New Zealand Employment Relations Authority Decisions

Robinson v Robinson (Auckland) [2018] NZERA 353; [2018] NZERA Auckland 353 (15 November 2018)

Last Updated: 20 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 353
3043111

BETWEEN CLIFF ROBINSON

Applicant

AND MARITA ROBINSON

First Respondent

AND JOHN ROBINSON

Second Respondent

AND CHIEF EXECUTIVE OF THE MINISTRY OF HEALTH

Third Respondent

Member of Authority: Robin Arthur

Representatives: Jane Carrigan, Advocate for the Applicant

Sally McKechnie and Catey Boyce, Counsel for the Third Respondent

Determination: 15 November 2018

DETERMINATION OF THE AUTHORITY

A. **This matter is removed to the Employment Court to hear and determine without the Authority investigating it.**

Employment Relationship Problem

> [1] Cliff Robinson has lodged an application in the Authority seeking a number of declarations about whether he is in an employment relationship with his daughter Marita Robinson and his son John Robinson. The question arises because Mr Robinson, aged 82, receives funds to care for Marita, aged 51, and John, aged 49, under the Ministry of Health's Funded Family Care (FFC) policy. The policy requires technical arrangements whereby Marita and John are deemed to be the employer of their father. Mr Robinson objects to that arrangement because his son and daughter have profound intellectual impairments that severely limit their capacity to exercise the usual functions of an employment relationship. Mr Robinson says the Ministry of

Health, named as a third respondent in his application, should be declared to really be his employer.

[2] The Ministry's operation of the policy was the subject of a judgment of the Court of Appeal delivered on 7 February 2018.1 The judgment referred to a Ministry Notice that described how funding was arranged under the policy. The Notice described the required arrangements for the Ministry "to pay a disabled person to receive funded family care, and for that disabled person to use that funding to employ a family carer". Commenting on this description the Court noted the following:2

... The language of employment, to which we have referred, is used throughout the Notice to describe the relationship between the person with disabilities and the family carer. The Crown accepts, however, that this statement is a mere fiction which is not subject to the Employment Relations Act 2000, and that many persons with disabilities are so impaired that they do not have the necessary capacity in law to employ another person.

[3] Despite the Crown's apparent concession, the Ministry is said to have continued to operate its policy of requiring funding recipients to formally be in an employment relationship with the family member providing their care.

[4] This issue was the subject of a similar application to the Authority by Diane Moody in September with her son Shane Chamberlain named as the respondent. That matter was removed to the Employment Court.3

[5] Mr Robinson seeks removal to the Court on the same basis. By memorandum Counsel for the Ministry advised the Ministry did not oppose removal. In doing so the Ministry submitted there were a number of procedural and jurisdictional matters raised by the claim for which the Court appeared to be the appropriate forum to resolve those matters.

[6] As with Mrs Moody's application for removal, Mr Robinson's request for removal to the Court easily met the ground that important questions of law were likely

1 *Chamberlain & Moody v Ministry of Health* [2018] NZCA 8. See also the judgment under appeal:

Chamberlain v Ministry of Health [2017] NZHC 1821.

2 At [48].

3 *Moody v Chamberlain* [2018] NZERA Auckland 288.

to arise other than incidentally.4 Mr Robinson could also, it appears, have applied to the Court directly anyway for a declaration as to whether he was an employee.5

[7] Either way his application raised the same fundamental questions about the nature of the employment relationship, how it is formed and what capacity is required to be an employer or meaningfully form an employment relationship. Answers to those questions will be of consequence to other families affected by how the Ministry is said to currently operate its FFC policy and, potentially, other arrangements the Ministry funds for caregiving services to be provided to severely disabled people who are also deemed to be the direct employer of their (non-family) caregivers.

[8] Having concluded grounds for removal were established, I also considered whether the discretion not to remove this matter should be exercised for any reason. I was satisfied there was no reason to do so. Consideration of this matter by the Court at first instance would be more effective for the parties and, because of its potential wider import, was appropriate. The whole matter is to be removed to the Court. Whether or not the Court would consider it appropriate to deal with both Mr Robinson's and Mrs Moody's applications on removal together is however entirely a matter for the Court.

[9] Ms Carrigan noted that the Ministry had not lodged a statement in reply in the Authority and sought a direction that this be done. Such a direction is neither practical nor necessary in the circumstances. She provided a copy of an intended statement of claim to the Employment Court from Mrs Moody and Mr Robinson, prepared by counsel who would act for them in court proceedings. Subject to whatever the directions the Court may give about how it hears these two cases, jointly or not, it is more cost-effective and sensible for the Ministry to provide a statement of defence in that forum, once the statement or statements of claim are filed in the Court.

Robin Arthur

Member of the Employment Relations Authority

4 Employment Relations Act 2000, s 178(2)(a).

5 Employment Relations Act 2000, s 6(5).
