home-worker in the ERA, the requirement to consider "the substance" of the engagement, employment or contracting of the worker is referred to in sub-para (b) but not sub-para (a). However, given the various indications of an intention to cover a broad range of relationships, we hold that the use of the words "in substance" should apply to both limbs. It is necessary to consider the substance of the engagement, the employment, or the contract whatever the technical position may be.

Conclusion

[51] Against the foregoing construction of the statutory provisions, we now express our conclusions.

[52] It is inherent in the statutory framework that the Ministry and the C&CDHB were required to provide health and disability services in some manner; they had the ultimate responsibility of ensuring such services were delivered. The Ministry and

C&CDHB were in business when discharging their statutory responsibilities, a point

13. *New Zealand Dairy Workers Union Inc v Open Country Cheese Company Ltd* [2011] NZCA 56; [2011] ERNZ 78 (CA) at [27].

14 This conclusion was upheld by the Supreme Court in *Open Country Cheese Company Ltd v New*

Zealand Dairy Workers Union Inc [2011] NZSC 59 at [2].

which was accepted by counsel for both those parties. This concession was properly made given the similar conclusion reached by the Court of Appeal in *Cashman* with regard to a Regional Health Authority.15

[53] To discharge their responsibilities, the Ministry or the DHB offered to pay Carer Support workers on certain terms and conditions. The work would be of a particular kind – as defined by the needs assessment of the client. The work was in fact performed in a dwellinghouse. Once the Ministry was assured the work had been undertaken, the worker was paid accordingly.

[54] Ms Lowe made a living in material part from the provision of homecare. As observed by the Court of Appeal this question is one of fact and degree.16 We are satisfied that Ms Lowe provided Carer Support services with sufficient frequency as to permit the conclusion that she undertook such work on a regular basis. Although, from time to time, she described herself in the relevant invoices as a "friend" of the client, she did not provide these services only as a friend.

[55] Having regard to these factors, it is clear that the substance of the arrangement is one of engagement. Ms Lowe provided a service which the Ministry and C&CDHB required to be undertaken so that their responsibilities could be met. Her services were secured to that end; she was for their purposes "engaged".

[56] Where a person providing Carer Support is GST registered, a GST invoice is required to be submitted. The payment of GST is a requirement of the Goods and Services Tax Act 1985 (GST Act) in a wide variety of situations – even where the service which is supplied is not made to the person who makes the payment.17 But that is because of the wide definition of "consideration" in s 2 of the GST Act. The conclusion we have reached as to the application of the definitions of the ERA does

not rest on the effect of the deeming provisions of the GST Act.

15 *Cashman*, above n 4 at 14, 162.

16 At 14, 167.

17 This is emphasised in *Turakina Maori Girls College Board of Trustees v Commissioner of Inland Revenue,* CA 35/92, 11 December 1992 at 7; *Director-General of Social Welfare v De Morgan* [1996] NZCA 420; [1996] 3 NZLR 677 at 682.

[57] The label of "subsidy", as used by the Ministry in some but not all of its documents, is not determinative. Whilst the payment is a subsidy in the sense that it is a contribution made to supplement an unpaid carer's efforts, such a term does not recognise the reality of the arrangement where payment for a service is made on the basis of an invoice. We also observe that the Carer Support Guidelines, the document which provides the most comprehensive description of the arrangements, does not refer to such a payment being a subsidy.

[58] Some weight was placed by the Ministry and C&CDHB on the fact that neither party has any role in selecting the relief carer, and may not even know who that person is. That does not alter our conclusion. The policy decision has been made that the client and/or primary caregiver should be in a position to make choices both as to who the relief carer should be, or indeed whether the payment should be expended on engaging, employing or contracting a relief carer. In any event, the Ministry and/or C&CDHB is able to ascertain the identity of the relief carer, and if need be audit and otherwise investigate the services being rendered.

Disposition

[59] We conclude that Ms Lowe was a homeworker as defined in the ERA. She is thus deemed to be an employee under s 6(1)(b)(i) of that Act. The challenge is accordingly allowed.

[60] In her statement of claim, Ms Lowe pleads that the Ministry and/or the C&CDHB were required to comply with the Minimum Wage

Act 1983 and the Holidays Act 2003, but have not. To this point, the Court has not been required to consider those aspects of the matter; all that is sought at this stage is a declaration to the effect that Ms Lowe was a homeworker within the meaning of the ERA. All issues as to remedies are accordingly reserved. The Registrar will now arrange a telephone directions conference to discuss this issue; it will be scheduled for a convenient date two months hereafter.

[61] We also reserve questions as to costs; we anticipate the parties will be able to resolve this issue directly, but if not, the plaintiff may file a memorandum and evidence within 28 days after the delivery of this judgment. The first and second

defendants may file memoranda and evidence (if any) 28 days thereafter. In accordance with the usual practice, the intervener should bear its own costs.

B A Corkill

Judge

For the full Court

Judgment signed at 2.00 pm on 2 March 2015
