IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA371/2021
[2024] NZCA 92

BETWEEN	ATTORNEY-GENERAL Appellant
AND	CHRISTINE FLEMING First Respondent
AND	JUSTIN JAMES COOTE Second Respondent

CA742/2021

BETWEEN	ATTORNEY-GENERAL Appellant
AND	PETER HUMPHREYS First Respondent
AND	SIAN HUMPHREYS Second Respondent

Hearing:	29 and 30 November 2022 and 14 March 2023 Further submissions 1 March 2024
Court:	French, Brown and Courtney JJ
Counsel:	S V McKechnie, B A Heenan and T J Bremner for Appellant in CA371/2021 and CA742/2021 P J Dale KC and M A Jeffries for First Respondent in CA371/2021 L T Meys as litigation guardian for Second Respondents in CA371/2021 and CA742/2021 J S Hancock, E C Vermunt and P A Mitskevitch for Human Rights Commission as Intervener in CA371/2021 and CA742/2021 P Cranney and E Griffin for First Respondent in CA742/2021
Judgment:	9 April 2024 at 11 am

JUDGMENT OF THE COURT

A The appeal in CA371/2021 is allowed.

B The cross-appeal in CA371/2021 is dismissed.

C The appeal in CA742/2021 is allowed in part.

D There is no order as to costs.

REASONS OF THE COURT

(Given by Courtney J)

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INTRODUCTION

A brief outline of the cases

[1] These appeals concern the basis on which the care of adult disabled people by family members has been funded since 2013. They are latest in a line of cases that have addressed the funding of family carers for disabled people.[1]

[2] In issue are the funding schemes known as Funded Family Care (FFC), which operated between 2013 and 2020, and Individualised Funding (IF), which replaced FFC as one means of funding family carers.[2] Underlying the issues for determination are two general complaints. The first relates to the requirement under FFC that if a disabled person wished to have a family carer, the disabled person had to be the carer's employer even if (as in these cases) the disabled person lacked the mental capacity to fulfil that role and did not have a welfare guardian under the Protection of Personal and Property Rights Act 1988 (PPPRA).[3] The Crown maintains that under FFC the employment relationship was a deemed one, so that capacity was not an issue. The second main complaint is that, in assessing the amount of care it would fund, the Ministry of Health (MOH) failed to give effect to the decision of this Court in

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1 See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771.

2 IF pre-dated FFC but, following the disestablishment of FFC in 2020, was modified to enable funding for a disabled person to employ their family carer.

3 The Family Court has jurisdiction under s 6 of the Protection of Personal and Property Rights Act 1988 to appoint a welfare guardian for any person who wholly or partly lacks capacity to understand or communicate decisions in respect of matters relating to their personal care and welfare. Under s 18(2) a welfare guardian has all powers reasonably required to make and implement decisions for the person lacking capacity. Under s 19(1) everything done by a welfare guardian in the exercise of powers conferred by the Act has the same effect as it would if the person lacking capacity were doing it and they had full capacity.

Chamberlain v Minister of Health, which held that intermittent night care, which was not funded at all, should be remunerated.[4]

[3] Christine Fleming and Peter Humphreys each care for their respective adult disabled child. Ms Fleming's son, Justin Coote, has physical and intellectual disabilities, and has high needs. Ms Fleming did not become aware of the FFC scheme until 2018 and then elected not to accept funding for Mr Coote's care under FFC. Instead, she continued to receive a benefit paid by Work and Income | Te Hiranga Tangata (WINZ), which enabled her to stay at home and care for Mr Coote. Since 2021, Ms Fleming has been funded under the IF scheme.[5]

[4] Mr Humphreys cares full-time for his daughter, Sian Humphreys, who has physical and intellectual disabilities and very high needs. From 31 March 2014, Ms Humphreys was funded under the FFC scheme. For some of the FFC period, Ms Jimenez, Ms Humphreys' mother, was also funded as a carer.[6] Since 2020 Ms Humphreys, too, has been funded under the IF scheme.

[5] Neither Mr Coote, nor Ms Humphreys, has the mental capacity to enter into an employment agreement.[7] Neither had a welfare guardian appointed under the PPPRA. Ms Fleming and Mr Humphreys say that, in reality, they were employed by the MOH. They each brought proceedings against the Attorney-General in respect of the MOH seeking declarations that they were employees of the MOH in relation to the care they provided for their children.[8] In addition, Ms Fleming sought an order that she had shown a personal grievance as a result of not having been funded appropriately since at least 1 October 2013, and was entitled to back pay, compensation and interest. She

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4 *Chamberlain v Minister of Health,* above n 1, at [83]–[85].

5 This funding is without prejudice to the current appeal.

6 At some points Ms Jimenez appears to have been funded directly under FFC and at other times she was available as a respite carer. For reasons discussed further below at [238]–[241], we did not consider the care Ms Jimenez provided changed the nature of the relationship between Mr Humphreys and the MOH.

7 The Crown formally conceded this fact at the outset of the hearing before us.

8 Ms Fleming's proceedings named the Attorney-General on behalf of the Minister of Social Development and Minister for Disability as the first defendant, the Attorney-General on behalf of the Minister of Health as the second defendant (referred to collectively as the MOH), and Mr Coote by his litigation guardian Mr Meys as the third defendant. Mr Humphreys' proceedings named Ms Humphreys by her litigation guardian Mr Meys as the first defendant and the Chief Executive of the MOH as the second defendant.

also sought an order imposing a penalty on the Crown for breaches of its statutory obligations and the asserted employment agreement.

[6] The claims were heard separately in the Employment Court.[9] Judge Inglis held that the Employment Relations Act 2000 (ERA) applied to Ms Fleming and Mr Humphreys. Further, both Ms Fleming and Mr Humphreys were homeworkers as defined in s 5 of the ERA, and therefore employees of the MOH for the purposes of s 6(1) of the ERA, because neither Mr Coote nor Ms Humphreys has the capacity to enter into an employment contract. Notwithstanding these findings, the Judge held that pt 4A of the New Zealand Public Health and Disability Act 2000 (PHDA) precluded recovery of minimum entitlements in relation to the period the FFC scheme was in place. She also held that the Crown had acted in the genuine belief that Ms Fleming was not an employee and so declined to impose a penalty.

[7] The Crown was granted leave to appeal both decisions.[10] Ms Fleming was granted leave to cross-appeal.[11]

Issues on appeal

[8] The following issues are for determination:

Crown appeal against Fleming

(a) Was Ms Fleming a "homeworker" as defined by s 5 of the ERA, and therefore an employee of the MOH, when she cared for her son?

(b) Was the Employment Court wrong in finding that the "well-established test for what constitutes work" as set out in *Idea Services Ltd v Dickson* applies to Ms Fleming?[12]

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9 *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; and *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 NZELR 668.

10 *Attorney-General v Fleming* [2021] NZCA 510, [2021] ERNZ 943; *Director-General of Health* [2022] NZCA 92.

11 *Attorney-General v Fleming*, above n 10.

12 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.

(c) Did the Employment Court err in finding that Ms Fleming had a personal grievance for discrimination?

Ms Fleming's cross-appeal

(d) Did the Employment Court err in finding that the MOH was not permitted under a family care policy or expressly authorised under any enactment to pay Ms Fleming for work she did during the time of pt 4A of the PHDA?

(e) Did the Employment Court err in failing to consider the imposition of a penalty under s 134 of the ERA?

(f) What is the level of knowledge required to establish a breach of an employment agreement for the purposes of s 134 of the ERA?

Crown appeal against Humphreys

(g) Did the Employment Court err in its assessment of the effect of pt 4A and s 88 of the PHDA on its ability to assess the employment relationship under the FFC scheme?

(h) Was Mr Humphreys a "homeworker" as defined by s 5 of the ERA, and therefore an employee of the MOH when he cared for his daughter during (i) the FFC period (April 2014 to August 2020) and (ii) the IF period (August 2020 onwards)?

(i) Was the Employment Court wrong in finding (if it did) that the Court of Appeal's approach in *Idea Services* applies to an assessment of hours worked by Mr Humphreys as a homeworker for (i) the FFC period and/or (ii) the IF period.

The statutory and policy context of funding family carers

The New Zealand Public Health and Disability Act 2000

[9] The relevant history and statutory basis for funding disability support services begins with the PHDA. The PHDA pre-dated New Zealand's 2007 ratification of the Convention on the Rights of Persons with Disabilities (the Convention) and the recognition of it in New Zealand domestic law.[13] Subsequent consideration of disability support services and the way they are funded have, properly, been viewed in the context of the obligations assumed under the Convention.[14]

[10] The primary purpose of the PHDA was to "provide for the public funding and provision of … disability support services" in order to pursue stated objectives.[15] These objectives included achieving "the promotion of the inclusion and participation in society and independence of people with disabilities"[16] and "the best care or support for those in need of services".[17] However, these objectives were to be pursued "to the extent that they [were] reasonably achievable within the funding provided".[18]

The Service Specifications

[11] The precise basis for funding home care was, and still is, policies contained in Service Specifications. The Disability Support Services Tier Two Service Specification for Home and Community Support Services (HCSS) identifies the types of services that will be funded. Relevantly, these include:

> **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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13 Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

14 See *Ministry of Health v Atkinson*, above n 1, at [42]; and *Chamberlain v Minister of Health*, above n 1, at [31]–[33].

15 Section 3(1).

16 Section 3(1)(a)(ii).

17 Section 3(1)(a)(iii).

18 Section 3(2).

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.

[12] The Needs Assessment Service Co-ordination (NASC) Services Specification provides for NASC organisations to undertake needs assessments and coordinate the funding and organisation of support services. Needs assessments identify the person's circumstances, goals and daily needs, including needs for which there are already "natural supports" (which usually refers to help provided by family members or friends). The next stage is service coordination, during which the NASC organisation reviews the needs assessment and determines how many hours are required to meet a person's unmet needs, based on a MOH provided template. The options for how these hours can be funded and delivered are also discussed. NASC organisations are independent of the MOH but operate under MOH policies and delegated statutory authority and are agents of the MOH.

[13] Before 2013 it was the Crown's policy not to fund the care of disabled adults by family members. It was considered that families could be expected to provide the necessary care at no cost to the State. Care for disabled adults was only funded if the care was provided by an external caregiver. Therefore, funding for the services described in the service specifications was not available where the carer was a family member. In *Atkinson*, this Court held that this policy discriminated against family carers on the basis of family status in breach of the New Zealand Bill of Rights Act 1990 (BORA) because it treated unrelated caregivers who provided disability support services to the MOH more favourably than family carers who were prepared to do the same work.[19]

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[19] *Ministry of Health v Atkinson*, above n 1. Most, but not all, of the plaintiffs in the *Atkinson* litigation (including Mr Humphreys), were the parents of adult children with significant intellectual disabilities.

Funded Family Care

[14] The Crown responded to *Atkinson* by introducing pt 4A of the PHDA, which was passed under urgency on 17 May 2013.[20] Part 4A would permit funding for disability support to be provided for family carers of disabled people but its stated purpose was to keep the funding of support services provided by family carers within sustainable limits in order to give effect to the restraint imposed by s 3(2) and to affirm the principle that, in the context of the funding of support services, families generally have primary responsibility for the wellbeing of their family members.[21]

[15] The means of keeping the funding of family carers within sustainable limits was to prohibit funding for a family carer other than pursuant to an applicable family care policy or as expressly authorised by an enactment.[22] The FFC scheme was the family care policy adopted. It was implemented by way of a notice of terms and conditions for funding given pursuant to s 88 of the PHDA (the s 88 Notice), which incorporated by reference the Funded Family Care Operational Policy (the Operational Policy).[23]

[16] During oral argument Mr Cranney, for Mr Humphreys, suggested that the s 88 Notice was merely policy and did not have legislative status. We do not accept that proposition. The s 88 Notice was subordinate or delegated legislation, that is, legislation made by a body or person under powers conferred by an Act of Parliament. Despite its form as a notice of terms or policy, it is clearly legislative in effect, altering the rights or obligations of a class of people.

[17] The s 88 Notice included conditions that the Crown says had the effect of creating an artificial employment relationship between the disabled person as employer and the family carer as employee. A "host" provider would become involved

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20 The New Zealand Public Health and Disability Amendment Act 2013 was passed on the sitting day 16 March 2013, with the debate continuing on the calendar day 17 March 2013, and, as this Court noted in *Chamberlain v Minister of Health*, above n 1, at [40], without public consultation or select committee scrutiny.

21 New Zealand Public Health and Disability Act 2000 [PHDA], s 70A(1).

22 Section 70C.

23 "Funded Family Care Notice 2013" (26 September 2013) 131 *New Zealand Gazette* 3639 at 3670–3677.

to assist with setting up the necessary arrangements.[24] The disabled person was required to sign an employment agreement and assume all the obligations of an employer.[25] The funding was at minimum wage and capped at 40 hours per week.[26] Funds were paid directly into the bank account of the disabled person, to be paid onto the family carer.[27] The requirement that the disabled person employ their family carer was a contentious issue for many families of intellectually disabled people with high or very high needs. It was a major focus of Ms Fleming's and Mr Humphreys' cases.

[18] The amount of funding provided was determined by reference to the existing HCSS specifications, including the needs assessment process. The approach taken to needs assessments under FFC was also contentious because many families of disabled people considered that it resulted in grossly inadequate recognition of the amount of time needed to care for a disabled person with high or very high needs, especially in relation to intermittent care needed during both day and night. In *Chamberlain* this Court held that the policy of treating intermittent care as supervision (which was not funded at all) was incorrect — instead, such care should be remunerated and doing so would require only a modest adjustment to the existing service co-ordination and funding arrangement.[28]

[19] The FFC scheme was disestablished in 2020 and pt 4A repealed.[29]

Individualised funding

[20] After the disestablishment of FFC, family carers could either be employed by an HCSS provider or a disabled person could elect to manage their own funding under IF. IF was an existing scheme for funding disability support. It provided an annual budget which the disabled person could use to purchase support services. The number of hours of care, the rate paid[30] and the identity of the carer engaged were all matters

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24 Clause 23(g).
25 Clause 20.
26 Clause 20(c), n 22.
27 Clauses 20(i) and 34.
28 *Chamberlain v Minister of Health*, above n 1, at [72] and [83].
29 New Zealand Public Health and Disability Amendment Act 2020, s 4; and "Funded Family Care (Revocation) Amendment Notice 2020" (31 July 2020) *New Zealand Gazette* No 2020-go3371.
30 Subject to the relevant rates in the Minimum Wage Act 1983 and later the Care and Support Workers (Pay Equity) Settlement Act 2017.

for the disabled person to decide. The scheme was not, however, available to fund family carers who lived with the disabled person until the disestablishment of FFC, when the IF scheme was amended to permit care to be provided by resident family members.

[21] The basis for funding under IF is the policy set out in the IF Service Specification, and the associated IF Operational Policy. The amount of funding under IF is determined through the needs assessment and service coordination process but disabled people who were already receiving FFC funding were not required to be reassessed. The disabled person is encouraged to have an agent to manage the care services being purchased with IF funding. The funding structure and assistance with managing the allocation of funds is provided by the Host provider. Typically, a person funded under IF submits time sheets or invoices from the carers to the Host provider, who either pays the carer directly or reimburses the disabled person and then invoices the MOH which, in turn, reimburses the Host provider.

CROWN APPEAL AGAINST *FLEMING*

Ms Fleming's and Mr Coote's circumstances

[22] [Redacted]

[23] [Redacted]

[24] While Mr Coote was under 18, Ms Fleming received a Domestic Purposes Benefit. When Mr Coote turned 18 in 1999, he began receiving the Invalids Benefit and Ms Fleming (after some difficulty) received a separate benefit to enable her to remain at home to care for Mr Coote. This was the Domestic Purposes Benefit – Care of the Sick or Infirm, now called the Supported Living Payment for caring for another person (SLP).

[25] Ms Fleming gave evidence in the Employment Court that her NASC organisation did not advise her about FFC and she only became aware of it in 2018. She sought a needs assessment to secure funding under FFC but was discouraged by the limited hours offered. She considered (incorrectly) that she would be worse off

financially under FFC. Nor could she understand the basis on which Mr Coote would (or could) be her employer. Ms Fleming therefore elected to continue receiving the SLP.

[26] In 2018 Ms Fleming applied for, and was granted, funding for respite care under the IF Respite scheme. Otherwise, she remained on the SLP. Since 2021, Mr Coote's care has been funded under the IF scheme, without prejudice to the current appeal.

The Employment Court decision

[27] The Judge summarised Ms Fleming's case as follows:[31]

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

[28] This summary belies the complexity of the pleading (the third amended statement of claim), which made wide ranging assertions regarding the FFC, particularly the purported imposition of an employment relationship on a disabled person and their family carer and the continued narrow approach to assessing the time allowed for funded personal care and household management.[32] Most of the declarations Ms Fleming sought were answers to hypothetical questions relating to funding schemes (principally FFC), which Ms Fleming had never been funded under. For example, the agreed issues recorded by the Judge included the following:[33]

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31 *Fleming*, above n 9.

32 We infer that the complexity of the pleading likely reflects the fact that, initially the proceeding was brought by a disability advocate, Ms Carrigan, and sought to raise issues relating to disability funding generally including FFC and IF. Ms Fleming was subsequently joined as a party to the proceeding. Later still, Ms Carrigan was struck out of the proceeding and the matter went to trial with Ms Fleming as the sole plaintiff: *Carrigan v Attorney-General* [2020] NZEmpC 147.

33 *Fleming*, above n 9, at [44(f)–(g)]. Although these questions were hypothetical vis-à-vis

If [Mr Coote] had received Funded Family Care:

(i) [W]ho would have been the employee?

(ii) [W]ho would have been the employer?

If [Mr Coote] had received Individualised Funding (other than Individualised Respite Funding) and used the personalised budget to fund [Ms] Fleming as his family carer:

(i) [W]ho would be the employee?

(ii) [W]ho would be the employer?

[29] However, Ms Fleming also sought a declaration:

(vii) That the work Christine Fleming does in providing care and support for her son, Justin Coote … is work that the first and second defendants are responsible for funding:

(a) [b]ecause she is an employee of one or both of the defendants;
…

[30] The Judge held that from the time Mr Coote turned 18, the Crown was responsible for his care by virtue of the obligations assumed under the Convention on the Rights of Persons with Disabilities.[34] She held that Ms Fleming met the definition of a homeworker in s 5 of the ERA, specifically, that in the circumstances of the case — particularly the MOH's knowledge that Ms Fleming was providing the care that it was responsible for providing — the MOH had engaged Ms Fleming to care for Mr Coote.[35] Ms Fleming was therefore entitled to a declaration that she was an employee of the MOH. Notwithstanding that conclusion, the Judge declined to make an order for the payment of wages and holiday pay arrears for the period pt 4A was in force, on the basis that it precluded any such recovery.[36]

[31] The Judge found, however, that Ms Fleming had made out a personal grievance for discrimination, for which she was entitled to compensation.[37]

Ms Fleming, the parties nevertheless requested that Judge determine them.

34 At [32]–[36], [66]–[67], [72] and [79].

35 At [79]–[80] and [96].

36 At [96].

37 At [99].

Question (a): Was Ms Fleming a "homeworker" as defined by s 5 of the ERA when she cared for Mr Coote?

[32] The Crown says that, in reaching her conclusion that Ms Fleming was a homeworker for the purposes of s 5, the Judge:

(a) wrongly applied the broad approach mandated by s 6(2) of the ERA rather than the more restrictive approach in ss 5 and 6(1);

(b) misinterpreted *Lowe v Director-General of Health*;[38] and

(c) wrongly assumed that the State was under an obligation to care for adult disabled people.

Did the Judge err by applying s 6(2) when considering whether Ms Fleming was a homeworker?

[33] Section 6 of the ERA relevantly provides:

> (1) In this Act, unless the context otherwise requires, **employee**—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> (b) includes—
>
> (i) a homeworker; or
>
> …
>
> (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.

[34] "[H]omeworker" is defined in s 5 of the ERA in the following terms:

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[38] *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691.

> (a) means a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
>
> (b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser

[35] The Judge started her analysis of whether Ms Fleming was an employee by reference to s 6(2) and the requirement to determine the real nature of the relationship and to consider all relevant matters.[39] She referred to the fact that under s 6, the definition of employee included homeworker.[40] She summarised the rationale for the homeworker status (to ensure adequate protection for a group of vulnerable workers). The Judge then referred to art 19 of the Convention on the Rights of Persons with Disabilities (which places an obligation on the State to ensure the persons with disabilities have access to a range of in-home residential and community support services) as being "relevant in terms of the interpretative exercise".[41]

[36] Against that background the Judge identified the questions arising for determination, including whether Ms Fleming was "engaged" by the MOH for the purposes of s 5.[42] In considering those questions, she focussed on the effect of the Supreme Court's decision in *Lowe*[43] and then commented that:[44]

> The issue for the Court is to separate the wood from the trees, have regard to all of the circumstances and determine the real (rather than described) nature of the relationship.

[37] Ms McKechnie submitted that this comment indicated that the Judge had taken the wrong approach because the considerations identified in s 6(2) and (3) for determining whether a person is employed pursuant to a contract of service, are not relevant in determining whether a person is an employee by virtue of being a homeworker under s 6(1)(b)(i). She said that the Judge blurred the respective

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39 *Fleming*, above n 9, at [60].
40 At [61]–[64].
41 At [66], referring to Convention on the Rights of Persons with Disabilities, above n 13, art 19.
42 At [68].
43 At [70]–[74], discussing *Lowe v Director-General of Health*, above n 38.
44 At [75] (footnote omitted).

provisions and, consequently, took into account general circumstances that were not relevant to the definition in s 5.

[38] Mr Hancock, for the Human Rights Commission, and Mr Cranney, for Mr Humphreys, raised arguments in support of the Judge's application of s 6(2) and (3) to the homeworker issue. Mr Hancock argued that the underlying protective purpose of the ERA should be taken into account in interpreting s 5. He also submitted that there was no "carve out" within s 6, and the inclusion of homeworker within the definition of employee means s 6(1)(b) should be read as a subset of the general definition of employee in s 6(1)(a). We accept that the underlying protective purpose is relevant to the interpretation, but do not consider that it is tenable to treat s 6(1)(b) as a subset of s 6(1)(a).

[39] Mr Cranney argued that the real nature of the relationship approach was the common law position prior to the enactment of the ERA and that s 6(2) and (3) only confirmed the application of the common law approach to s 6(1)(a). The common law approach should therefore still apply to questions outside of s 6(1)(a) such as determining whether a person is a homeworker. That argument does not explain the Judge's approach because she clearly and repeatedly referenced s 6(2) and (3) rather than the common law approach.

[40] Section 6(2) and (3) apply where the Employment Court is considering whether a person is employed under a contract of service. They require the Judge to take all the relevant circumstances into account to determine the real nature of the relationship. In comparison, where the Court is considering whether a person is a homeworker, the enquiry is much narrower, requiring the Court only to consider whether the definition in s 5 is satisfied.

[41] We agree that the Judge's analysis demonstrates the approach required for the enquiry under s 6(1)(a). While we accept the point made by Mr Hancock, that s 5 is to be construed in a way that reflects the underlying protective purpose of the ERA, we do not accept that doing so required the Judge to apply an approach that is contrary to the plain text of s 6.

Did the Judge misinterpret Lowe v Director-General of Health*?*

[42] In *Lowe*, the Supreme Court considered the question of what was required for engagement under s 5.[45] The Judge applied the decision, as she understood it. The Crown submitted that the Judge's interpretation was incorrect. The same issue arises in Mr Humphreys' appeal and, for convenience, we also address the arguments made by Mr Cranney, for Mr Humphreys, on this point.

The Supreme Court decision in *Lowe*

[43] *Lowe* concerned the employment status of an external relief carer who received payment from the MOH or relevant DHB for respite care to relieve unpaid, full-time carers of disabled persons.[46] The respite care was provided pursuant to a scheme known as the Carer Support scheme. Ms Lowe was paid after she had provided the services and on the basis of forms she completed and submitted to the primary carers. Sometimes Ms Lowe was paid directly by the DHB and sometimes by the full-time carers, who were reimbursed.

[44] Ms Lowe claimed that she was a homeworker for the purposes of s 5 of the ERA. Her argument was that the combined effect of the various aspects of the scheme (specifically, the needs assessment, the arrangements for funding of the relief carer, the obtaining of a carer, and the Carer Support Guidelines) amounted to engagement for the purposes of s 5.[47] The Employment Relations Authority found that Ms Lowe was not a homeworker.[48] The Employment Court held that she was.[49] This Court held that she was not.[50] The Supreme Court upheld this Court's decision.[51]

[45] The majority in the Supreme Court — Arnold, O'Regan and William Young JJ — was divided in its reasoning as to why Ms Lowe was not a homeworker. Arnold and O'Regan JJ held that she was not a homeworker because the MOH had not

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45 *Lowe v Director General of Health*, above n 38, at [9].
46 At [9].
47 At [61].
48 *Lowe v Director-General of Health, Ministry of Health* [2014] NZERA Wellington 24.
49 *Lowe v Director-General of Health, Ministry of Health* [2015] NZEmpC 24, (2015) 10 NZELC 79-050.
50 *Director-General of Health v Lowe* [2016] NZCA 369, [2016] 3 NZLR 799.
51 *Lowe v Director-General of Health*, above n 38.

engaged her — the primary carers had done so.[52] William Young J held there was a contractual relationship between the MOH and Ms Lowe when it had paid her directly but because the MOH's "trade or business" was to subsidise the cost to the primary carer of engaging a relief carer, not to actually provide relief care directly, she had not been engaged by the MOH in the course of its trade or business.[53]

[46] Mr Cranney, for Mr Humphreys, invited this Court to reconsider the meaning of "engage" in s 5 on the basis that the differing reasons of the majority meant that there was no identifiable ratio and that *Lowe* is therefore not binding on us. The precedential effect of an appellate judgment in which the majority is divided as to the reasons for the decision appears not to have been considered in New Zealand.[54] However, we consider that the reasoning of the majority discloses a sufficiently clear and common approach so as to produce a ratio.

[47] O'Regan J, writing for himself and Arnold J, began by considering the meaning of "engaged" in other parts of the ERA, noting that "[t]he term 'engaged' is used in various forms in other provisions in the ERA, in a way which illustrates that it does take its meaning from its context", though neither of the instances identified assisted in interpreting s 5.[55] The Judge then considered the use of "engaged" in other contexts and observed "that 'engaged' is a flexible, ambiguous word, the meaning of which is substantially affected by context".[56] Later, rejecting an argument as to the construction of s 5(a), O'Regan J commented that "[a]s will become apparent, we see the term 'engage' as being a flexible term".[57]

[48] Turning to consider what "engaged" meant in s 5(a), the Judge noted this Court's conclusion that "engagement involved an active role in selection and oversight or control of the work of the individual whose status is at issue".[58] The conclusion

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52 At [71].
53 At [81] and [85].
54 The issue has, however, been considered in Australia: see *Jones v Bartlett* [2000] HCA 56, (2000) 205 CLR 166 at 62–64, citing *In re Harper v National Coal Board* [1974] QB 614 at 621; and *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188.
55 *Lowe v Director-General of Health*, above n 38, at [35].
56 At [36].
57 At [39].
58 At [40], citing *Director-General of Health v Lowe*, above n 50, at [24].

regarding oversight and control was held not to be correct. On the issue of selection O'Regan J said:[59]

> … we agree with the Court of Appeal that the normal meaning of "engage" contemplates the hirer making the selection of the person engaged. In the present context the Carer Support scheme contemplates that the relief carer will be engaged by the primary carer, without any reference to the Ministry or the DHB. As the Court of Appeal noted, neither the Ministry nor the DHB will even be aware the relief carer has been engaged until a claim is made for payment.

[49] In the overall evaluation of Ms Lowe's argument that the circumstances in which she came to provide the relief care amounted to engagement, O'Regan J concluded:

> [63] The difficulty with that argument, as we see it, is that the concept of engagement (particularly when read in the context of the phrase "engaged employed or contracted") requires that an event occurs which creates a relationship between the hirer and the engaged person. We see that as lacking in the present case. We do not consider it possible to extend the ambit of the concept of engagement to the extent that it applies in circumstances where the person said to be the hirer is not even aware of an engagement having taken place until after the initial period of care has concluded.
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> …
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> [65] The key aspect of engagement, being the selection of the person who is to be engaged, is clearly undertaken by the primary carer and the work that is undertaken by the relief carer is undertaken for the primary carer without reference to the Ministry or the DHB.

[50] William Young J explained the reasons he considered a contract existed between the MOH and Ms Lowe:[60]

> [81] The Carer Support Scheme operates on the basis that: (a) a primary carer who has already paid the respite carer will be reimbursed to the amount of the subsidy the Ministry is prepared to pay; and otherwise (b) the Ministry will pay the respite carer directly. As I construe the relevant material, the Ministry is offering to pay prospective respite carers providing: they (a) do the work; (b) fill in the forms; and (c) have not been paid by the primary carer. This offer is accepted by the provision of work and the filling in of the forms. It follows that I accept that there is a contractual relationship between the Ministry and the respite carers, at least where the Ministry pays them directly.

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59 *Lowe v Director-General of Health*, above n 38, at [44] (footnote omitted).

60 Footnotes omitted. The Judge characterised the contract as a unilateral contract, citing, by way of example, *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA).

[51] For completeness, and comparison, we note the approach taken by the minority, Elias CJ and Glazebrook J. They said that the overall circumstances in which Ms Lowe provided the relief care had resulted in her being engaged by the MOH or DHB. Glazebrook J, giving the reasons for the minority, said:[61]

> The term engaged can be one of wide import. Remembering the policy behind the definition being to protect vulnerable workers, a wide reading of the term is justified so that employers cannot avoid the homeworker definition through technicalities. … The circumstances described above would therefore in our view suffice to constitute engagement.
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> …
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> In any event, it seems to us that the phrase "engaged, employed or contracted" is a composite one designed to cover all means of getting a person to do work for an employer and to ensure that regard is to substance as against technicalities.

The Employment Court's interpretation of *Lowe*

[52] The Judge interpreted O'Regan J's reasons as indicating that the question of engagement was fact-specific, and informed by context:[62]

> [70] The majority of the Supreme Court found "engaged" to be a flexible and ambiguous word. They made it clear that active oversight or control was not a prerequisite, otherwise any homeworker would also very likely be an employee under the narrower ordinary s 6 definition.
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> …
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> [73] Relevantly, the majority in *Lowe v Director-General of Health* made it clear that whether or not a worker has been "engaged" for the purposes of the s 5 definition will be fact specific, requiring an event to have occurred where a relationship is created between the hirer and the engaged person. …
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> …
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> [74] … I do not read the majority's judgment as requiring any particular formality in terms of process or as suggesting the hirer needs to play an active, as opposed to passive, role. Rather the focus is on awareness. Nor do I read the majority judgment as requiring the hirer to be aware of the legal impact of engagement, in terms of the nature of the relationship formed. The existence of an employment relationship is objectively assessed; it can exist despite one or both parties being subjectively unaware of their status as employer or employee. In other words the Ministry did not need to actually know that it was formally engaging Ms Fleming as a homeworker for the purposes of the Employment Relations Act for that to be the reality of the situation.

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61 *Lowe v Director-General of Health*, above n 38, at [144] and [146] (footnotes omitted).

62 *Fleming*, above n 9 (footnotes omitted). In *Humphreys*, above n 9, the Judge substantially repeated this analysis at [72]–[77].

[53] Ms McKechnie submitted that O'Regan J's description of "engage" as being a flexible, ambiguous word that takes its meaning from its context was simply a general description that reflected the various contexts in which the word was used outside the ERA and the Judge had misstated the effect of the majority's approach. Ms McKechnie argued that the Judge should have applied O'Regan J's later, explicit, statements that, for the purposes of s 5, the "normal meaning of 'engage' contemplates the hirer making the selection of the person engaged"[63] and that engagement required an event "which creates a relationship between the hirer and the engaged person".[64] It was therefore an error to conclude that a carer could be engaged if they had not actually been selected and that merely being aware that care is being provided is sufficient to create engagement.

[54] In our view the statements by Arnold and O'Regan JJ, and by William Young J, all disclose an approach to the meaning of engage in s 5 that is properly described as contextual. O'Regan J's description of "engage" as a flexible word did not rest solely on consideration of contexts other than the ERA but, as we have noted, at least two examples of its use within the ERA. And it must be correct to say that it is a word that, in a general sense, is used flexibly. Further, although O'Regan J agreed with this Court's approach in a general sense, his description of it was couched in more nuanced terms — referring to the "normal meaning" of "engage" and then immediately referring to the context in which the question of engagement has arisen.[65]

[55] While this Court determined the question of engagement on the basis of "the person doing the engaging tak[ing] an active role in … the selection",[66] O'Regan and Arnold JJ recognised that engagement could occur in a less direct way — when "an event occurs which creates a relationship".[67] Framing the enquiry in this way clearly invites consideration of all the circumstances said to have resulted in engagement to determine whether such an event occurred. We accept Mr Cranney's submission that O'Regan J's next comments indicate that a broader, contextual, approach was being

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63 *Lowe v Director-General of Health*, above n 38, at [44].
64 At [63].
65 At [44].
66 *Director-General of Health v Lowe*, above n 50, at [24].
67 *Lowe v Director-General of Health*, above n 38, at [63].

taken (albeit that the facts were not regarded as sufficient to have resulted in engagement).

[56] It is clear, too, that William Young J took a contextual approach in reaching his conclusion that a contractual relationship existed, taking into account the scheme operated and by construing "the relevant material".[68]

[57] In our view, the effect of the majority judgment is to recognise that "engage" in s 5 is flexible in the sense that it does not have a fixed meaning in every circumstance and must respond to the factual context in which the question whether engagement has occurred arises. To that extent, we do not see any error in the Judge's interpretation of *Lowe*.

[58] However, it is clear that there must be some event (or, we would add, series of events) by which the change in a person's status from not being engaged to being engaged can be identified. That is explicit in the judgment of Arnold and O'Regan JJ. We also consider it is evident from the judgment of William Young J; on his analysis the (unilateral) contract arose when, in the context of the offer by the MOH to pay for respite care, a carer who had provided the services completed the forms and did not receive payment from the primary carer. Even if we were to approach the question afresh, without reference to *Lowe*, we would conclude that this is the correct construction of s 5.

[59] The Judge did identify the need for an event that constitutes engagement:[69]

> [73] Relevantly, the majority in *Lowe v Director-General of Health* made it clear that whether or not a worker has been "engaged" for the purposes of the s 5 definition will be fact specific, requiring an event to have occurred where a relationship is created between the hirer and the engaged person.

[60] However, as we come to next, we consider that the Judge erred in applying *Lowe* to the present case.

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68 At [81].
69 *Fleming*, above n 9.

The application of *Lowe* to the present case

[61] In order to find that Ms Fleming was a homeworker, the Judge had to identify the event or series of events that resulted in an identifiable change in Ms Fleming's status from not being engaged by the MOH to being engaged. She began by identifying the context from which a conclusion could be drawn:[70]

> The relevant context is that Ms Fleming's selection as [Mr Coote'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 fulltime residential care because Ms Fleming continued to provide permanent care for him at home.

[62] The Judge accepted that Ms Fleming had not been selected in the sense discussed in *Lowe*, where an external carer had been "sourced" by the primary carer.[71] However, that did not mean that Ms Fleming was not engaged by the MOH "to do the work it was responsible for delivering in order to meet its obligations".[72] The Judge cited O'Regan J's statement that it was not possible to extend the concept of engagement so that it "applies in circumstances where the person said to be the hirer is not even aware of the engagement having taken place until after the initial period has been concluded"[73] and extrapolated as follows:[74]

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

[63] The Judge went on to distinguish *Lowe* from Ms Fleming's case on the basis that the MOH was aware of Ms Fleming's work as Mr Coote's primary caregiver through the ongoing needs assessments, which began in 1997 and were conducted at

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70 At [72] (footnote omitted).
71 *Fleming,* above n 9, at [72].
72 At [72].
73 At [73], citing *Lowe v Director-General of Health*, above n 38, at [63].
74 *Fleming,* above n 9, at [74] (footnote omitted).

reasonably regular intervals after that.[75] She noted the acknowledgment made by the MOH's witness, Mr Wysocki, that after the age of 18 Mr Coote's care was the State's obligation and that the person providing that care was Ms Fleming.[76] The Judge concluded, on this evidence, that Ms Fleming had been engaged by the MOH:

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

[64] The reasons for this conclusion can be summarised as: (1) from at least 1997, the MOH knew that Mr Coote required full-time care; (2) on the basis of needs assessments from 1997 onward the MOH knew that Ms Fleming was providing that care; and (3) the MOH was obliged to support Mr Coote to stay in the community and lead a full and active life after he turned 18.[77] Because the point becomes relevant later, in relation to the cross-appeal, we note that the Judge's conclusion that Ms Fleming was engaged by the MOH did not go so far as to conclude that the engagement was affected pursuant to the FFC scheme. To the contrary, referring to the Crown's argument that the Employment Court lacked the jurisdiction to enquire into Ms Fleming's employment status, the Judge specifically noted that because Ms Fleming had not accepted funding under FFC, she was not subject to the s 88 Notice.[78]

[65] The Crown says that the Judge wrongly reasoned that because lack of awareness precluded engagement in *Lowe* then awareness, without more, could be sufficient to create engagement.[79] In other words, the Judge treated the context as sufficient to satisfy the requirement for an event. We agree with the Crown's analysis that awareness per se was not sufficient to create an engagement of Ms Fleming by the MOH.

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75 The Judge at [76] and n 38 noted that NASC assessments before the Court were dated 1997, 1998, 2002, 2004, 2005, 2010, 2013, 2017 and 2018.

76 At [76]–[77].

77 At [79].

78 At [52].

79 As we have already noted, the Judge's conclusion rested in part on the MOH's obligations to provide care for Mr Coote. We address this aspect later.

[66] Although needs assessments were undertaken and the results of them imputed to the MOH, the mode of funding provided to meet those needs varied and was not always tied specifically to the work Ms Fleming undertook. For most of the relevant period when Ms Fleming was receiving the SLP, the funding was indirect, with the benefit provided to allow Ms Fleming to remain at home to care for Mr Coote in a general sense. There was no specific point at which it was possible to identify a change in Ms Fleming's status from receiving funding indirectly to being engaged as a homeworker. As a result, awareness of Mr Coote's needs and the fact that Ms Fleming was meeting those needs could not, in itself, amount to engagement for the purposes of s 5.

[67] We acknowledge Mr Dale KC's oral argument that the situation ought not be viewed as requiring a "triggering event" by which a prospective carer suddenly goes from stranger to employee because it was known all along that Ms Fleming had provided Mr Coote's care in the past and was therefore likely to be the funded carer once he reached adulthood. However, as a matter of law, engagement for the purposes of the ERA requires some means of pinpointing the transition from not being engaged to being engaged. This is particularly so because there were alternative means by which the necessary care could be funded, either by Ms Fleming maintaining her existing benefit (which she did) or having external carers (which could be funded under other funding schemes such as IF).

[68] For completeness, we also note a submission made by Mr Dale in the context of Ms Fleming's cross-appeal that a contract of engagement between Ms Fleming and the MOH was formed when Ms Fleming offered to undertake responsibility for Mr Coote's care and the Crown, by requiring her submission to the NASC process, accepted that offer.[80] We cannot accept that analysis. It is not consistent with the evidence given by both Ms Fleming and Ms Carrigan, a disability support advocate who assisted Ms Fleming to consider the FFC option. Ms Fleming requested the specific needs assessment for the purposes of applying for FFC funding and, as a result of the low hours offered, declined to accept that funding and elected to remain on her existing benefit. No agreement could result from these circumstances.

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[80] This submission was contained in a memorandum filed on 9 March 2023 to supplement oral submissions made on the cross-appeal.

[69] Finally, we accept Ms McKechnie's submission that the Judge erred in relying on *Cowan v Kidd*, which concerned the status of a party who undertook work, including farming, labouring and truck driving, for a friend's business.[81] The Employment Court in *Cowan* held that the friendship had evolved into an employment relationship. The indicia of an employment relationship included the fact that the work being done was the same as that being done by other employees, whom he worked alongside, and that he was subject to direction.[82] The case was decided under s 6(1)(a) of the ERA and the Court accepted that, on a strict contractual analysis, no contract would have been proved but that under s 6(1) its task was to look to the real nature of the relationship to determine whether a person is employed by another person under a contract of service.[83] *Cowan* is very different from the present case, where the question for the Employment Court was whether Ms Fleming had been engaged, not whether the real nature of the relationship was one of employment.

[70] In summary, the Judge did not misinterpret *Lowe*, but did err in applying it to the case before her. While the Judge correctly identified the requirement in the majority reasoning of *Lowe* for an event creating the employment relationship, she wrongly treated the context in which Mr Coote's care was funded — specifically, the MOH's awareness of his needs and the fact that she was providing the necessary care — as sufficient to amount to an engagement.

Did the Court err in finding that there is an obligation on the State to care for disabled people over the age of 18?

[71] An important strand in the Judge's reasoning that Ms Fleming was a homeworker was her conclusion that the Convention imposed on the State the obligation to care for Mr Coote after he reached adulthood.[84] This aspect of the decision engaged art 19, which requires the State to ensure that "[p]ersons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the

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81 *Fleming*, above n 9, at [74], n 36, citing *Cowan v Kidd* [2020] NZEmpC 110, [2020] ERNZ 319.
82 *Cowan v Kidd*, above n 81, at [34]–[36].
83 At [30]–[31].
84 *Fleming*, above n 9, at [66] and [79].

community…".[85] The Crown says that the Judge's conclusion misstates the nature and extent of the obligations imposed by art 19.

Convention on the Rights of Persons with Disabilities

[72] The purpose of the Convention, stated in art 1, is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". Article 12 recognises and protects the right of people with disabilities to exercise their legal capacity. It requires the provision of safeguards to achieve this, the primary purpose of which is to ensure the respect of the person's rights, will and preferences or, if they cannot be determined, the best interpretation of their will and preferences (as opposed to an objective best interests approach).[86]

[73] Article 19 recognises the right of people with disabilities to live independently and be included in the community. It provides:

> States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
>
> (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
>
> (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

[74] In 2017 the Committee on the Rights of Persons with Disabilities released its *General comment No. 5 (2017) on living independently and being included in the*

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85 Convention on the Rights of Persons with Disabilities, above n 13, art 19(b).

86 *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [98]–[99], citing Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [20].

community.[87] Addressing the rationale for art 19 and the steps required to fulfil the obligations of State parties to it, the Committee noted art 19's roots in international human rights law, including in particular the interdependence of an individual's personal development and the social aspect of being part of a community, recognised in art 29(1) of the Universal Declaration of Human Rights 1948.[88] It emphasised the strong focus on deinstitutionalisation,[89] pointing out that the institutionalisation of people with disabilities on cost grounds or where the disabled person (particularly those with intellectual disabilities) is considered to be unable to live independently are contrary to art 19.[90] Instead, State parties should empower family members to support their family members with disabilities to realise the latter's right to live independently and be included in the community.[91]

[75] In relation to the obligation to provide access to support services the Committee said:[92]

> (i) Funding for personal assistance must be provided on the basis of personalized criteria and take into account human rights standards for decent employment. The funding is to be controlled by and allocated to the person with disability for the purpose of paying for any assistance required. It is based on an individual needs assessment and upon the individual life circumstances. Individualized services must not result in a reduced budget and/or higher personal payment;
>
> (ii) The service must be controlled by the person with disability, meaning that he or she can either contract the service from a variety of providers or act as an employer.

The issue in the Employment Court

[76] The State's obligations under art 19 were not advanced as a basis on which Ms Fleming ought to be held to be a homeworker.[93] Instead, the Convention obligations arose in the context of the jurisdictional question and MOH's assertion that the employment model of FFC complied with art 12, which requires people with

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87 Committee on the Rights of Persons with Disabilities *General Comment No 5 (2017) on living independently and being included in the community* UN Doc CRPD/C/GC/5 (27 October 2017).
88 At [9].
89 At [16], [49] and [59].
90 At [21].
91 At [55].
92 At [16(d)].
93 This was Ms McKechnie's advice from the bar, made without objection from any other counsel.

disabilities to be supported to make their own decisions (supported decision-making), rather than have decisions made for them (substituted decision-making).[94] The MOH had submitted that Mr Coote could assume the role of employer through supported decision-making,[95] which the Judge rejected:[96]

> … the State is the primary duty bearer under the Convention. The Ministry of Health designs the policies, sets the funding limits and then requires the disabled person to agree to the funding mechanism before the funding is released. …
>
> I agree with counsel for the Human Rights Commission that the delivery of services through an agency structure and imposed relationships should not be taken to obviate the State's responsibilities to disabled persons, particularly those (like [Mr Coote]) who lack mental capacity.
>
> I agree too with the submission advanced by the Human Rights Commission that the imposition of a one-size fits all approach via a compulsory employment relationship between the disabled person and their family carer will not always be compatible with the principles of the Convention. For some disabled persons, particularly those with high and complex needs, it may not align with their circumstances.
>
> Employment relationships are important. They are not to be viewed as a convenient device to shift liabilities away from the key players or to paint a distorted picture of reality. That is why Parliament has conferred on this Court the exclusive jurisdiction to determine, on a case by case basis, whether a particular individual is an employee and (if so) of whom, and made it clear that the answer to that question emerges from a fact specific inquiry, rather than (for example) the way in which the relationship may have been characterised.
>
> There are many severely disabled people who are perfectly capable of undertaking the role of employer. [Mr Coote] is plainly not one of them. He does not have capacity to understand or discharge the most basic obligations he would be required to shoulder as an employer, and as set out in the Gazette Notice.

[77] It was not until later, when the Judge came to consider Ms Fleming's employment status, that she turned her attention to art 19. She noted:[97]

> [66] Also relevant in terms of the interpretative exercise are various articles of the Convention, including the right to live independently and be included in the community. In this regard, art 19 places an obligation on States to ensure that persons with disabilities have access to a range of in-home residential and other community support services. Those obligations and the

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94 *Fleming*, above n 9, at [30].
95 At [30].
96 At [36]–[40] (footnote omitted).
97 Footnote and emphasis omitted.

> way in which they are to be met find statutory expression in the [PHDA], and the policies sitting under it.
>
> [67] Further, I note that in *Ministry of Health v Atkinson* the Crown sought to rely on the existence of a social contract between parents and their severely disabled children. The Court of Appeal observed that:
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> > … There is no support for the suggestion of a social contract to care for adult children who are disabled for the remainder of their lives on a full-time basis, subject to respite care.

[78] Then, in deciding whether Ms Fleming was engaged for the purposes of s 5, and without any further consideration of art 19, she concluded that, from the time Mr Coote became an adult:[98]

> … his health, well-being and ability to participate in the community became (from a legal perspective) the responsibility of the State. …
>
> … it was known that he had to be cared for and that the State had that obligation.
>
> …
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> The work that Ms Fleming did, and which the Ministry was aware of, allowed [Mr Coote] to remain in the community. That was and is of benefit to the Ministry and is consistent with meeting its obligations under both the [PHDA] and the Convention.

Appeal

[79] The Crown said that the State's obligations are not as described by the Judge because the obligation imposed by art 19 is simply to ensure access for in-home residential support services (which it does through funding provided under the PHDA) and does not require it to ensure that such services are funded at any cost. In any event, the Convention was ratified in 2008, eight years after Mr Coote turned 18. Therefore, it does not provide any foundation for reasoning that Ms Fleming had been engaged prior to that date. Ms McKechnie also submitted that the Judge had misconstrued the statements in *Atkinson* about the Convention, on which she relied for her conclusion.

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98 At [72] and [79] (footnote omitted).

[80] Mr Hancock, for the Human Rights Commission, carried this argument and supported the Judge's conclusion regarding the effect of art 19. He submitted that the MOH's interpretation of art 19 is unduly narrow. Noting the complex intertwining of employment law, human rights law and policy in relation to Ms Fleming's status, Mr Hancock submitted that, on a holistic view of the Convention, the obligations on the State under art 19 are as the Judge expressed them. Moreover, those obligations build on human rights recognised by the Universal Declaration of Human Rights so that the obligations can be seen as pre-dating New Zealand's ratification of the Convention.

[81] We remind ourselves that the Judge's task was to identify the meaning of "engaged" in s 5 and determine whether Ms Fleming's circumstances satisfied the test for engagement. The former was a question of law, the latter a question of fact.

[82] It is evident that the Judge understood — correctly — that the Convention was available to her as an interpretative aid only. Treaties such as the Convention are not directly enforceable in domestic law unless they are incorporated into New Zealand law.[99] While the Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008 enabled ratification of the Convention by amending any provisions inconsistent with it, it did not amend the PHDA. Nevertheless, domestic legislation should be interpreted consistently with international obligations.[100] In relation to the Convention, Winkelmann CJ observed, in *TUV v Chief of New Zealand Defence Force*:[101]

> … because these provisions directly affect the rights and interests of persons with disabilities, they fall to be interpreted against the backdrop of New Zealand's obligations under the United Nations Convention on the Rights of Persons with Disabilities. It is well established that legislation should be read, so far as possible, consistently with New Zealand's international obligations.

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99 *Ortmann v United States of America* [2020] NZSC 120, [2021] NZLR 475 at [75].

100 At [96], n 111, citing *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] and [207].

101 *TUV v Chief of New Zealand Defence Force*, above n 86, at [92] (footnote omitted).

[83] In this case, the scope for reliance on the Convention as an interpretative aid is limited. The only question of interpretation arising was the meaning of engagement under s 5. But the Judge did not treat the obligations imposed by the Convention as assisting in that interpretation; the meaning of engaged in s 5 had been addressed at length in *Lowe*, which the Judge accepted and applied. Instead, the Judge used the Convention as part of the relevant context to show that Ms Fleming had, as a matter of fact, been engaged by the MOH. In our view, this was a permissible use of the Convention. However, we differ from the Judge as to the effect of it.

[84] First, we agree with the Crown that the Judge overstated the nature of the obligation in that under the Convention, a person with disabilities does not become the responsibility of the State. The focus of the Convention, especially arts 12 and 19 is on recognising and supporting the rights of people with disabilities to live independently and participate in the community. The means by which this is to be achieved are predominantly through legislation and policy initiatives by which the use of institutionalisation is replaced with adequate support services made available to the disabled person and their family. We agree with Mr Hancock that a holistic view of the Convention should be taken. We consider, however, that 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.

[85] Secondly, art 19 is not prescriptive in terms of how the support services should be delivered. Because there are several mechanisms available for that purpose, the fact of the State's obligation to provide support services could not, in itself, indicate engagement by a family carer as a homeworker rather than funding through some other mechanism.

[86] Finally, we agree that the Judge treated this Court's rejection in *Atkinson* of a social contract requiring parents to care for adult disabled children as having a meaning beyond what was intended. The fact that parents cannot be required to continue caring for their adult children does not lead to the conclusion that parents

who are willing to do so are more likely to be engaged by the MOH as a homeworker for the purposes of s 5, in comparison to being funded by some other mechanism.

Summary on question (a)

[87] On the question of whether the Judge erred in finding that Ms Fleming was a homeworker as defined by s 5 of the ERA, we have concluded that the Judge:

(a) erred in applying the approach mandated by s 6(2) of the ERA;

(b) the Judge did not misinterpret *Lowe* but did err in the application of *Lowe* to the facts of this case; and

(c) erred in identifying the nature of the obligations owed by the State in relation to the care of disabled people.

[88] We therefore conclude that Ms Fleming was not a "homeworker" as defined by s 5 of the ERA when caring for Mr Coote.

Question (b): Was the Employment Court wrong in finding that the "well-established test for what constitutes work" as set out in *Idea Services* applied to Ms Fleming?

The issue in the Employment Court and on appeal

[89] Ms Fleming had claimed for lost wages and holiday pay after the date on which pt 4A was revoked.[102] The Judge held that her entitlement to minimum wages should be determined by reference to the approach endorsed by this Court in *Idea Services*,[103] stating only that "[the] correct calculation of wages will appropriately reflect the hours of work performed by Ms Fleming, applying the well-established test for what constitutes work",[104] and only referring to *Idea Services* by way of a footnote.[105]

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102 Subject to any other restrictions imposed by the Employment Relations Act 2000 such as the limitation period.
103 *Idea Services Ltd v Dickson,* above n 12.
104 *Fleming*, above n 9, at [98] (footnote omitted).
105 At [98], n 48.

[90] Later, in *Humphreys*, the Crown requested that the Judge address the question of what work Mr Humphreys would be entitled to be remunerated for and how that would be assessed, even though that issue did not actually arise in the case because Mr Humphreys had only sought a declaration. The Judge confirmed that Mr Humphreys' entitlements would be determined on the basis of *Idea Services* and explained the reasons for that conclusion.[106] As a result, in answering question (b) in the *Fleming* appeal, we necessarily address the Judge's (obiter) reasoning in *Humphreys*.

[91] In *Humphreys*, the Judge referred to the factors identified in *Idea Services* and a number of cases decided by reference to *Idea Services* involving a variety of factual situations. She said:[107]

> [105] These judgments reflect two important things. First, a developing understanding of what constitutes work and the time during which employees are entitled to be remunerated. In this regard there has been a discernible move away from a perception that a worker is working only when they are doing something regarded by the employer as active and productive. Such a narrow conception of work was roundly rejected by the Court of Appeal in *Idea Services Ltd v Dickson* …
>
> [106] Second, the case law reflects the fact that work and how work is done are rapidly evolving. Employment relationships and the circumstances in which work is undertaken have become progressively varied, as the Court of Appeal has observed by reference to the annual survey of employed people conducted by Statistics New Zealand.
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> [107] It is now well accepted that a worker's time has a value and, where an employer wishes to have the benefit of that time, it comes at a cost.

[92] The Crown argued that the *Idea Services* approach does not adequately reflect the reality of the relationship between a disabled person and their family carer and the fact that the work was conducted in the carer's residence, and that it would be difficult to properly estimate, or take steps to reduce, the amount of paid work Mr Humphreys did. The Judge rejected this argument but did not give reasons for doing so beyond

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106 *Humphreys*, above n 9, at [101]–[119].

107 Footnotes omitted. Citing at [107] June Hardacre and Natalie Healy "What it means to 'work' — developments since *Idea Services v Dickson* [2017] ELB 45; and Richard L Alfred and Jessica M Shauer "Continuous Confusion: Defining the Workday in the Modern Economy" (2011) 26 ABA J Lab & Emp 363.

dismissing the hypothetical example suggested by the Crown of a not-for-profit carer coming into the home.[108]

[93] The Judge also rejected the Crown's argument that, as an employer, the Crown would have a limited ability to properly estimate, or reduce, the amount of "work" actually being done:[109]

> The difficulty with this submission is that it disregards the fact that Parliament has specifically legislated for homeworkers (who perform their work in the home and whose activities, by definition, lack visibility) to come within an expanded definition of employee and thus entitled to all of the rights that come with that status, including to be remunerated for work performed. Nor did Parliament see fit to couple the expanded definition with a statutory test for how remuneration might be assessed.

[94] The Judge considered that, in any event, the question of how much work was done by a family carer was fact-specific, requiring the kind of pragmatic assessment that the Employment Relations Authority and the Employment Court were well used to undertaking:[110]

> … the objection appears to me to boil down to the sort of concern raised by the employer in *Idea Services Ltd v Dickson*, which failed to gain traction. Issues about the extent to which Mr Humphreys was and is constrained in terms of what he does will fall to be determined on the facts. … And while an appropriate assessment of lost wages might not be a particularly straightforward exercise, the reality is that such an assessment is often an inexact science, as the caselaw and various statutory provisions reflect. It may well be necessary for the Court to make the best assessment it can, being satisfied on the balance of probabilities that the conclusion as to loss is correct. A pragmatic view is sometimes required. Both the Employment Relations Authority and the Court are well used to this sort of task.
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> …
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> In summary, I do not see the fact that Mr Humphreys works in his home as justifying a departure from the test endorsed by the Court of Appeal. I perceive the test to have significant benefits in this specialist area of the law, particularly in terms of it being sufficiently flexible and fact-dependent to enable the Court to apply it in a range of cases and within the context of different employment relationships and as they evolve over time.

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108 *Humphreys*, above n 9, at [111].
109 At [112].
110 Footnotes omitted.

Did the Judge err in applying Idea Services*?*

[95] Ms Heenan carried this aspect of the argument for the Crown. She asserted two errors by the Judge in her reasoning. First, applying the *Idea Services* approach was inappropriate in relation to homeworkers who are family carers. Ms Heenan invited this Court to clarify the approach to be taken in determining what constitutes work in such cases. Secondly, the Judge failed to differentiate between the FFC and IF funding periods and the *Idea Services* approach was not applicable to the FFC funded period because that was subject to s 70C of the PHDA, which prohibited the Crown from paying family carers other than in accordance with the family care policy.

[96] Mr Cranney, who appeared for Mr Humphreys but was heard on this point in the *Fleming* appeal, supported the Employment Court's approach. He submitted that *Idea Services* did not impose a rigid test but simply recognised that determining when someone was working was a fact specific enquiry and identified factors that could assist in that enquiry. He submitted that the *Idea Services* factors were now integrated into the entire caregiving sector, including by legislation, pointing to the Sleepover Wages (Settlement) Act 2011, which was in force between 2011 and 2016 and enabled minimum wage back-pay for sleepovers. He also pointed to the fact that the *Idea Services* approach had been applied flexibly in other contexts, as identified by the Judge. These, relevantly, included the situation of doctors on-call,[111] and of matrons and boarding house mistresses required to sleep over[112] as well as cases outside the care sector.[113]

<u>The statutory framework does not define "work"</u>

[97] As Ms Heenan submitted, the Judge's reference to homeworkers coming within an "expanded definition of employee" and the fact that Parliament did not "couple the expanded definition with a statutory test for how remuneration might be

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111 *Humphreys,* above n 9, at [104(a)], citing *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127, [2017] ERNZ 749.

112 *Humphreys,* above n 9, at [104(d)], citing *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.

113 *Humphreys,* above n 9, at [104(b) and (c)], citing *Ovation New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2018] NZEmpC 151, [2018] ERNZ 455; *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2019] NZCA 146; and *Labour Inspector (Ministry of Business, Innovation and Employment) v Smiths City Group Ltd* [2018] NZEmpC 43, [2018] ERNZ 124.

assessed" overlooks the fact that there is no statutory test for assessing remuneration or how "work" should be identified for employees under contracts of service. The test applying to employees under contracts of service such as in *Idea Services* was developed at common law.

[98] The Minimum Wage Act 1983 (MWA) provides that:[114]

> … 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 his employer payment for his work at not less than that minimum rate.

[99] "Worker" has the same meaning as that given to "employee" by s 6 of the ERA (thereby including homeworkers).[115] However, there is no definition of "work". The Minimum Wage Orders made pursuant to the MWA simply provide for minimum rates for adult workers paid "by the hour or by piecework" or "by the day" or "by the week" and so do not assist in determining what activities constitute work for the purposes of the MWA.[116] This is a particular problem in the context of family carers who live with their disabled family member and provide full-time care during the day and intermittent care during the night.

[100] The legislative history relating to the inclusion of homeworkers as employees under the ERA does not assist. This history was canvassed by the Supreme Court in *Lowe*.[117] The Court referred to the Green Paper that preceded the inclusion of homeworkers in the Labour Relations Act 1987.[118] At that point, the position of homeworkers existed mainly in relation to the manufacturing sector, mostly in the clothing industry.[119] There was no reference to care workers. Considering the ways in which homeworkers might be better protected, it was noted that the existing legislation under the MWA and Holidays Act 1981 was general and there were limitations, notably the difficulty in identifying those employed under a contract of

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114 Section 6.
115 Section 2.
116 See for example Minimum Wage Order 2024, cl 4.
117 *Lowe v Director-General of Health*, above n 38, at [11], [12] and [90]–[96].
118 Ministry of Labour *Industrial Relations: A Framework for Review* (17 December 1985).
119 At 87.

service as opposed to being an independent contractor, the lack of worker appreciation and geographic isolation.[120]

[101] Alternative means of protection included greater award coverage (which would require specific negotiation and be likely to face resistance from unions) and protection through legislation to provide minimum wages and holiday provisions to all homeworkers, including legislation stipulating that homeworkers would receive the same remuneration as workers performing the same job in a factory.[121] However, no legislative change to the MWA resulted.

[102] The Sleepover Wages (Settlement) Act, introduced in response to the *Idea Services* decision, does not address the situation of homeworkers because it applies only to "sleepovers", defined as a period of time spent by an employee overnight during which the employee, under the terms of his or her contract of service, is required to be at the employee's workplace and allowed to sleep at the workplace while on duty but is required to be available to attend to their duties during the night as necessary.[122] "Workplace" is defined by reference to the definition in s 5 of the ERA — "a place where an employee works from time to time; and includes a place where an employee goes to do work".

The application of Idea Services

[103] We therefore turn to the approach taken by the courts to define what constitutes work. We agree with Mr Cranney that it is not accurate to view *Idea Services* as articulating a rigid test. Determining whether a person is working at any particular time is, as the Judge recognised, intensely fact specific.[123] The effect of *Idea Services* was to identify factors that could be expected to assist in that enquiry.[124]

[104] The facts in *Idea Services* were as follows. Mr Dickson was employed pursuant to a contract of service to care for people with disabilities living in

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120 At 89. A further barrier was said to be the failure of the existing legislation to meet the recommendations of the Second Tripartite Technical Meeting of the Clothing Industry in October 1980, which is not relevant for present purposes.

121 At 89–93.

122 Section 4.

123 *Humphreys*, above n 9, at [113].

124 At [103], citing *Idea Services Ltd v Dickson*, above n 12, at [7]–[10].

community homes.[125] Idea Services Ltd had been paying him on a per night basis plus his ordinary hourly rate for time actively spent attending to the residents' needs during the night.[126] Mr Dickson claimed that he was entitled to the minimum wage under the MWA for all the hours he spent on overnight "sleepovers".[127]

[105] The evidence showed that there were considerable constraints on Mr Dickson and other community service workers performing this kind of service.[128] These included that, during sleepovers, they could not leave their community home without the supervisor's permission, in which case a relief worker would be needed. They could sleep but had to be readily available to respond to any incident. That meant they could not sleep behind a locked door. They could not use alcohol or any other drugs. They could not have visitors without the prior permission of a manager. Any activity they undertook during the sleepover period could not be one that would disturb the residents.

[106] The Employment Relations Authority and the Employment Court both upheld Mr Dickson's claim. On appeal, this Court endorsed the Employment Court's approach and went on to conclude, by reference to this approach, that Mr Dickson had been working when engaged in a sleepover:[129]

> [7] In deciding whether sleepovers constitute work for the purposes of this section, the Employment Court found it helpful to consider three factors:
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> (a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;
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> (b) the nature and extent of the responsibilities placed on the employee; and
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> (c) the benefit to the employer of having the employee perform the role.
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> [8] The greater the degree or extent to which each factor applied (that is, the greater the constraints, the greater the responsibilities, the greater the benefit to the employer), the more likely it was that the activity in question

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125 *Idea Services Ltd v Dickson*, above n 12, at [1].
126 At [2].
127 At [3].
128 At [5], quoting *Idea Services Ltd v Dickson* [2009] ERNZ 116 at [12]–[25].
129 Footnotes omitted. Later, at [25], the Court concluded with the observation that if the judgment was of concern to the government, the solution was to amend the MWA, which it described as "rather simplistic in its formulation" and to be "contrasted with the sophistication of the equivalent legislation in the United Kingdom". As we have noted, Parliament did in fact respond to *Idea Services* by enacting the Sleepover Wages (Settlement) Act 2011 (SWS Act).

> ought to be regarded as "work". The Court said that the question has to be approached in an "intensely practical" way, adopting what was said by this Court in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union.*
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> …
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> [10] We agree with the factors the Employment Court found helpful. We also agree with the Court's application of those factors to the facts as it found them. In our view, Mr Dickson was clearly working when engaged in a sleepover. The findings [of the Employment Court] amply demonstrate the significant restraints placed on Mr Dickson when engaged in a sleepover, the important responsibilities placed on him with respect to the home and those in his care, and the substantial benefit the employer derived from Mr Dickson's role as night carer. It is difficult to see how the home could function as it does without Mr Dickson or a similar worker being in attendance overnight. Put shortly, Mr Dickson was at the employer's disposal throughout the period of the sleepover.

[107] Rejecting the criticisms made of the Employment Court's approach, this Court said that the conclusions of both the Employment Court, and it, as to the interpretation of "work" in the context of minimum wage legislation were consistent with the approach taken in other jurisdictions in relation to similar legislation.[130] One of the cases it identified as illustrative of what the concept of "work" entailed in the minimum wage area was *British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team)*, which concerned workers operating a telephone booking service who worked from home during the night, taking calls diverted to their phones.[131]

[108] *British Nursing* was the only case the Court cited that involved workers who slept at home while on duty.[132] The issue was whether the call centre workers were working for the purposes of the minimum wage regulations. The Employment Tribunal had made two inconsistent findings. It held that (1) the workers were engaged in "time work" when they were awake and awaiting calls at home and that time work did not include time when the workers were asleep and (2) the workers were working for the whole of their shift — necessarily including periods during which they

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130 At [17].

131 At [21], citing *British Nursing Assoc v Inland Revenue (National Minimum Wage Compliance Team)* [2002] EWCA Civ 494, [2002] IRLR 480.

132 The other cases referred to concerned on-call doctors who slept over at the hospital and a night watchman permitted to rest or sleep at work when not actively engaged.

were asleep.[133] Nevertheless, the decision was upheld by the Employment Appeal Tribunal and by the Court of Appeal.[134]

[109] The Court in *Idea Services* cited from Buxton LJ's decision in the Court of Appeal on the basis that, although the case had been decided under different legislation, it was based on the "ordinary use" of the term "working".[135] Buxton LJ had said:[136]

> [12] I have to say that not only was it open to the employment tribunal and to the Employment Appeal Tribunal to find that the workers were working throughout their shift, but also, as an issue of the ordinary use of the English language, it seems to me self-evident on these facts that they were indeed so working. No one would say that an employee sitting at the employer's premises during the day waiting for phone calls was only working, in the sense of only being entitled to be remunerated, during the periods when he or she was actually on the phone. Exactly the same consideration seems to me to apply if the employer chooses to operate the very same service during the night-time, not by bringing the employees into his office (which would no doubt impose substantial overhead costs on the employer and lead to significant difficulties of recruitment), but by diverting calls from the central switchboard to employees sitting waiting at home. …
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> [13] That in the event there may during the middle of the night be few calls to field is nothing to the point. It is for the employer to decide whether it is economic and necessary to his business to make the facility available on a 24-hour basis. If he does so decide, it is the availability of the facility, not its actual use, that is important to him; and that is what he achieves by the working arrangements described in this case.

[110] However, *British Nursing* has now been overturned by the United Kingdom Supreme Court in *Royal Mencap Society v Tomlinson-Blake* both as to reasoning and effect.[137] The decision contains general statements regarding the ordinary meaning of work that are at odds with those from *British Nursing* cited in *Idea Services*. As a result, it is appropriate to review the basis on which *Idea Services* can be said to apply to homeworkers who work overnight in their home.

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133 *British Nursing Assoc v Inland Revenue (National Minimum Wage Compliance Team)*, above n 131, at [7] and [8].

134 *British Nursing Assoc v Inland Revenue (National Minimum Wage Compliance Team)* [2001] IRLR 659 (EAT); and *British Nursing Assoc v Inland Revenue (National Minimum Wage Compliance Team)*, above n 131.

135 *Idea Services Ltd v Dickson*, above n 12, at [22].

136 *British Nursing Assoc v Inland Revenue (National Minimum Wage Compliance Team),* above n 131, at [12]–[13].

137 *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8, [2021] IRLR 466.

[111] *British Nursing* and *Royal Mencap* were both decided under minimum wage regulations. It is necessary to briefly explain the history and effect of the regulations, which were canvassed by Lady Arden in *Royal Mencap*.[138] The National Minimum Wage Regulations 1999 (the 1999 regulations) were introduced in response to a report by the Low Pay Commission that addressed so-called "sleep-in" shifts, where workers were required to sleep at their workplace.[139] Lady Arden described the objectives of the 1999 regulations as being "that work should normally include time for which a worker was required to be available for work at the place of work" but, by implication, not apply if the worker was at home (the home exception).[140] In those cases, an agreed allowance should be reached for such work.

[112] Regulation 15(1) of the 1999 regulations provided that, in addition to time when a worker was working, "time work" included time when the worker was "available at or near a place of work, other than his home, for the purpose of doing time work and is required to be available for such work".[141] There was an exception for workers who by arrangement sleep at or near a place of work, in that "time during the hours he is permitted to sleep shall only be treated as being time work when the worker is awake for the purpose of working".

[113] These were the regulations under which *British Nursing* was decided. Following his earlier, general, statements about the meaning of "work" (relied on in *Idea Services*) Buxton LJ made comments that might be seen as detracting from the general effect of the earlier statements (and suggest that the earlier statements are not easily separated from reg 15(1)). Buxton LJ cautioned that reg 15(1) did not actually apply to the facts at all because of the "home exception", indicating that a worker on call at home was not, in fact, working when they were asleep:[142]

> Regulation 15(1) relates to workers who are, in colloquial terms, 'on call'. When a worker falls into that category, he has to be paid the minimum wage for his waiting hours, unless he is on call at home. … However, if the worker is permitted to sleep when on call, the hours during which he is permitted to

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138 At [11]–[17].

139 *The National Minimum Wage — First Report of the Low Pay Commission* (Cmd 3976, June 1998) at [4.33] and [4.34].

140 *Royal Mencap Society v Tomlinson-Blake*, above n 137, at [14].

141 National Minimum Wage Regulations 1999 (UK).

142 *British Nursing Assoc v Inland Revenue (National Minimum Wage Compliance Team)*, above n 131, at [17].

> sleep and when he is not actually working do not count as the equivalent of time work.

[114] The 1999 regulations were amended in 2000 to narrow the home exception and sleep-in provisions so that "time work" included time a worker was available at or near a place of work for the purpose of doing time work and was required to be available for such work except where: (a) the worker's home was at or near the place of work and (b) the time was time the worker was entitled to spend at home.[143] In that case, in relation to a worker who "by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping", the time during which he was permitted to use those facilities for the purpose of sleeping was only to be treated as work "when the worker is awake for the purpose of working".[144]

[115] In 2015 new regulations were introduced which provided that "time work" included hours when the worker is "available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home".[145] Regulation 32(2) provided further that when a worker is "available" only includes hours when they are "awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping".

[116] In *Royal Mencap*, one appellant was a care worker who worked overnight in the home of vulnerable adults — so called "sleep-in" shifts.[146] She was permitted to sleep but had to "keep a listening ear out" in case she was needed. The other appellant was an on-call care assistant at a residential care home, where he also lived, having been provided with free accommodation as part of his employment conditions.[147] He was required to be in his accommodation overnight. He was permitted to sleep but could be called upon to assist the night care worker on duty. Both contended that they were entitled to be remunerated for the whole of the night-time hours. The Supreme Court held that neither was working during the night for the purposes of the

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143 *Royal Mencap Society v Tomlinson-Blake*, above n 134, at [16]. See National Minimum Wage Regulations 1999 (Amendment) Regulations 2000 (UK), reg 6(1).

144 Regulation 6(1A).

145 National Minimum Wage Regulations 2015 (UK), reg 32(1), as discussed in *Royal Mencap Society v Tomlinson Blake*, above n 137, at [17].

146 *Royal Mencap Society v Tomlinson-Blake*, above n 137, at [19].

147 At [20].

regulations. Rather, they were only available for work, and this did not fall within the scope of the regulation. [148]

[117] Lady Arden began the exercise of interpreting the regulations with general comments about the meaning of "work" which are notable for their divergence from the general statements made in *British Nursing*:[149]

> It is clearly not the position that, simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage. There are many situations when a worker has to act for the benefit of his employer which do not count for time purposes, for example when he travels between home and work. … Nor in my judgment is the [National Minimum Wage] dependent on the extent to which the work produces value for the employer or enables the employer to say he has fulfilled his duty to someone else: that would make the [National Minimum Wage] depend on the terms of a contract between private parties.
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> The objectives of the [National Minimum Wage] as a social and economic measure are no doubt complex. It clearly helps to redress the law of supply and demand where there may be market failure, and the worker is not able to obtain basic recompense for his labour, but there are no doubt other policy objectives which it serves.

[118] In relation to *British Nursing* Lady Arden said:[150]

> … I would overrule *British Nursing*. … The fundamental feature of the case is that the employment tribunal held that the employees were working, and not merely available for work, throughout their nightshifts even during the periods when they were expected to be sleeping and calls which they had to answer were infrequent. …
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> As it seems to me, neither the [Employment Appeal Tribunal] nor the Court of Appeal [in *British Nursing*] recognised that the 1999 regulations drew a basic distinction between working and being available for work. The latter is the subject of reg 15 and it is in this sense, I suggest, that the parties agreed that reg 15 was the governing provision. If the worker was only available for work, his activity was distinct from working … The arrangements covered by reg 15 are only those where the principal purpose and objective of the arrangement is that the employee will sleep at or near the place of work, and responding to any disturbance during the time allocated for sleep must be subsidiary to that purpose or objective. …
>
> The question whether the employee was working or merely available for work therefore had to be addressed in *British Nursing* irrespective of whether the home exception in reg 15(1) applied. …. It would be anomalous if the regulations had the effect that the employee who was required to be available

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148 At [57] and [96].
149 At [35] and [36].
150 At [56]–[59].

> for work at home (but not actually working there) could be treated as working during the time they were expected to sleep while the sleep-in worker away from home was only entitled to have the time actually spend working taken into the calculation for [National Minimum Wage] purposes. There is no reason why the regulations should put the employee who is at home in that preferential position, and it is therefore reasonable to assume that this was not the intention of the legislator.
>
> The better view in my judgment is that the effect of the home exception in reg 15(1) is that such an employee, ie an employee who is expected to sleep during his shift at home, and only to be woken infrequently, is not working but only available for work. The further effect of the home exception is that he is outside the extended meaning of work in reg 15 and so, for his time to be included in the calculation for [National Minimum Wage] purposes, he has to show that he is actually working. He can do this when he is actually performing duties as part of his employment. That puts him in the same position as the sleep-in worker who has to be available away from home. The case of the worker who would be a sleep-in worker but for the fact that by arrangement he sleeps at home has therefore not been omitted from the regulations as this analysis flows from the regulations when the basic distinction between working and being available for work is taken into account. It is significant, not happenstance, that the sleep-in provision and the home exception in reg 15(1) are attached to availability for work, and not to working.

[119] The reasoning in *British Nursing* should therefore be put aside as a reliable basis on which to decide what constitutes work under the MWA. While the subsequent, consistent, application of the *Idea Services* approach is testament to its efficacy in many circumstances, we do not think that it can be assumed to apply to workers who both live and work in their own home. The subsequent cases that applied *Idea Services* to workers who were required either to work, or to be available to work, at night, all concerned workers who were either required to spend the night away from their homes or had the choice to live off-site when they were not on duty — that is to say, their homes were not also their workplaces. In *Sanderson*, anaesthetic technicians slept over at premises away from their home when they were on call.[151] In *Woodford*, boarding house matrons were routinely rostered on for "sleepovers" and provided with accommodation for those times but were not required to live permanently on-site (even though some chose to do so).[152]

[120] We think it is undeniable that the position of a family carer who lives with a disabled person and provides full-time care during the day and intermittent care during

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151 *South Canterbury District Health Board v Sanderson*, above n 111, at [3].
152 *Law v Board of Trustees of Woodford House*, above n 112, at [171].

the night, occupies a different position to those who must work, or be available for work, away from their own residence. Unlike the situation of Mr Dickson, 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.

[121] Ms Heenan submitted that the test in *Idea Services* as it relates to homeworkers ought to be modified to acknowledge that "work" does not include time when the employee is available at or near a place of work for the purpose of working if the workplace is their own home. However, we do not have sufficient information on which to express a view as to the basis on which family carers should be remunerated for overnight hours. This issue requires that matters of both policy and practicality affecting the basis on which homeworkers who are family carers be fully ventilated at first instance.

Question (c): Did the Employment Court err in finding that Ms Fleming has a personal grievance?

[122] One of the orders Ms Fleming sought was an order that she "has been shown to have a grievance in not having been funded appropriately since at least 1 October 2013". A personal grievance under the ERA is defined as a grievance an employee may have against their employer because of a claim based on one or more of the specified grounds.[153] As a result of our conclusion that Ms Fleming was not an employee of the MOH, the necessary factual basis for any personal grievance is absent. We therefore address the issues briefly.

[123] The Judge concluded that Ms Fleming had made out a personal grievance based on discrimination:[154]

> [99] Ms Fleming also pursued a claim to compensation. This claim was directed at the way in which funding had been dealt with. I am satisfied that Ms Fleming has established a personal grievance for discrimination. The reality is that Ms Fleming was an employee and received lesser treatment

[153] Section 103(1).
[154] *Fleming*, above n 9 (footnotes omitted).

> compared with other carers who did not have a familial connection to the disabled persons they cared for. The discrimination has been ongoing. An order for compensation for non pecuniary loss under s 123(1)(c)(i) (for hurt, humiliation and loss of dignity) is appropriate in the circumstances, the quantum of which is reserved.

[124] The Judge footnoted her finding that Ms Fleming had established a personal grievance for discrimination with the comment "[as] in *Ministry of Health v Atkinson*".[155]

[125] The Crown appeals the finding of a personal grievance based on discrimination on the grounds that:

(a) between 21 May 2013 and 30 September 2020 pt 4A of the PHDA precluded any claim for discrimination;

(b) after the repeal of pt 4A in 2020, family carers in Ms Fleming's position have been eligible to receive funding for in-home care on the same terms as other carers so that no discrimination exists; and

(c) in any event, because Ms Fleming's status was unrelated to the FFC scheme, there was no comparator group by which to establish a claim for discrimination.

[126] Ms Heenan, who carried this aspect of the argument for the Crown, also said (without objection from other counsel) that there had been no indication during the hearing that the Judge was contemplating treating the personal grievance claim as one for discrimination.

[127] We start by noting the considerable uncertainty as to the basis for the personal grievance claim. There was no allegation of breach of an employment agreement. Although the pleading made repeated assertions of misconduct by the MOH in imposing an employment relationship on those funded under FFC, failing to implement *Chamberlain* and discriminating against family carers, it did not expressly tie the claim for personal grievance to a specific ground under s 103(1) of the ERA.

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155 At [99], n 49, citing *Ministry of Health v Atkinson*, above n 1.

Nor did the agreed issues for determination clarify the basis for the personal grievance claim:[156]

> (i) Does [Ms] Fleming have a grievance for not having been funded appropriately since 1 October 2013?
>
> (j) If so, is she entitled to receive compensation for lost funding as a result?

[128] In closing submissions in the Employment Court, Mr Dale submitted that, for the purposes of s 103, Ms Fleming had suffered a personal grievance from (1) disadvantage in her employment caused by being forced to work overtime without support or pay and (2) discrimination since 2020 through being treated differently to third party care workers.

[129] In this Court however, Mr Jeffries, who appeared with Mr Dale for Ms Fleming and argued the cross-appeal, expressly disavowed discrimination as the ground on which the personal grievance claim had been brought at all. In his oral submissions Mr Jeffries said that the Judge's reference to discrimination came "somewhat out of the blue" and that the claim was "stated as being for [humiliation] and loss of dignity … loss of mana, … the [MOH's] lack of kaitiakitanga in its actions towards her by not paying her for 20 years".

[130] In his written submissions, Mr Jeffries referred to the allegations on which the personal grievance claim was based as being those set out in at [21]–[26] of the third amended statement of claim. Those allegations did not identify any of the grounds specified in s 103(1) and did not identify discrimination as the ground on which the claim was brought. The allegations can be summarised as:

> (a) the MOH's funding mechanisms did not satisfy the certainty required by s 6 of the ERA; and
>
> (b) the Crown acted in bad faith by: insisting on employment relationships as a precondition of funding; creating a misleading and confusing structure in breach of ss 11 and 12 of the Fair Trading Act 1986; and

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[156] *Fleming,* above n 9, at [44(i)].

> creating an employment relationship that was unnecessarily burdensome and oppressive.

[131] At the least, we are satisfied that discrimination during the pt 4A period was not advanced as a ground for the personal grievance claim. If that was the basis for the Judge's finding of personal grievance claim, it was an error. We turn to the Crown's argument that there was no basis for a finding of discrimination in relation to the post-2020 period either.

[132] Ms McKechnie submitted that the Judge's reasoning on this issue was inadequate and appeared to be limited to a finding that Ms Fleming had received lesser treatment compared to non-family carers and, further, it was an error to find that the basis for the personal grievance was "[as] in *Ministry of Health v Atkinson*", which concerned the policy then current, under which family carers were not funded at all.[157]

[133] Mr Dale submitted that there was discrimination because Ms Fleming should have been paid by the MOH (as her employer) but as a family carer she was not paid equivalent rates to other carers. He did not provide specific details to support the submission and we do not have any basis on which to find that in that period family carers were at lower rates than other carers. In the post-2020 period, family care could be funded through employment by an HCSS provider or through an agreement between a disabled person and their family carer under IF. In both cases, remuneration was on the basis of the relevant rate in the Care and Support Workers (Pay Equity) Settlements Act 2017 and other relevant entitlements such as holidays, KiwiSaver and ACC. Ms Fleming's understandable anxiety over the low hours funded does not assist on this issue because all carers, family or external, are funded on the same basis and following the same needs assessment process.

[134] Mr Dale and Mr Jeffries submitted that, in any event, it was open to the Judge to have relied on another section for the compensation award, suggesting s 103(1)(b) or (h). Mr Meys also identified aspects of ongoing disadvantage that could ground a claim for personal grievance based on discrimination. He submitted that health and safety support and arrangements for urgent respite care when Ms Fleming falls ill are

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[157] At [99].

not provided in the same way as they would be for external carers working in the home. Nor is there any traditional employer support such as a manager to whom Ms Fleming can turn in the event of an employment problem. Mr Meys also submitted that if the Court finds that while Ms Fleming is sleeping in her own bed she is not working and therefore need not be paid, then that would not amount to discrimination compared to third party care workers who need to stay at different premises overnight. However, in the absence of a cross-appeal or a notice supporting the judgment below on other grounds, we do not take these suggestions further.

Summary

[135] On the *Fleming* appeal, we have concluded that:

(a) Ms Fleming was not a homeworker as defined by s 5 of the ERA when she cared for Mr Coote because she had not been engaged by the MOH;

(b) the test in *Idea Services* cannot be relied on as applying to workers who both live and work at home; and

(c) the Judge erred in finding that Ms Fleming had a personal grievance based on discrimination.

FLEMING CROSS-APPEAL

Question (d): Did pt 4A of the PHDA preclude Ms Fleming from recovering arrears of wages and holiday pay?

The issues in the Employment Court and on appeal

[136] Although the Judge granted a declaration that Ms Fleming was an employee of the MOH, she declined to order the payment of arrears for wages and holiday pay on the basis that such a claim was barred by pt 4A of the PHDA:[158]

> I accept … that statutorily imposed limitations on funding (such as provided for in part 4A) are relevant to the suite of remedies which might otherwise flow from a declaration of employment status.

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158 At [56] and [96] (footnote omitted).

…

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

[137] In this Court, the Crown accepted that, contrary to the Judge's finding, pt 4A did not preclude a claim being brought against the Crown under the ERA.[159] Nevertheless, the Crown maintained that the Employment Court could not have made an order for the recovery of arrears because such a payment would be prohibited by s 70C of the PHDA. It will be recalled that the purpose of pt 4A was to fund family carers within sustainable limits and to affirm the principle that, in the context of the funding of support services, families generally have primary responsibility for the wellbeing of their family members.[160] Sections 70A–70D sought to achieve those objectives by limiting the circumstances in which family carers could be paid. In particular, s 70C prohibited the Crown from making any payment to family carers unless permitted by an "applicable family care policy" or authorised by an enactment.

[138] This issue arose for the first time on appeal. It appears that the effect of s 70C on the relief available to Ms Fleming was not argued in the Employment Court because it depended on the determination of Ms Fleming's employment status and was therefore expected to be dealt with (if appropriate) at a later date.[161] Mr Jeffries, who carried the oral argument on the cross-appeal, submitted that the MOH was not precluded from paying Ms Fleming (and therefore the Employment Court was not precluded from making an order for payment) because payment of wages and holiday pay was permitted by an applicable family care policy or authorised by the MWA.

[139] These arguments were advanced on the basis of the Judge's finding that Ms Fleming was an employee of the MOH. We have held that she is not. As a result,

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159 The Crown accepted that the only claims precluded by pt 4A were those based on a "specified allegation", which was directed towards claims for discrimination.

160 PHDA, s 70A(1).

161 Mr Dale advised that this was the position in written reply submissions.

the factual basis for the argument falls away and this issue is necessarily hypothetical. We therefore address the arguments more briefly than we would otherwise have done.

Were payments to Ms Fleming permitted by an applicable family care policy for the purposes of s 70C(a)?

[140] Sections 70A–70D contained the provisions that constrained the circumstances in which the Crown could pay family carers:

> **70A Purpose of this Part**
>
> (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 funding of support services, families generally have primary responsibility for the well-being of their family members.
>
> (2) To achieve that purpose, this Act, among other things—
>
> (a) prohibits the Crown or a DHB from paying a person for providing support services to a family member unless the payment is permitted by an applicable family care policy or is expressly authorised by or under an enactment:
>
> (b) declares that the Crown and DHBs have always been authorised, and continue to be authorised, to adopt or have family care policies that permit persons to be paid, in certain cases, for providing support services to family members:
>
> (c) stops (subject to certain savings) any complaint to the Human Rights Commission and any proceeding in any court if the complaint or proceeding is, in whole or in part, based on an assertion that a person's right to freedom from discrimination on any of the grounds of marital status, disability, age, or family status (affirmed by section 19 of the New Zealand Bill of Rights Act 1990) has been breached by—
>
> (i) a provision of this Part; or
>
> (ii) a family care policy; or
>
> (iii) anything done or omitted in compliance, or intended compliance, with this Part or a family care policy.
>
> **70B Interpretation**
>
> (1) In this Part, unless the context otherwise requires,—
>
> **family care policy**, in relation to the Crown or a DHB,—

(a) means any statement in writing made by, or on behalf of, the Crown or by, or on behalf of, the DHB that permits, or has the effect of permitting, persons to be paid, in certain cases, for providing support services to their family members; and

(b) includes any practice, whether or not reduced to writing, that has the same effect as a statement of the kind described in paragraph (a), being a practice that was followed by the Crown or by a DHB before the commencement of this Part.

…

70C Persons generally not to be paid for providing support services to family members

On and after the commencement of this Part, neither the Crown nor a DHB may pay a person for any support services that are, whether before, on, or after that commencement, provided to a family member of the person unless the payment is—

(a) permitted by an applicable family care policy; or

(b) expressly authorised by or under an enactment.

[141] Ms Fleming contends that payments by the MOH to her were not prohibited by pt 4A because they were permitted under the applicable family care policy of FFC and therefore came within s 70C(a). Mr Jeffries did not see the fact that Ms Fleming had declined to accept funding under FFC as a barrier to recovering wages arrears as an employee of the MOH.

[142] On Mr Jeffries' analysis, the MOH was permitted to pay Ms Fleming under FFC because: Ms Fleming and Mr Coote were eligible for funding under FFC; the MOH had made an offer to Ms Fleming to fund Mr Coote's care under FFC and Ms Fleming had provided (and continued to provide) the necessary care. He argued that, although agreement could not be reached on the hours that would be funded, the conditions relating to rate (prescribed at minimum wage), the nature of the work (determined through the needs assessment) and Ms Fleming's suitability had all been confirmed. The requirement that Ms Fleming be employed by Mr Coote was unlawful and unenforceable because Mr Coote lacked capacity and, in any event, cl 58 of the s 88 Notice provided that the notice did not apply "to the delivery of funded family care in any circumstances which are an emergency or are exceptional". In exceptional circumstances, the MOH could act as it considered reasonable in the circumstances and it was reasonable for MOH to engage Ms Fleming directly.

[143] The flaw in this argument is that s 70C(a) did no more than create a gateway to FFC which could only be accessed by satisfying the terms and conditions of FFC contained in the s 88 Notice. Relevantly, this required acceptance by the disabled person of the terms and conditions in the s 88 Notice. Later, in relation to the *Humphreys* appeal, we conclude that that where a person lacks the mental capacity to understand and agree to the terms being offered, they cannot accept those terms unless they have a welfare guardian appointed under the PPPRA. Mr Coote did not have the capacity to understand the terms being offered and did not have a welfare guardian. He therefore could not have accepted the terms on which funding under FFC would have been offered and, as a result, payment could not have been made.

[144] Nor was there purported acceptance of the terms and conditions — to the contrary, Ms Fleming considered and rejected the terms being offered.[162] She elected to continue caring for Mr Coote on the same basis as she had previously done. This was a course open to her. Clearly, it was one that many other families took, based on the fact that only a small proportion of those forecast to take up FFC funding actually did so.[163]

[145] In these circumstances the terms of the s 88 Notice were not accepted and nor was payment ever made pursuant to FFC so the MOH's right to make payments in accordance with FFC was never triggered and the provisions of cl 58 of the s 88 Notice were not engaged.[164]

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[162] Ms Fleming and Mr Coote's situation is to be compared with that of Mr Humphreys and Ms Humphreys, who purported to accept the terms of funding under FFC and received payments under that scheme. We discuss their situation later, in the context of the Crown's appeal against *Humphreys*.

[163] According to a Cabinet paper presented to the Cabinet Social Policy Committee on 11 December 2012 (SOC (12) 161) following the *Atkinson* decision, 1,600 people were forecast to be eligible for FFC (if it was made available to those classed as having high or very high needs). According to the Crown's witness, Mr Wysocki, at the time of FFC's disestablishment, only 481 were funded under the policy.

[164] We do not need to address Ms McKechnie's argument on the interpretation of cl 58, though we do so later in the context of the *Humphreys* appeal.

Were payments to Ms Fleming authorised by an enactment?

[146] Mr Jeffries argued that wages and other payments to Ms Fleming were not prohibited by s 70C because they were expressly authorised by s 6(1) of the MWA, which provides:

> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, 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 his employer payment for his work at not less than the minimum rate.

[147] Mr Jeffries also submitted that payment was expressly authorised by s 10 of the PHDA which authorised the Minister on behalf of the Crown to enter into agreements and provide money to "any person … in return for the person providing, or arranging for the provision of, services specified in the agreement".

[148] We accept the submission made for the Crown that the MWA does not expressly authorise the payment of family carers. It sets minimum rates for those entitled to be paid. It is not, itself, the source of authority, or liability, to pay those wages.

[149] In submissions in reply, a further submission was made that provisions in the ERA itself expressly authorise payments to Ms Fleming. However as with the MWA, the provisions cited (such as s 4 which requires proof of compliance with minimum entitlement provisions) do not expressly authorise payments to Ms Fleming for support services.

[150] Nor do we accept the submission made by Mr Jeffries in oral argument and in the subsequent written submissions in reply, that pt 4A was intended only to create a barrier to discrimination claims. It is clear from the legislative history that pt 4A represented Parliament's response to the finding of discrimination in *Atkinson* and that response was to provide funding, on terms, for family carers.[165] The many express references to the ERA in the FFC documents shows that this was a matter that was specifically considered.

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[165] See below at [203]–[205].

[151] We deal, finally, with a submission made by Mr Jeffries in oral argument that support for Ms Fleming's position in relation to both s 70C(a) and (b) can be found in this Court's decision in *Attorney-General v Spencer*.[166] That case concerned the position of a family carer who, following the release of *Atkinson*, had applied to be joined as a plaintiff into the *Atkinson* litigation for the purpose of obtaining compensation on the same grounds as had been granted to the other claimants in that proceeding.[167] One of the issues raised by the Crown in opposing the application was whether s 70C prohibited the MOH from paying Mrs Spencer other than pursuant to any family care policy brought into force (the FFC scheme not yet having been implemented).[168] Mrs Spencer had argued in the High Court that s 10 of the PHDA would permit payments.[169]

[152] In the High Court, Winkelmann J accepted that s 10 provided a sufficient statutory authority to allow the MOH to pay Mrs Spencer and, as an aside, accepted an argument advanced by the Human Rights Commission that s 70C did not in itself preclude the payment of damages ordered by the Tribunal in the *Atkinson* litigation.[170] That finding was recorded, apparently approvingly, by this Court on appeal.[171] However, it does not assist us in relation to Ms Fleming's claim for wages and holiday pay. Those are not claims for damages, which are necessarily compensatory (or sometimes punitive). Where a statutory mechanism exists for the purpose of recovering wages and holiday pay, seeking to characterise a claim for them as one for damages would be an impermissible attempt to circumvent the legislation.

Question (e): Did the Employment Court err in failing to consider the imposition of a penalty under s 134 of the ERA?

Penalties under the Employment Relations Act

[153] The ERA contains provisions for penalties to be imposed both for breaches of employment agreements and for breaches of specific provisions of the Act. Under s 134(1), any party to an employment agreement is liable to a penalty if they breach

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166 *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449 at [77].
167 At [2]–[4].
168 At [5].
169 *Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780 at [157].
170 At [158]–[159].
171 *Attorney-General v Spencer*, above n 166, at [77].

the agreement. There is no comparable provision that imposes liability generally for breaches of ERA provisions but there are specific provisions that impose liability for particular conduct. Relevantly in this case, s 4A provides that a party to an employment relationship who fails to comply with the duty of good faith, imposed on parties to an employment agreement by s 4(1), is liable to a penalty if the failure was deliberate, serious and sustained.

[154] The Employment Relations Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties in respect of any breach of an employment agreement.[172] The Employment Relations Authority also has full and exclusive jurisdiction to deal with all actions for the recovery of penalties for breach of any provision of the Act "for which a penalty in the Authority is provided in the particular provision".[173] Section 4A, which imposes liability for a penalty for breach of the duty of good faith is silent as to whether the Employment Relations Authority or the Employment Court has the original jurisdiction. The Authority's penalty jurisdiction is subject only to the provisions that permit the referral or removal of certain matters to the Employment Court or confer a right to have a matter heard by the Employment Court.[174]

Ms Fleming's claim for a penalty order in the Employment Court

[155] The factual basis for Ms Fleming's penalty claim was the MOH's failure — said to be deliberate — to act on the statements made by this Court in *Chamberlain*.[175] The statutory basis for the claim was less clear.

[156] The pleaded case for a penalty order made a number of allegations that were not obviously breaches of an employment agreement and a pleading seeking to have a penalty imposed under s 134(1) (ie for breach of an employment agreement) but which did not identify the specific breach. It is convenient to set out [107(v)–(vii)] of the third amended statement of claim.

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172 Employment Relations Act, s 133(1)(a).
173 Section 133(1)(b).
174 Section 133(2).
175 *Chamberlain v Minister of Health*, above n 1.

107. The plaintiff seeks the following orders/determinations:

…

(v) A declaration that the first and second defendants are in breach of the statutory obligations in respect of the funding mechanisms including the FFC and IF under employment relationships that:

(a) [c]ontinue to apply to some of the funding mechanisms "natural supports" as a criteria, and which was dismissed in *Atkinson* in favour of "disability supports";

(b) [c]ontinue to apply criteria such as "met needs" and "unmet needs", unknown to the assessed person living with the family, and not published at large;

(c) [f]ail to apply the definition of household management and personal care as found by the Court of Appeal in *Chamberlain*;

(d) [e]xploit families;

(e) [a]llows the Crown and their agents to gain economic benefits from the exploitation of the plaintiffs' families by either under paying, or in the case of the Crown's agents, making charges to the plaintiff's families for services.

(vi) An order that a penalty be imposed in circumstances where the defendants' Ministries have created two entities as their agents, namely the NASC and the Host, and which the defendants' Ministries use to avoid their obligations under the Employment Relations Act 2000, the NZ Public Health and Disability Act 2000 and the Fair-Trading Act 1986, section 12[.]

(vii) In the event that the status of an employment relationship is established or identified by the Court, and order the defendants' Ministries pay to the Court a penalty to be set by the Court under s 134(1) of the Employment Relations Act 2000 for breaches.

[157] In submissions in the Employment Court, Ms Fleming's case was advanced on the basis of an employment agreement between her and Mr Coote imposed by the MOH, with the complaint being "the continued misapplication of key definitions result[ing] in a breach of the Crown's employment, statutory and treaty obligations". There was no allegation of breach of an employment agreement between Ms Fleming and the MOH.

[158] The Judge summarised her understanding of Ms Fleming's case in relation to penalty without identifying the statutory basis for the claim:[176]

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

[159] Although the Judge accepted that in *Chamberlain* this Court held that supervision of a disabled person should be included when assessing the time to be funded, she did not consider that it was open to her to impose a penalty for failing to follow *Chamberlain*. Her reasons suggested that she had approached the claim for a penalty order as being based on a breach of the duty of good faith rather than breach of an employment agreement:

> [102] The Court's jurisdiction to award penalties is limited. It is set out in s 133 of the Act, including for breach of an employment agreement and for a breach of any provision for which a penalty is provided for, none of which appear directly relevant to this case. And while s 4A provides that a party to an employment relationship who fails to comply with the duty of good faith in s 4 is liable to a penalty, that is only where the established failure was deliberate, serious and sustained; or was intended to undermine bargaining, an employment agreement or an employment relationship.
>
> [103] The difficulty for the penalty claim in this case is that the failure complained about was not deliberate (the Crown believing that there was no employment relationship between it and Ms Fleming). I am not satisfied that an adequate basis has been made out for the imposition of a penalty and I decline to do so. If jurisdiction extended to other actions, or inactions of the Ministry of Health, the position would likely have been different.

Should the Judge have considered imposing a penalty?

[160] The ground of cross-appeal was that the Judge erred in finding that the Crown did not act deliberately in failing to implement *Chamberlain*. That reflects the Judge's approach, which assumed the claim for a penalty was based on a breach of the duty of good faith under ss 4 and 4A. In this Court, however, Mr Dale sought to clarify the

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176 *Fleming*, above n 9, at [100].

basis for the claim to a penalty order.[177] He confirmed that the grounds for the penalty claim were those set out at [107(v)–(vii)] of the third amended statement of claim, and specified that the jurisdiction relied on was s 134(1). He did not specify s 4A as a basis for the claim.

[161] Mr Dale explained that the case was about the MOH's acts and omissions towards Ms Fleming in an employment context and regard should be had to the whole pleading and the extensive references in it to breaches of employment standards and the context in which they occurred, namely a history of unlawful, discriminatory conduct. He submitted that, while the primary thrust of the pleading was that employment law breaches had occurred, those breaches did not happen in a vacuum but in the context of the Crown's unlawful actions arising from its policies. Essentially, the MOH's continued application of funding mechanisms in a way that did not reflect the findings in *Chamberlain* should be viewed (at least) as a breach of the MOH's obligations to Ms Fleming as an employer (necessarily pursuant to an employment agreement).[178]

[162] There are three difficulties. First, what Mr Dale now says was the basis for the penalty claim differs from what the Judge treated as the basis for it, yet the cross-appeal was not advanced on the basis that the Judge misunderstood the basis for the claim.

[163] Secondly, whether the penalty claim is based on a breach of the duty of good faith under s 4A or on a breach of an employment agreement under s 134(1), it must fail because of our conclusion that Ms Fleming was not employed by the MOH. The essential factual basis for this aspect of the cross-appeal is therefore missing.

[164] Thirdly, if, as Mr Dale now says, the basis for the penalty claim was breach of an employment agreement, it was a claim that could only have been determined by the Employment Relations Authority unless one of the exceptions applied that would have

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177 This clarification was contained in a memorandum filed on 9 March 2023, between the completion of oral argument on the cross-appeal on 30 November 2022 and resumption of the hearing on 14 March 2023, the earlier hearing having been adjourned part-heard.

178 Mr Dale also suggested that the MOH's conduct might be viewed as contempt, but we do not need to address that possibility.

brought the matter within the jurisdiction of the Employment Court.[179] However, Ms Fleming's case was never before the Employment Relations Authority. Therefore, the Employment Court had no jurisdiction to determine the question of penalty under s 134(1). The Judge accordingly did not err in declining to consider imposing a penalty.

Question (f): What is the level of knowledge required to establish a breach of an employment agreement for the purposes of s 134 of the ERA?

[165] Given our conclusion that it was not open to the Employment Court to consider the question of penalty in this case, we do not see it as appropriate to determine this question.

CROWN APPEAL AGAINST *HUMPHREYS*

Mr Humphreys' and Ms Humphreys' circumstances and their claim in the Employment Court

[166] Ms Humphreys was born in 1988. She has been diagnosed with Angelman syndrome. She has no verbal language and requires constant care, including for bathing, toileting and feeding. Her level of disability and consequent very high needs were summarised in a report to the Funded Family Care National Review Panel (the Panel) dated 26 February 2014:

> [Ms Humphreys] requires 24/7 supervision. [Ms Humphreys] suffers from uncontrolled seizures. Doubly incontinent. [Ms Humphreys] is up 3-4 times per night. Requires someone to accompany her outside at all times. Full assistance for all personal cares, hand over hand assistance for showering, dressing[,] tooth brushing. Spoon fed meals as it can take hours for [Ms Humphreys] to feed herself. No road safety awareness. Supervision to access the community. Parents have to re-blanket [Ms Humphreys] during the night as she is unable to do this herself.

[167] Mr Humphreys has been Ms Humphreys' primary caregiver throughout the relevant period. Her mother, Ms Jimenez, now works full-time outside the home and provides care for Ms Humphreys when she is home, though at some points Ms Jimenez has been allocated funded hours under FFC. If Ms Humphreys' parents were unable

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[179] There was nothing in the case on appeal to suggest that any of the exceptions provided in ss 177, 178, 178AA or 179 of the Employment Relations Act applied in this case.

or unwilling to care for her, it is likely that she would need round-the-clock residential care.

[168] Mr Humphreys was one of the plaintiffs in the *Atkinson* litigation. As a result of the *Atkinson* decision, the MOH came to an arrangement with Mr Humphreys and the other *Atkinson* plaintiffs under which the family caregivers would be temporarily employed pending the introduction of a family care policy. The MOH wrote to Mr Humphreys on 14 January 2013 in the following terms:

> This letter confirms your back payment details as part of an interim employment arrangement agreed between the [MOH] and your legal counsel as your representative.
>
> This agreed arrangement applies solely to you and other plaintiffs in the Atkinson vs Attorney-General litigation. It is recognition that you may be paid as an employed caregiver for your daughter [Ms Humphreys] from 14 May 2012, which is the date of the Appeal Court decision, until the date that the Ministry implements a new paid family caregivers policy later this year.

[169] Mr Humphreys was paid pursuant to this interim arrangement to provide 11.5 hours per week of personal care for his daughter.

[170] After FFC was introduced, Ms Humphreys' care was funded under that scheme. It was common ground that funding could not be provided under FFC without a specific needs assessment, an employment agreement (or document purporting to be an employment agreement) being signed and payment being made to the disabled person's bank account. We proceed on the basis that this took place for Ms Humphreys, even though a full set of documents relating to the approval and commencement of funding for Ms Humphreys' care under that scheme was not before the Employment Court (nor this Court). Some documents relating to the approval of exceptions under the FFC policy were in evidence and, together with other testimony before the Employment Court, allow us to summarise the approved FFC arrangements as follows.

[171] In March 2014, funding was approved under FFC for Mr Humphreys to provide 21 hours of care per week. Mr Humphreys had to apply to the Panel for an exception because he was already working 30 hours per week in other employment

outside the home. The application was originally declined, but following involvement of the Minister of Health, Acting Director-General of Health and Human Rights Commission, the exception was approved by the Panel.

[172] In 2017, funding was increased to 39 hours per week. The Panel approved these hours being provided by both Mr Humphreys and Ms Jimenez, both of whom at this time had other employment, on the condition that neither of their total hours of work exceeded 55 hours per week. In his evidence before the Employment Court, Mr Humphreys said that the hours were mainly allocated to him.

[173] One of the documents in evidence was a support needs reassessment dated 5 February 2019. The "[e]vents leading to the reassessment" were noted as being "3 yearly re-assessment". The reassessment noted, among other things, that Mr Humphreys would like to see an increase in FFC (presumably a reference to the hours funded) and that both Mr Humphreys and Ms Jimenez work 30 hours per week and take turns caring for Ms Humphreys. Following this reassessment, Ms Humphreys' funded hours of support increased to 44 hours of week, with the Panel again approving these hours being provided by Ms Jimenez and Mr Humphreys on the condition that neither of their total hours of work exceeded 55 hours per week. Later that year, Mr Humphreys retired from his job, and was approved to provide the full 44 hours of support per week, with Ms Jimenez available as a relief carer. Amanda Bleckmann, in evidence for the Crown, said that these Panel approvals were not about approving a particular carer, but rather ensuring the support provided met the appropriate standards and was safe.

[174] Since 2020, Ms Humphreys' care has been funded at the same hours under IF. Throughout both periods funding based on the minimum wage or relevant wage under the Care and Support Workers (Pay Equity) Settlement Act 2017 was paid into Ms Humphreys' bank account (which is operated by Mr Humphreys) to meet wages and the compliance costs of PAYE, ACC and KiwiSaver.

[175] On the disestablishment of the FFC scheme, the funding options were either that Mr Humphreys be employed by an external agency or that Ms Humphreys receive funding under the IF scheme to contract or employ a carer. Mr Humphreys had

previously been employed by an external agency, under interim arrangements following the *Atkinson* litigation. This had proved unsatisfactory because the external agency was not prepared to do more than make sure Mr Humphreys' wages were paid on time. Mr Humphreys also said in his evidence that he did not want to have to pursue an employment case (the current proceedings, which initially were about health and safety issues relating to bathing and toileting Ms Humphreys) against a new employer as soon as he signed the employment contract.

[176] Mr Humphreys therefore decided to accept IF funding for his daughter. This, too, was problematic because it required Ms Humphreys to have an agent and also to employ Mr Humphreys. Although it was discouraged for the same person to be both agent and employee, Mr Humphreys took both roles. As an example of how this situation works, Mr Humphreys explained that as the agent, he completes all the necessary forms associated with his employment and receives related correspondence, which he passes onto the host organisation. In early 2021, a letter came from the Department of Inland Revenue threatening Ms Humphreys with prosecution for late filing which, it transpired, had been caused by a problem with the transfer of information from one payroll system to another.

[177] In his evidence, Mr Humphreys described the difficulties of his situation, especially in terms of addressing health and safety issues for himself, in addition to other employment issues. A particular issue was the need to modify the bathroom. Mr Humphreys was unable to get a satisfactory response from either the MOH or WorkSafe New Zealand. In 2019, he brought an application in the Employment Relations Authority, asserting that he was, in reality, an employee of the MOH and it was therefore the MOH that was responsible for meeting the cost of the necessary modifications. The Authority removed that matter to the Employment Court for determination.[180]

[178] Mr Humphreys' case in the Employment Court was that because Ms Humphreys lacked the capacity to enter into a contract, and notwithstanding the form of the employment agreements under the FFC and IF schemes, the reality was

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[180] *Humphreys v Humphreys* [2019] NZERA 708.

that the MOH, not Ms Humphreys, was his employer. He sought declarations that the MOH was his employer since 2014 with all the obligations of an employer.

[179] The Crown contended that the Employment Court had no jurisdiction to consider whether Mr Humphreys was employed by the MOH. Nor did it accept that Mr Humphreys was, in fact, employed by the MOH. The Judge rejected both aspects of the Crown case.[181] She concluded that the Employment Court was not precluded from enquiring into Mr Humphreys' employment agreement status. She held that Ms Humphreys did not have the capacity to employ Mr Humphreys,[182] and Mr Humphreys was a homeworker as defined in s 5 of the ERA and therefore an employee of the MOH.[183]

Question (g): Did the Employment Court err in its assessment of the effect of pt 4A and s 88 of the PHDA on its ability to assess the employment relationship under the FFC scheme?

The issue in the Employment Court

[180] In relation to the FFC period, the Crown argued that the employment status of family carers was determined by the FFC policy, which could only be challenged by judicial review. The Crown was merely a funder and the funding mechanism was a deemed employment agreement between a disabled person and their family carer designed to keep the level of control exerted by the MOH to a minimum and create distance between it and the provision of care to the disabled person.[184] The funding model and the deemed employment agreement sat outside the ERA framework, precluding the Employment Court from enquiring into it.

[181] In rejecting this argument, the Judge gave her reasons as, essentially, "the reasons set out in *Fleming v Attorney-General*".[185] This was a reference to the reasons the Judge had given in *Fleming* in relation to the hypothetical question regarding the

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181 *Humphreys*, above n 9, at [39] and [40].
182 At [54].
183 At [88].
184 At [7].
185 At [40].

Employment Court's jurisdiction to consider employment relationships under the FFC model and the IF scheme.[186]

The reasoning in Fleming

[182] In *Fleming*, the Crown had argued that pt 4A, the s 88 Notice and the rest of the FFC policy created a legislative "carve-out", which precluded the Employment Court from considering the employment status of family carers funded under FFC because: s 70D permitted conditions to be imposed on funding for family carers; s 88(1) deemed acceptance of the first payment under FFC to be acceptance of the terms contained in any notice issued pursuant to it; the terms of the s 88 Notice imposed an artificial employment relationship between the disabled person and their family carer; and the Employment Court did not have the jurisdiction to make a declaration that was contrary to the terms of the s 88 Notice.[187]

[183] The Judge accepted that the lawfulness of the policy was not a matter for the Employment Court but did not accept that the Employment Court had no role in determining whether there was an employment relationship between Mr Coote and Ms Fleming for the purposes of the ERA.[188] She noted the personal nature of the employment relationship and the onerous obligations imposed on employers under the ERA, including the impositions of substantial fines and penalties and even the risk of imprisonment on employers for breaches of the ERA.[189]

[184] The Judge recorded the Crown's position (through its witness, Mr Wysocki) that the MOH would not have expected Mr Coote to actually discharge any of the obligations imposed on an employer under the ERA, and that under NASC guidelines a disabled person who lacked the capacity to fully comprehend their obligations or to fulfil their responsibilities, had to have "a chosen advocate, welfare guardian or circle of support to 'assist' them in fulfilling 'their' responsibilities".[190] The Judge pointed out that, in Mr Coote's case, his lack of capacity mean that substituted decision-making

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186 *Fleming*, above n 9, at [45]–[58]. As noted earlier, although the jurisdictional issue was hypothetical in relation to Ms Fleming (because she had not been funded under FFC), the parties nevertheless agreed that the Judge would determine it. .

187 At [47].

188 At [53].

189 At [28] and [30].

190 At [29].

("considered out of bounds by the United Nations Committee on the Rights of Persons with Disabilities") would be required, rather than supported decision-making.[191]

[185] After reviewing the obligations imposed by art 12 of the Convention (equal recognition before the law), the Judge said:[192]

> [39] Employment relationships are important. They are not to be viewed as a convenient device to shift liabilities away from the key players or to paint a distorted picture of reality. That is why Parliament has conferred on this Court the exclusive jurisdiction to determine, on a case by case basis, whether a particular individual is an employee and (if so) of whom, and made it clear that the answer to that question emerges from a fact specific inquiry, rather than (for example) the way in which the relationship may have been characterised.
>
> [40] There are many severely disabled people who are perfectly capable of undertaking the role of employer. [Mr Coote] is plainly not one of them. He does not have capacity to understand or discharge the most basic obligations he would be required to shoulder as an employer, and as set out in the Gazette notice. …
>
> [41] The end point that the Crown wishes to arrive at requires a leap of legal logic and common sense that I find myself unable to make.

[186] The Judge noted that, while s 6 of the ERA expressly excluded certain occupations from the Employment Court's jurisdiction — real estate agents, sharemilkers and film workers — no statutory provision was made to exclude family carers of severely disabled adult children from the ERA.[193]

[187] The Judge concluded:

> [55] The point is that, if Parliament had intended to displace or limit the [Employment Court's] exclusive jurisdiction in relation to family care givers, it likely would have done so via express legislative amendment to the Act, as it had done for other specific groups of workers. Employment rights and obligations are important, and an expansive interpretation of legislative provisions (such as part 4A) which would otherwise lead to the exclusion of categories of workers from this Court's jurisdiction should be avoided.
>
> [56] I do not read the provision of part 4A, either individually or collectively, as reflecting a Parliamentary intent that family caregivers are deemed to be employees of their disabled adult children for the purposes of s 6 of the Act whether or not they accept funding. I accept, however, that statutorily imposed limitations on funding (such as provided for in part 4A)

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191 At [30], and n 10, citing Committee on the Rights of Persons with Disabilities, above n 86, at [17].
192 Footnotes omitted.
193 *Fleming,* above n 9, at [54].

> are relevant to the suite of remedies which might otherwise flow from a declaration of employment status.

Did the Employment Court have jurisdiction to determine Mr Humphreys' employment status?

[188] Ms McKechnie, for the Crown, submitted that the Judge erred by adopting her reasoning in *Fleming* and that, in any event, the reasoning in *Fleming* was wrong. We take the Judge's adoption of her reasoning in *Fleming* as a way of avoiding repeating the discussion in the earlier decision and not an error. We therefore address only the question of whether the reasoning was correct in a substantive sense.

[189] Ms McKechnie submitted that the question of the Employment Court's jurisdiction turned on the proper interpretation of both s 88(1) and the s 88 Notice and the Judge had failed to address that aspect. Ms McKechnie's argument was, essentially, that the legislative history of pt 4A showed that any funding scheme implemented would involve employment as a condition of funding and the policy, as implemented, imposed an artificial employment contract on the disabled person and their family carer. Part 4A, s 88(1) and the s 88 Notice created a more specific framework than the existing ERA framework and, on orthodox principles of statutory interpretation, that more specific framework ought to prevail, and the resultant legal fiction that sat outside the ERA.

[190] We accept that the Judge did not engage in an interpretative exercise of the kind needed to determine the effect of pt 4A and the s 88 Notice on the jurisdiction of the Employment Court to determine whether Mr Humphreys was an employer and, if so, of whom. We turn to that question now.

The Funded Family Care framework

[191] The introduction of pt 4A was prefaced by a Regulatory Impact Statement, Cabinet Legislation Committee paper and (limited) parliamentary debates.[194] A notice

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[194] Cabinet materials were referred to in counsel's oral and written submissions and we therefore take them into account. Nevertheless, we note and repeat the reservations about the use of such material previously expressed by this Court: see *Sky City Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 at [39]–[42]; and *Adlam v Accident Compensation* [2017] NZCA 457, [2018] 2 NZLR 102 at [30], n 24.

under s 88(1) was the mechanism by which the "applicable family care policy" — FFC — would be implemented.[195] In *Chamberlain* this Court identified the FFC policy as comprising the s 88 Notice, the Operational Policy and the Service Specifications for HCSS.[196]

[192] Section 88(1) was a general provision located in the "miscellaneous provisions" contained in pt 6 of the Act, which pre-dated pt 4A. It provided that:

> **88 Arrangements relating to payments**
>
> (1) Where the Crown or a DHB gives notice of the terms and conditions on which the Crown or the DHB will make a payment to any person or persons, and, after notice is given, such a payment is accepted by any such person from the Crown or DHB, then—
>
> (a) acceptance by the person of the payment constitutes acceptance by the person of the terms and conditions; and
>
> (b) compliance by the person with the terms and conditions may be enforced by the Crown or DHB (as the case may be) as if the person had signed a deed under which the person agreed to the terms and conditions.

[193] The s 88 Notice issued pursuant to s 88(1) included the following:[197]

> **Acceptance of terms and conditions**
>
> 6. The disabled person accepts these terms and conditions when they accept their first payment for the funding.
>
> 7. These terms and conditions can only be amended by the Minister of Health; and at any time.[198]
>
> …
>
> **Overview**
>
> 9. This Notice sets out the funding arrangements of the Government's family care policy that are required to enable 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.

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195 The merits of this option, and the alternative options that were rejected, were set out in the Regulatory Impact Statement dated 17 March 2013, which was referred to during the parliamentary debates that preceded the passing of the New Zealand Public Health and Disability Amendment Bill (No 2) 2013 (22).

196 *Chamberlain v Minister of Health*, above n 1, at [46] and [47].

197 "Funded Family Care Notice 2013", above n 23 (footnotes omitted).

198 Clause 7 was footnoted at n 4: "[after] 12 weeks' public notice is given of any amendment (section 88(2) of the New Zealand Public Health and Disability Act 2000)".

…

11. Funded family care is provided through a 5–way partnering relationship among the disabled person, family carer, Ministry, and Ministry's agents (NASC and Host), requiring:

    (a) the Ministry to pay the disabled person for funded family care;

    (b) the disabled person to use the funding to employ a family carer to provide the funded family care;

    (c) the disabled person and the family carer to prepare an individual service arrangement;

    (d) the family carer to provide the funded family care according to the arrangements reflected in the individual service arrangement; and

…

Responsibilities of the disabled person

20. The disabled person is responsible for:

…

Complying with employment requirements

    (h) employing the family carer;

    (i) paying the family carer;

    (j) complying with all laws as an employer;

    (k) ensuring that payments relating to employment obligations are made;

    (l) resolving any employment problems;

…

Authorisation and payment

30. Before the disabled person can receive payment, the Ministry must be satisfied that:

…

    (f) the disabled person and the family carer understand all their responsibilities; and

    (g) there is an employment agreement in place.

…

Resolving problems

40. The disabled person must try and resolve any problems in the following order:

    (a) directly with their family carer;

    (b) with the assistance of any other member of the family/whānau/aiga;

    (c) with the assistance of any friend; and

    (d) with the assistance of the Ministry's agent.

…

42. If the problem is an employment one, the disabled person and the family carer must try to resolve the problem themselves.[199]

…

Emergency and exceptional circumstances

58. This notice does not apply to the delivery of funded family care in any circumstances which are an emergency or are exceptional.

59. Where those circumstances do occur, all parties may take any action that they consider is reasonable in the circumstances and which is in the interests of the disabled person.

The Operational Policy

[194] The Operational Policy contained primary and secondary criteria for eligibility for FFC funding and details as to how funding would be delivered, including the limits on funding. It provided that eligible people could "only use this funding to employ their approved family/whānau carers to provide some or all of their personal care and household management".[200] The funding would allow "provision for the disabled person to pay their employed family carer(s) for annual, sick and bereavement leave when this is required".[201] Funding was limited to 40 hours per week, though additional hours, if required, could be provided either through external contractors or under the

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199 Clause 42 was footnoted at n 44: "[the] employment relationship is between the disabled person and the family carer, therefore the Ministry or the Ministry's agent cannot become involved in any employment problems".

200 Ministry of Health *Funded Family Care Operational Policy* (2nd ed, New Zealand Government, Wellington, March 2016) [FFC Operational Policy] at [4.1].

201 At [4.1].

IF scheme and it was also possible for an exception to be granted to fund additional FFC hours by the family carer.[202]

[195] Exceptions could be made to the secondary eligibility criteria, the limit on hours allocated to a person and the limit on hours provided by a single carer.[203] The Operational Policy provided that the Panel would consider applications for such exceptions, taking into account the specific circumstances of the disabled person and their carer, as well as the availability of suitable external service providers.[204] As discussed above, Mr Humphreys had several exception applications approved by the Panel in relation to the allocation of funded hours.[205]

[196] The Operational Policy contemplated that decisions would be made by the disabled person, supported if necessary by an advocate. Relevantly:[206]

> The NASC needs to ensure, where possible, that the person is able to make an informed decision whether to choose this service option or not. If the NASC believes that a disabled person lacks the capacity to fully understand the terms of FFC then the NASC should recommend that the disabled person is supported with their decision making. An independent advocate can be recommended to assist the disabled person with understanding the terms of the FFC arrangement and what it entails. …
>
> … The advocate would also be expected to assist the disabled person with understanding the employment requirements under the FFC arrangement and support them with their decision to proceed with FFC or not.
>
> … If the disabled person chooses not to obtain an advocate the NASC must still be satisfied that the disabled person has made an informed and willing choice about the FFC option. There is no obligation on the NASC to proceed with the FFC arrangement if they are not satisfied with this requirement.

[197] And later, in relation to the monitoring of the FFC arrangement, the Operational Policy provided that:[207]

> The requirements of the FFC arrangement are quite extensive and complex and understanding the obligations and responsibilities of being an employer in this arrangement can be quite daunting. In the initial discussions about FFC the NASC or host facilitator can suggest or recommend that the disabled

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202 At [4.3].
203 At [5.1] and [5.2].
204 At [5.3].
205 See above at [169]–[171].
206 FFC Operational Policy, above n 200, at [6.1].
207 At [11.1].

> person set up a 'circle of support' to assist them with administering all or some of their responsibilities within the FFC arrangement.

[198] Nothing in the Operational Policy addressed how supported decision-making would be achieved in relation to disabled people who were severely intellectually disabled and lacked any decision-making capacity.

Did the FFC framework create a deemed employment agreement?

[199] Ms McKechnie pointed out that the Courts have long recognised that deeming provisions, by their nature, create legal fictions and sometimes may be the only way to give effect to a policy.[208] Ms McKechnie also relied on this Court's statement in *Chamberlain* that:[209]

> [36] Section 88 creates an artificial contractual relationship between a person with disabilities and his or her carer. The receipt of payments made by the Crown in return for disability support services, whether performed by a family member or a third party, is deemed to be the provider's acceptance of the terms and conditions contained in a notice of general application.

[200] Taking the last point first, we note that in *Chamberlain* the Court was concerned with the basis on which needs assessments were being conducted. It was not concerned with the nature of the relationship between the disabled person and their family carer. The possibility that the s 88 Notice did not create a deemed employment contract was not in issue. The statement relied on was part of a brief, general description of the statutory context rather than an exercise in statutory interpretation and does not assist in determining the issue before us now.

[201] Secondly, we do not agree that the legislative history of pt 4A suggests an intention to impose a deemed employment agreement on people who lacked the capacity to agree to being an employer. It will be recalled that pt 4A was a direct legislative response to this Court's decision in *Atkinson*. Although a number of the plaintiffs in the *Atkinson* litigation had serious intellectual disabilities, the litigation was concerned with discrimination against family carers rather than the capacity of

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208 See for example: *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2014] NZHC 3191, [2015] 2 NZLR 688 at [190]–[193]; *D'Esposito v Ministry for Primary Industries* [2018] NZCA 9, [2018] NZAR 388 at [25]; and *MP v Attorney-General* [2021] NZCA 482, [2021] 2 NZLR 632 at [70].

209 Footnotes omitted.

those disabled peopled being cared for. Moreover, not all the disabled people whose carers had brought claims lacked the capacity to make decisions about their care. For instance, two of the claims were brought directly by people with disabilities who had the capacity to do so.

[202] Nor do any of the Regulatory Impact Statement, Cabinet Legislation Committee paper or parliamentary debates disclose an intention that the family care policy would deem an employment contract to exist between a disabled person lacking the capacity to contract and their family carer. The Regulatory Impact Statement, to which a number of Members referred during the parliamentary debates, noted that "disabled people as employers will have more control and influence over the support they receive than if family carers were paid directly, and flexibility within the terms and conditions of the Notice".[210] The notion of "control and influence" is not consistent with a contractual relationship being imposed on a person without capacity through a deeming provision.

[203] Likewise, the paper submitted by the then Minister of Health, the Hon Tony Ryall, to the Cabinet Legislation Committee seeking approval for the New Zealand Public Health and Disability Amendment Bill 2013 only referred to the fact that the proposed policy would "allow some disabled people who are aged 18 and over to employ their parents, or other adult family members … to provide them with [HCSS]".

[204] In terms of the parliamentary debates, Ms McKechnie pointed out that there were many references to employment during the debates, most of which contemplated the disabled person as the employer and that the group of disabled people who would be employers would necessarily include some with intellectual disabilities.[211] While this is true, those references are all consistent with an intention that the employment would be pursuant to a genuine employment agreement. The fact that acceptance of the terms in the s 88 Notice had to be given by either the disabled person or a person

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210 Ministry of Health *Regulatory Impact Statement: Government Response to the Family Carers Case* (15 March 2013) at [34].

211 Mr Wysocki, a witness for the Crown, advised that 481 people were receiving FFC (approximately 12 per cent of the number forecast as likely to take up the funding, see above at n 160) at the time of FFC's disestablishment. Of these, 316 had intellectual disabilities and of that number, 230 had very high needs. For those, like Mr Coote and Ms Humphreys, who had been the subject of needs assessments over many years, the level of their intellectual disability was known to the MOH.

holding a PPPRA order in respect of them makes it clear that it was not intended to impose a deemed employment relationship on a disabled person but instead to provide them the choice of doing so — terminology that is inconsistent with deeming an intellectually disabled person to be party to a concluded agreement. The Minister's introduction of the Bill made this clear:[212]

> The [Bill] is a significant change in that eligible disabled people will now have the choice of employing a family member to provide them with support at home. … The [MOH] will allocate funding to adult disabled people in high and very high need situations who wish to employ their parents or resident family members to provide personal care and household management supports they have been assessed as needing.

[205] Ms McKechnie also pointed out that a proposed amendment to cl 4 of the Bill (subsequently s 70E), that would have carved out of the prohibition on claims for breaches of BORA a right to bring a claim in the Employment Court for a personal grievance for a breach of the Human Rights Act 1993 or BORA, had failed. However, we do not see this as relevant, given that the Bill had been introduced to address the finding in *Atkinson* that the existing policy was a breach of BORA and s 70E is expressly directed to that aspect.

[206] Thirdly, the suggestion that s 88(1) and the terms of the s 88 Notice had the combined effect of deeming an employment contract to exist between a disabled person and their family carer when care was funded under FFC is inconsistent with the provisions of both. Because s 88(1) was the mechanism by which the policy was implemented, satisfaction of its terms was a pre-requisite to funding under FFC. But the deeming effect of s 88(1) (that the payee has accepted the terms and conditions contained in the notice) was not triggered by the mere payment — or even the receipt — of funding but by "acceptance by the person of the payment". Section 88(1) was a general provision that applied to payments made by the Crown and DHBs for all kinds of services. No example was given of any other payments made pursuant to s 88(1) to persons lacking the capacity to understand the terms on which payment was offered and it can reasonably be assumed that, prior to pt 4A being introduced, payments made pursuant to s 88(1) were made to people who had that capacity.

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[212] (16 May 2013) 690 NZPD 10117.

[207] In our view, there is no basis on which to treat "accepted" in s 88(1) as meaning anything other than true acceptance, as a matter of fact, necessarily by a person with the capacity to understand and agree to the terms being offered. It is evident that Ms Humphreys, whom everyone accepts lacks the capacity to enter into a contract, was not capable of accepting the terms being offered in any notice given under s 88.

[208] Turning to the s 88 Notice itself, we note that cl 6 was clearly intended to mirror s 88(1)(a): the requirement that "[the] disabled person accepts these terms and conditions when they accept their first payment for the funding" was footnoted with a reference to s 88(1)(a). Further, the phrase "disabled person" was separately footnoted with "[o]r their legally authorised representative". "[A]uthorised representative" was defined in cl 72 as:

> the person who has the legal authority to make personal care and welfare decisions, or property decisions, or both, for the disabled person under the Protection of Personal and Property Rights Act 1988; or other legal authority (this person may also be called the *advocate* in the Ministry's *Funded Family Care Operations Policy*);

[209] The provision for participation by the disabled person by way of a person authorised under PPPRA order indicates that a distinction was being recognised between those who had capacity and those who did not. However, acceptance of terms and conditions by a person authorised under the PPPRA would be treated as actual notice, so that there would be no need for acceptance to be deemed.[213]

[210] Nor were the other terms and conditions in the s 88 Notice framed so as to actually deem an employment agreement to exist. Rather, they required an employment agreement to be entered into, which is inconsistent with an intention to impose a deemed contractual relationship on the parties. The option that became FFC — initially referred to as "employment through s 88 Notice" — was never referred to in terms of a deemed employment relationship. Rather, the language used in the s 88 Notice and in the Operational Policy (referred to in the footnote to cl 10 of the s 88 Notice) were consistent with the disabled person and their family carer entering into a genuine employment relationship. For example:

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213 Protection of Personal and Property Rights Act, s 19.

(a) Clauses 9 and 11(b) both referred to the funding being available for the disabled person "to use … to employ a family carer".

(b) Clause 10 provided that the FFC is described in the Funded Family Care Operational Policy. The template Individual Service Plan set out in an appendix to the FFC Operational Policy asks, under the section "[agreeing] the plan", whether "you/your advocate" agree to the plan; and, in the section requiring "all parties to this service plan agreement to print their names and sign below", provides for the signature of the "person" and their "[g]uardian/advocate". As noted earlier, an "advocate" is an alternative description of an "authorised representative", being a person authorised under the PPPRA or similar.

(c) Clause 20 included, among the "[responsibilities] of the disabled person", "employing the family carer" and "complying with all laws as an employer". The latter is subject to a footnote that reads "[this] includes obligations such as those under the Employment Relations Act 2000, Health and Safety in Employment Act 1992, Holidays Act 2003, Wages Protection Act 1983, and all other laws relating to being an employer …".

(d) Clause 30(f) provided that before the disabled person can receive payments, the MOH must be satisfied that "the disabled person and the family carer understand all their responsibilities".

(e) Clause 30(g) provided that before the disabled person can receive payments, the MOH must be satisfied that "there is an employment agreement in place".

(f) Clause 40 provided that the disabled person must try and resolve any problems in the following order:

    (a) directly with their family carer;

    (b) with the assistance of any other member of the family/whānau/aiga;

(c) with the assistance of any friend; and

(d) with the assistance of the Ministry's agent.

[211] For those disabled people who had the capacity to choose to employ a family carer or understand and comply with the statutory obligations imposed on employers, the terms of the s 88 Notice were unremarkable. There was no need to impose an artificial relationship and no indication that this was intended. The express requirement for the employer of the family carer to assume ERA (and other) obligations was strongly against that. The corollary of those obligations were the corresponding rights conferred on the family carer as employee. We cannot accept that Parliament intended to deprive that party of the means of enforcing their rights. It follows that we do not see pt 4A and the s 88 Notice as either intending to, or having the effect of, excluding the Employment Court's jurisdiction in respect of a family carer employed by a disabled person who had the capacity to do so.

[212] Nor do we accept that a deemed employment agreement was intended between disabled people who were eligible for FFC funding and had a welfare guardian appointed under the PPPRA who could contract on their behalf. The s 88 Notice expressly contemplated that a disabled person would act through a welfare guardian. That situation would not require a deemed contract to be imposed, since the welfare guardian could enter into a genuine contract. Again, it would be unfair to deprive the parties to a genuine agreement of access to the ERA.

[213] The purpose of pt 4A was to create a new framework for funding family carers. The framework could have utilised a range of different mechanisms. The mechanism selected was employment on terms that expressly included the obligations imposed by the ERA. This was clearly functional for disabled people who had the capacity to contract with their family members or those who could do so through a welfare guardian. For these genuine employment agreements, we do not see the FFC model as creating a more specific — and artificial — framework existing outside the ERA.

We are therefore satisfied that the Employment Court retained its jurisdiction to determine the employment status of family carers funded under FFC.[214]

[214] On our interpretation of the s 88 Notice, Ms Humphreys was not eligible for funding under FFC. We have held that acceptance of the terms on which FFC was offered had to be genuine acceptance by a person with the capacity to understand the offer or a welfare guardian authorised to made decisions for that person. If the person has neither, acceptance of the terms offered, which was necessary to access FFC funding, would be absent. Ms Humphreys lacked the capacity to understand and agree to the terms being offered and she did not have a welfare guardian.[215] She therefore could not accept FFC funding or enter into an employment contract as required by the s 88 Notice.[216]

[215] Nevertheless, the MOH funded Ms Humphreys' care. This raises two obvious questions. The first question is, what was the basis on which the MOH paid for Ms Humphreys' care? It is evident to us that the MOH's funding of Ms Humphreys' care was based on the mistaken belief that she met the eligibility criteria for FFC. The MOH knew that Ms Humphreys did not have the capacity to actually be an employer of her family carer. It also knew — or ought to have known — that there was no welfare guardian appointed. It could have declined funding until a welfare guardian was appointed. But it appears to have misunderstood, or misinterpreted, the requirements of s 88(1) and the terms of the s 88 Notice.

[216] The second question is whether the MOH was prohibited by s 70C from funding Ms Humphreys' care. Counsel had a variety of views on this issue. Mr Meys, who appeared as Ms Humphreys' litigation guardian,[217] pointed to s 89 of the PHDA, which, relevantly, provided:

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214 The Crown raised in oral argument that the Judge erred in concluding the lack of a specific ouster clause (such as for real estate agents and dairy workers) meant pt 4A was subject to the ERA. Given our conclusion that pt 4A did not contradict the ERA, we do not address this argument.

215 Mr Humphreys had authority to operate a bank account in Ms Humphreys' name but no power to make other decisions for her.

216 This means that no employment agreement could have come into existence between Ms Humphreys and Mr Humphreys. As a result, it is unnecessary to consider the general law regarding the status of contracts entered into by persons who lack mental capacity, which was referenced by this Court in *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12, [2020] 2 NZLR 446 at [4].

217 Mr Meys was also Mr Coote's litigation guardian.

> **89 Principles of national consistency applicable to notices under section 88**
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> (1) The principles stated in subsection (2) apply to the Crown and to a DHB whenever the Crown or a DHB proposes to issue a notice under section 88.
>
> (2) The principles are—
>
> (a) that it is desirable to maintain national consistency in the terms and conditions set in respect of the same or substantially the same services; but
>
> (b) that it needs to be recognised that there are circumstances when there is good reason to depart from terms and conditions set in respect of the same or substantially the same services, including, without limitation,—
>
> (i) special circumstances relating to a geographical area; or
>
> (ii) the need to adjust the amounts payable for services; or
>
> (iii) the need to update standards set for services.

[217] Section 89 operates at a general level to guide the terms and conditions that might be included in a s 88 notice. On the one hand, it identifies the desirability of maintaining national consistency when setting terms and conditions. On the other, it justifies provision for exceptions to be made from the terms and conditions when necessary. This fact could not, in itself, lead to any conclusion regarding a specific case.

[218] Mr Cranney, for Mr Humphreys, took the view that, in paying family carers where the disabled person lacked the capacity to fulfil the terms of the s 88 Notice, the Crown was in breach of s 70C (which prohibited a family carer being paid other than pursuant to the family care policy) but submitted that, since the Crown had the power under s 88(1)(b) to enforce the terms and conditions of a s 88 notice, it also, impliedly, was entitled to refrain from enforcing them. We do not accept that merely refraining from taking steps to regularise the position could overcome the prohibition in s 70C.

[219] Mr Jeffries argued that cl 58 of the s 88 Notice, which provided for exceptions to be made to the terms and conditions of FFC in exceptional circumstances, could have permitted payment for the care of a disabled person who lacked capacity.

Ms McKechnie responded to this argument by arguing that Ms Humphreys' circumstances were not exceptional, citing the fact that of the 481 people who were funded under FFC, 316 had an intellectual disability. She submitted that cl 58 was intended to respond to emergency and exceptional situations and exceptionality was not to be viewed as a proxy for capacity.

[220] It will be recalled that clause 58 provided that:[218]

> This Notice does not apply to the delivery of funded family care in any circumstances which are an emergency or are exceptional.

[221] We do not interpret the opening words of cl 58 — "[this] Notice does not apply" — as intended to have a literal effect. It is obvious that the purpose of cl 58 was to provide a means of managing emergencies or exceptional circumstances within the FFC scheme without adversely affecting the interests of the disabled person. The literal meaning of the opening words would be to eliminate the statutory basis for the scheme and make it illegal to fund family carers in an emergency or exceptional circumstances. That would be inconsistent with footnote 50 of the s 88 Notice which provides that the MOH "may continue making payment or stop payments" when those circumstances occur. Reading cl 58 consistently with the purpose of the scheme simply requires reading the opening words as meaning that the terms and conditions contained in the s 88 Notice would not apply in emergencies or exceptional circumstances.

[222] We turn, then, to the meaning of "exceptional circumstances". We start with the plain and ordinary meaning of the word. In *Creedy v Commissioner of Police*,[219] the Supreme Court accepted the following definition given by Lord Bingham of Cornhill in *R v Kelly (Edward)*:[220]

> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

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218 Footnote omitted.
219 *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7 at [32].
220 *R v Kelly (Edward)* [2000] QB 198 (CA) at 208.

[223] Clause 58 was worded disjunctively, responding to circumstances that were "an emergency or are exceptional". It does not fall to be construed by reference to the ejusdem generis rule and we see no other basis on which to constrain the usual meaning of exceptional.

[224] In considering whether Ms Humphreys' circumstances are properly viewed as exceptional for the purposes of cl 58, we have regard to the following. In enacting pt 4A, Parliament was responding to the finding of this Court that its previous refusal to pay family members to care for adult disabled people was discriminatory. The effect of FFC was to meet the cost of such care for disabled people with high or very high needs. It was expected that 1,600 people would seek funding under FFC.[221] It was known that some of those who would be eligible for funding would have serious intellectual disabilities. There was, however, no intention to create a framework that discriminated against people with serious intellectual disabilities.[222] To the contrary, the s 88 Notice (as we have held) made provision for disabled people who had the capacity to employ a family carer and those who did not. It was expected that the latter would be represented by a welfare guardian or other legally authorised representative.

[225] Ms Humphreys was part of that relatively small group of New Zealanders whose care it was intended the MOH would be permitted to fund through the FFC scheme. She was a disabled person with very high needs who wished to have a family carer. She had a family member willing and able to fulfil that role. The MOH was aware from previous needs assessments that being cared for by her family would be in Ms Humphreys' best interests (and also the most fiscally desirable outcome, given that the alternative would have been full-time residential care). If funding was not made available under FFC, Ms Humphreys would not have the benefit of a family

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221 Judy Paulin, Sue Carswell and Nicolette Edgar *Evaluation of Funded Family Care* (Artemis Research for the Ministry of Health, April 2015) at [1.1].

222 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No 2)* (16 May 2013). Parliament was aware, from the Attorney-General's report, at [18] that pt 4A was likely to result in an unjustified limitation of the right to judicial review under s 27(2) through the prohibition on future claims based on allegations of breach of the right to freedom from discrimination. It was also aware that the legislation could be potentially in breach of the right to freedom from discrimination under s 19(1), given it authorised policies that make distinctions on prohibited grounds of discrimination, whether or not those distinctions can be justified. No other form of discrimination arising from pt 4A was apprehended.

carer because FFC was the only means for funding family carers. But Ms Humphreys lacked both capacity and a welfare guardian and so could not have entered into the employment agreement ordinarily required by the s 88 Notice.

[226] In our view, these circumstances were exceptional, and it was within the MOH's power to allow Ms Humphreys' family carer to be funded under FFC, even though Ms Humphreys did not satisfy the terms and conditions of the s 88 Notice that would otherwise apply. Since payment could have been made on a basis provided for by the s 88 Notice, it cannot be said that the MOH's funding of Ms Humphreys' care contravened s 70C.

[227] We add, for completeness, that Ms Humphreys' situation differed from that of Mr Coote because, although he also lacked both capacity and a welfare guardian, Ms Fleming had expressly declined funding under FFC. In comparison, there was purported acceptance by Ms Humphreys of the FFC terms and the MOH actually made payments under FFC.

Question (h): Was Mr Humphreys a homeworker as defined in s 5 of the ERA, and therefore an employee of the MOH, when he cared for Ms Humphreys?

The Employment Court decision

[228] Mr Humphreys had pleaded that he was an employee of the MOH. The Judge considered at an early stage that Mr Humphreys was not an employee pursuant to a contract of service and dealt with the case on the basis that the question was whether Mr Humphreys was a homeworker as defined in s 5 of the ERA.[223] Then, as the Judge had done in *Fleming*, she referred to the task before her as being "to separate the wood from the trees, have regard to all of the circumstances and determine the real (rather than described) nature of the relationship".[224]

[229] The Judge's conclusion that Mr Humphreys was employed by the MOH largely reflected her reasoning in *Fleming*. The Judge held that the MOH knew that Ms Humphreys' care needs were very high and that Mr Humphreys was providing the

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223 *Humphreys*, above n 9, at [65].
224 At [78], citing *Fleming*, above n 9, at [75].

necessary care to an adequate standard and, having regard to the nature and extent of the MOH's involvement in and knowledge of the care arrangements, it had "selected" Mr Humphreys.[225] She concluded that Mr Humphreys was therefore "engaged" for the purposes of s 5:[226]

> [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 [Ms Humphreys] 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 [Ms Humphreys] 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 [Ms Humphreys] 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 Health and Disability Act and the Convention.

[230] The Judge acknowledged that the MOH did not know that Mr Humphreys might fall within the definition of a homeworker and that it did not intend to employ him but did not see either as a barrier to finding that he was engaged by the MOH as a homeworker and therefore employed by it.[227] Nor did the Judge consider it significant, although Mr Humphreys was usually Ms Humphreys' carer, sometimes her mother, Ms Jimenez, was the carer.[228] This fact would only affect the amount calculation of wages owed.[229] The determining factor was that the MOH knew that Ms Humphreys required care and that Mr Humphreys was providing that care from at least April 2014 (though likely earlier).[230]

[231] Although the Judge had not expressed her conclusions as specifically relating to the FFC period, she went on to make separate observations about the period during which Mr Humphreys was receiving funding under the IF scheme:

> [82] I make one final point. Mr Wysocki gave evidence that one of the underlying purposes of Individualised Funding was to give the disabled person the opportunity to engage support workers independently; as such the Ministry will not necessarily have visibility of any employment or contractor relationships. It was submitted that the Ministry had deliberately designed the

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225 *Humphreys*, above n 9, at [83].
226 (Footnote omitted).
227 At [76] and [77].
228 At [79].
229 At [80].
230 At [81].

> Individualised Funding model to ensure that the Ministry was "hands-off" and there was flexibility as to who provided the services. The point is somewhat circular. The reduced hands-on involvement of the Ministry flowed from the way in which it constructed the model, namely through a number of intermediaries (in this case agents). The reduced involvement was then said to support an inference that no employment relationship existed between itself and Mr Humphreys. The same sort of analysis was advanced, and rejected, in *Prasad v LSG Sky Chefs New Zealand Ltd*…[231]

[232] However, the Judge's final conclusion did not differentiate between the FFC and IF periods:[232]

> [83] I am satisfied that, in the particular factual context of this case and having regard to the nature and extent of the Ministry's involvement in and knowledge of arrangements for [Ms Humphreys'] care, it "selected" Mr Humphreys, and he was "engaged" by it for the purposes of s 5.

Error in relation to the Family Funded Care period?

[233] If we accepted that the Employment Court had jurisdiction to consider Mr Humphreys' employment status (which we do), Ms McKechnie's argument in relation to the FFC period reflected the arguments advanced in relation to Ms Fleming (and which we largely accepted in relation to that appeal).

[234] We agree that the Judge erred in applying the s 6(2) and (3) approach to the enquiry into whether Mr Humphreys was a homeworker, for the reasons discussed in relation to question (a).

[235] We turn to the substantive issue — whether the Judge erred in finding that Mr Humphreys had been engaged by the MOH and was therefore a homeworker. It will be recalled that in *Lowe*, O'Regan J considered that engagement, particularly when read in the context of the phrase "engaged, employed or contracted" requires an event that creates a relationship between the hirer and the person who is engaged.[233] In the *Fleming* appeal, we concluded that Ms Fleming had not been engaged because it was not possible to identify any event, or series of events, that resulted in a relationship being formed between her and the MOH. Although a needs assessment

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231 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at 31; *LSG Sky Chefs New Zealand Ltd v Prasad* [2018] NZCA 256.

232 Footnotes omitted.

233 *Lowe v Director-General of Health*, above n 38, at [63].

was completed for the purposes of an application for FFC funding, the application was not advanced. Instead, Ms Fleming continued to receive a benefit from WINZ, which enabled her to remain at home and care for Mr Coote. No relationship with the MOH could have resulted in these circumstances.

[236] In comparison, in Mr Humphreys' case, there was a distinct process followed, which started with a needs assessment undertaken by the MOH's agent for the purposes of assessing eligibility for FFC funding and concluded with the MOH's agreement to fund Ms Humphreys' care by Mr Humphreys.

[237] Ms McKechnie submitted, however, that there was no event that could have resulted in Mr Humphreys being selected as a homeworker because: the Crown had merely approved a continuing arrangement; acceptance of FFC funding was a unilateral decision by the Humphreys/Jimenez household; the MOH's knowledge of who was doing the caring was retrospective only; as a matter of fact, the caring was shared between Mr Humphreys and Ms Jimenez; and the MOH had neither knowledge of nor control over who did the work and therefore, the certainty required for a particular person to be engaged and to do specified work was absent.

[238] We do not accept this submission. There was a distinct process to be followed before FFC funding could be provided. Eligibility of the disabled person and the proposed family carer had to be confirmed and this was the MOH's responsibility.[234] The proposed family carer had to be approved and this, too, was the MOH's responsibility.[235] As a result, once the MOH approved FFC funding for Ms Humphreys on the basis that Mr Humphreys would be her family carer and that offer was accepted, Mr Humphreys' status changed from unpaid caregiver to family carer under FFC. Funding under the scheme was not the continuation of any existing legal arrangement, even if the de facto arrangements remained the same.

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234 "Funded Family Care Notice 2013", above n 23, at cl 30(b).

235 Clause 19(b), n 18 provided that "[t]he family carer must be physically capable, and have the necessary skills, qualifications and/or experience to provide the disability support services." "Family carer" was defined in cl 72 as "the family member who is approved by the Ministry, and employed by the disabled person, to provide the funded family care".

[239] The real question is whether the change in Mr Humphreys' status resulted in a relationship being formed with the MOH that brought him within the definition of a homeworker. Ms McKechnie argued that because Ms Jimenez sometimes cared for Ms Humphreys, and was at times funded to do so under FFC, there was no certainty as to who the family carer was and so no basis on which Mr Humphreys could have been engaged.

[240] Ms McKechnie was not explicit as to the basis on which Ms Jimenez's work was funded and we infer that Ms Jimenez provided replacement care, which was provided for under the s 88 Notice.[236] The disabled person's responsibilities included "ensuring that all payments [were] paid to the family carer and made only to the family carer"[237] and "ensuring that payments are made for replacement care when the family carer is unable to provide funded family care".[238] The responsibilities of the family carer were to provide funded family care of the required standard to the disabled person.[239] The person providing replacement care was, separately, responsible for providing funded family care to the disabled person.[240] The s 88 Notice did not include any requirement for the replacement carer to be approved by the MOH.

[241] In both the Employment Court and this Court, the argument over whether Mr Humphreys was a homeworker focussed on the question of engagement and the effect of *Lowe*. However, we do not see the enquiry as necessarily so narrow in this case. A person may satisfy the definition of homeworker by being employed or contracted, as well as engaged, and there is obvious commonality between all three in that all require a contractual or quasi-contractual relationship. We do not see any need to consider how they might be differentiated. For present purposes, it is sufficient to say that each case would require a sufficient level of consensus and certainty as to the work to be done and the terms on which it would be done.

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236 Clauses 20(s) and 22.

237 Clause 20(c). "Payments" were defined at n 22 as "[wages] (because payment is an hourly rate, can be up to 40 hours a week, and is based on the adult minimum wage)".

238 Clause 20(d).

239 Clause 21(a). The standard of care was specified at n 30 as being that contained in *NZS 8158:2012 Home and Community Support Sector Standard*.

240 Clause 22(a).

[242] The terms of the s 88 Notice were clear that there was to be one identified family carer and the MOH (by its agents) had to satisfy itself as to their suitability. However, it is also plain that the FFC scheme contemplated that, while there would be an identified, approved family carer, the funding for that person's work would extend to cover funding for a (possibly unidentified) replacement carer. Ms McKechnie described the funding as a "bucket" of money in the sense of a bulk funded situation and we accept that. But the fact that the replacement carer might not have been identified before they carried out the work does not preclude the approved family carer being engaged and does not raise any question of retrospectivity. We attach no significance to the fact that actual payment was made on invoices generated after each period of care had been provided — it is the agreement to pay that matters.

[243] In our view, approving a family member to be the family carer and agreeing to provide funding for that person's services, when it is known that an employment agreement between the family carer and the disabled person cannot be achieved, is capable of amounting to selection for the purposes of s 5 of the ERA. Allowing the approved family carer to use the funding for replacement care where necessary is not incompatible with the homeworker role, which inherently carries a degree of autonomy, constrained only by the requirements that the nature and standard of care provided are maintained. It may be more consistent with being an independent contractor, but that would not change the outcome, given the definition of homeworker in s 5 captures a person who is "engaged, employed or contracted".

[244] We acknowledge that engagement (or contracting) of the family carer as a homeworker by the MOH was not the intended outcome under the s 88 Notice. However, it was open to the MOH to decline the funding, either altogether or pending an order under the PPPRA 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.

[245] Finally, we briefly address Ms McKechnie's submission that Mr Humphreys may not have satisfied the requirements in the definition of homeworker that the work he was engaged (or contracted) to do was to be done in a dwellinghouse. This

submission drew on the discussion in *Lowe* and *Cashman v Central Regional Health Authority* regarding whether it needs to be a term (express or implied) of the engagement, employment or contract that the work be done in a dwellinghouse, or whether it would suffice that the work was in fact done in a dwellinghouse.[241]

[246] Regardless of which approach is correct, we are satisfied that there is no merit in this submission because the s 88 Notice required, expressly or impliedly, that the work was to be carried out in a dwellinghouse and the work was carried out in a dwellinghouse. The funding was expressly tied to personal care, household management and sleepover care which is necessarily undertaken in a dwellinghouse. The s 88 Notice and Operational Policy made it clear that the work being funded was, for all practical purposes, to be done in a dwellinghouse.[242] The fact that Mr Humphreys sometimes takes Ms Humphreys out of the house or that the family has moved houses does not detract from this. We therefore conclude that the Judge did not err in finding that Mr Humphreys was a homeworker for the FFC period, albeit for different reasons.

Error in relation to the Individualised Funding period?

[247] As noted earlier, funding for a family carer post-FFC was available either through direct employment by a HCSS or through IF. Ms McKechnie described IF as much more flexible than FFC because: while the funding could be spent on carers, it could also be spent on equipment, if that were more useful; there were no limits on who could provide the care (it could be family, friends or private contractors); and the rate could be higher than the minimum if that was thought necessary to obtain better quality care.

[248] There are three aspects of the IF scheme that are relevant to Mr Humphreys' assertion that he is, in reality, an employee of the MOH under it. These are (1) the issue of capacity, (2) the basis on which family carers can be funded to provide care

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241 *Lowe v Director-General of Health*, above n 38, at [72]–[74] and [169]–[172]; and *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA) at 14.

242 See for example: "Funded Family Care Notice", above n 23, at cls 12, 13, 17 and 28; and FFC Operational Policy, above n 200, at [3.1]–[3.3] and [4.1].

and (3) the timing and extent of the MOH's knowledge about who is providing care for the disabled person.

[249] Under cl 3.2.3 of the IF Service Specification, one of the criteria for the availability of IF is that the disabled person has:

> … had a discussion with the NASC to determine if Individualised Funding is a suitable option for them and confirmed that the Person will be responsible for all contracting and employment responsibilities associated with the purchase of the Support Services including the management of the quality of the care provided.

[250] Under cl 4.2:

> Individualised Funding offers the Person the ability to:
>
> 4.2.1 choose their Host Provider;[243]
>
> 4.2.2 choose their Support Provider and Support Service delivery plans;[244]
>
> 4.2.3 employ their own Support Provider;
>
> 4.2.4 manage the payment for services of the Support Providers;
>
> 4.2.5 purchase Support Services from more than one Support Provider; and
>
> 4.2.6 manage all aspects of service delivery.

[251] Significantly, however, the IF Service Specification also contemplates that management of the IF budget may be undertaken by someone on behalf of the disabled person. Clause 7.1 provides that:

> 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.

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243 Ministry of Health *Service Specification (Individualised Funding)* (New Zealand Government, Wellington, July 2020) [IF Service Specification]. Host Provider is defined in the glossary as "[t]he Individualised Funding Host Provider contracted to the Ministry to provide Services under this Agreement to assist People to purchase and manage their support allocation."

244 Support Provider is defined in the glossary as "[t]he individual(s) or organisation(s) employed or contracted by the Person to provide Support Services." Further, Support Worker is defined as "[a]n individual who is responsible for delivering the service on behalf of a Support Provider … "; Support Allocation is defined as "[t]he amount and type of services allocated to a Person by a NASC Approved Assessor, which will govern the Support Services that are available to a Person and are to be incorporated into an ISP"; and Support Services are defined as "[t]hose services the Person chooses to obtain under their Support Allocation …".

[252] In order to access IF the Host Provider must meet with the disabled person and their "nominated agent" and explain the options for services.[245] The Host Provider must, within three weeks of the date of referral, ensure the completion of an Individual Service Plan (ISP) for the disabled person.[246] The ISP must include, among other things, how the Support Allocation will be used, how the Support Allocation will be applied throughout the period for which it is allocated and the identity and contact details of the Support Providers including named Support Workers who will provide the Support Services. Before services can actually be provided the Host Provider has to ensure that "there is an executed agreement for Services between the Host Provider and the Person/nominated agent that incorporates all the terms necessary to ensure that the Host Provider can meet its obligations under this Agreement".[247]

[253] At general law a person lacking capacity to contract is unable to validly appoint an agent because capacity to contract by means of an agent is co-extensive with the capacity of the principal alone to make the contract.[248] However, in this case the "nominated agent" contemplated by the IF Service Specification is not one that is necessarily appointed by a principal with capacity but instead one that is "able to make decisions on behalf of" the disabled person. One might compare the requirement under the s 88 Notice for a welfare guardian to be involved where the disabled person lacked capacity whereas the IF Service Specification permitted the Host Provider to agree to funding on the basis that a "nominated agent" would undertake the obligations of the disabled person on their behalf. In this case, Mr Humphreys is the nominated agent of his daughter and entitled to manage all aspects of the funding arrangements, notwithstanding that Ms Humphreys lacks the capacity to appoint him in the usual way. The Host Provider is also entitled to deal with Mr Humphreys on that basis.

[254] We turn to the question of whether Mr Humphreys was a homeworker, and therefore an employee, of the MOH. Mr Humphreys is Ms Humphreys' agent but also

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245 Clause 8.1.1. "[N]ominated agent" is defined in the glossary as "[an] individual who is able to make decisions on behalf of the Person that relate to the management of the [Person's] supports via Individualised Funding."

246 Clause 8.1.4.

247 Clause 12.2.1.

248 Peter Watts and FMB Reynolds *Bowstead and Reynolds on agency* (23rd ed, Sweet and Maxwell, London, 2024) at [2.006]; and GE Dal Pont *Law of agency* (4th ed, LexisNexis, Australia, Chatswood, 2020) at 3.2.

her carer. Although he described himself as becoming his daughter's employee after funding under IF began, he asserts that, because Ms Humphreys lacks the capacity to employ him, he is, in reality, the MOH's employee.

[255] We see Mr Humphreys' position under IF as different from under FFC. Under FFC the only way a disabled person could have a family carer was by employing them. This limited route to family care funding led to the difficulties already discussed in relation to disabled people who lacked capacity. In the post-FFC period, however, the MOH provided a route for a family carer to be employed by a HCSS provider. Where a disabled person lacked the capacity to employ a family carer, the family carer could still have the security and benefits of a genuine employment relationship by being employed by a HCSS provider. In comparison, the IF scheme was explicitly a "bulk-funding" scheme. How the disabled person (or their nominated agent) chose to spend the funding was a matter for them. This was made clear in a letter from the MOH to FFC recipients (which Mr Humphreys received) dated 28 May 2020, which advised that:

> FFC is being disestablished, and the support provided by your family can continue through one of two arrangements:
>
> (a) Family members can be employed by a Home and Community Support Service (HCSS) to provide your care, or
>
> (b) You or your agent can access Individualised Funding (IF) and engage family member(s) to provide support directly.
>
> You (or your agent) can choose an arrangement that best suit[s] your circumstances:
>
> 1. The HCSS option means that all employment and training obligations are looked after by an HCSS provider. You get to select the HCSS provider. The employment of your family carer will however be at the discretion of the HCSS provider, and each provider has their own recruitment criteria.
>
> 2. The IF arrangement means that your household management and personal care needs are allocated as an annual budget. You get to select a Ministry funded IF Host to provide support around managing your budget, employment and contracting arrangements.

[256] Mr Humphreys knew and understood that he could be employed by a HCSS provider. He chose not to be employed under that model because he was unhappy with the level of instruction the HCSS provider was prepared to give, and he expected

that he would have to pursue a case against his employer in relation to the bathroom modifications and thought that was not fair on the HCSS provider. But when Mr Humphreys selected IF for his daughter, he also knew that Ms Humphreys could not be his employer because of her lack of capacity. And while there was no prohibition on a nominated agent also being a support carer, Mr Humphreys must have known that assuming both roles would leave him without an employer in any real sense.

[257] It was implicit that under IF support carers would be engaged, employed or contracted by the disabled person and would therefore be homeworkers within the meaning of s 5. But we do not accept that where such a relationship was impossible, either because the disabled person lacked capacity or the support carer was also the agent of such a person, the result was that the MOH became the employer of the support carer. This was not the basis of the IF scheme and, importantly, there was a means by which a family carer could be employed under a genuine employment agreement to provide that care.

[258] It is possible that the MOH'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 MOH was as Ms Humphreys' agent, not more.

[259] This conclusion means that we do not need to deal with Ms McKechnie's argument that there could be no engagement because the MOH's knowledge was retrospective. In deference to counsel's submissions, however, we address it briefly. Ms McKechnie argued that Mr Humphreys could not be engaged by the MOH because the precise use to which the funding is put is not known to the Host Provider (and hence the MOH) until the invoice for care provided is received by the Host Provider. Ms McKechnie argued that because the actual identity of the carer and the amount of work they have done is not known to the Host Provider until the invoice for the work

is received, there is no basis on which to find that the MOH had engaged or employed Mr Humphreys and the situation is akin to that in *Lowe*.

[260] It is correct that the exact amount of time worked, and by whom, is notified to the Host Provider after the event by way of a Verification Form. This form must contain specified details. These include "confirmation by the Person of the existence of a contract between the Person and a Support Provider (which will include an employment contract where appropriate) applicable to the Support Services claimed".[249] The Verification Form must also provide the dates and times of the Support Services that were provided during that period covered by the Verification Form and identification of the Support Provider/Support Workers who have performed the support services (including the direction for attachment of any relevant copies of third party records such as time sheets or invoices).[250] Finally, there must be a declaration by the Person as to the truth and accuracy of the record of Support Services provided. However, as we noted, earlier, the ISP completed at the outset of the process contained details of the Support Workers and the services they would provide. The position was therefore not the same as in *Lowe*.

Relief

[261] The Employment Court did not determine relief beyond declaring Mr Humphreys to be an employee of the MOH. We do not express a view on eligibility for relief beyond upholding that declaration in respect of the FFC period. Whatever other relief might be available to Mr Humphreys falls to be considered in the Employment Relations Authority and Employment Court as appropriate.

Question (i): Was the Employment Court wrong in finding (if it did) that the Court of Appeal's approach in *Idea Services* applies to an assessment of hours worked by Mr Humphreys as a homeworker for the FFC and/or IF periods?

[262] The answer to this question is determined by our conclusion on the *Fleming* appeal, that *Idea Services* cannot be relied on to apply to workers who both live and work at home.[251]

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249 IF Service Specification, above n 243, cl 12.2.2.2.
250 Clause 12.2.2.
251 See above at [89]–[121].

SUMMARY OF CONCLUSIONS ON APPEALS AND CROSS-APPEAL

[263] On the questions for which leave was granted on the appeals and cross-appeal we have concluded:

Crown appeal against Fleming

(a) Was Ms Fleming a "homeworker" as defined by s 5 of the ERA, and therefore an employee of the MOH, when she cared for her son?

Ms Fleming was not a "homeworker" as defined by s 5 of the ERA when she cared for Mr Coote.

(b) Was the Employment Court wrong in finding that the "well-established test for what constitutes work" as set out in *Idea Services* applies to Ms Fleming?

The Employment Court erred in finding that the "well-established test for what constitutes work" as set out in *Idea Services* applied to Ms Fleming.

(c) Did the Employment Court err in finding that Ms Fleming had a personal grievance for discrimination?

The Employment Court erred in finding that Ms Fleming had a personal grievance.

Ms Fleming's cross-appeal

(d) Did the Employment Court err in finding that the MOH was not permitted under a family care policy or expressly authorised under any enactment to pay Ms Fleming for work she did during the time of pt 4A of the PHDA?

Part 4A precluded Ms Fleming from recovering arrears of wages and holiday pay so the Employment Court did not err in its finding.

(e) Did the Employment Court err in failing to consider the imposition of a penalty under s 134 of the ERA?

The Employment Court did not err in failing to consider the imposition of a penalty under s 134 of the ERA.

(f) What is the level of knowledge required to establish a breach of an employment agreement for the purposes of s 134 of the ERA?

It has proven unnecessary to consider this question.

Crown appeal against Humphreys

(g) Did the Employment Court err in its assessment of the effect of pt 4A and s 88 of the PHDA on its ability to assess the employment relationship under the FFC scheme?

The Employment Court did not err in its assessment of the effect of pt 4A and s 88 of the PHDA on its ability to assess the employment relationship under the FFC scheme.

(h) Was Mr Humphreys a "homeworker" as defined by s 5 of the ERA, and therefore an employee of the MOH when he cared for his daughter during (1) the FFC period (April 2014 to August 2020) and (2) the IF period (August 2020 onwards)?

Mr Humphreys (1) was a homeworker as defined in s 5 of the ERA and therefore an employee of the MOH when he cared for Ms Humphreys during the FFC period and (2) was not a homeworker as defined in s 5 of the ERA when he cared for Ms Humphreys during the IF period.

(i) Was the Employment Court wrong in finding (if it did) that this Court's approach in *Idea Services* applies to an assessment of hours worked by Mr Humphreys as a homeworker for (1) the FFC period and/or (2) the IF period?

The Employment Court was wrong in finding that this Court's approach in *Idea Services* applies to an assessment of hours worked by Mr Humphreys as a homeworker for the FFC and/or IF periods.

[264] As a result of these conclusions:

(a) The Crown's appeal in *Fleming* is allowed.

(b) Ms Fleming's cross–appeal is dismissed.

(c) The Crown's appeal in *Humphreys* is allowed in part.

Costs

[265] Ms Fleming is legally aided and the Crown did not seek costs in the event of its appeal succeeding. Because we have allowed the Crown's appeal in *Fleming* and dismissed Ms Fleming's cross-appeal we make no order as to costs.

[266] The Crown did not seek costs in the *Humphreys* appeal, in the event of its appeal succeeding. In the event of the appeal failing, Mr Humphreys sought costs on a standard appeal, band A. We have allowed the Crown's appeal in part. Both the Crown and Mr Humphreys had a measure of success. We make no order as to costs either way.

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