CASE NOTE

EMPLOYMENT STATUS OF RELIEF SUPPORT WORKERS: *Lowe v Director-General of Health*

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I INTRODUCTION

Janet Lowe was a support worker who occasionally provided relief care for individuals in their own homes. Ms Lowe is one of 35,000 care support workers in New Zealand.[1] These workers are predominantly women.[2] They are paid as little as $2.69 per hour,[3] and provide relief services for primary carers, who are also predominantly women.

The relief services these workers provide are funded by the Ministry of Health (the Ministry) and the relevant District Health Board (DHB), through a Carer Support payment (Carer Support). These payments are generally made by the Ministry when the person being cared for is under 65 years old and by the relevant DHB if the person is over 65 years old.

Ms Lowe challenged the Ministry's position that she was not an employee under the Employment Relations Act 2000 (the Act) and claimed she was a "homeworker" under s 6(1)(b). A "homeworker" is a special category of employee. Homeworkers are workers who work from their own or someone else's house, and historically have been considered particularly vulnerable to exploitation (for instance, workers who sew at home and are paid per item of clothing produced). They do not always meet the standard tests to be an employee, so are a specific carve-out in the definition of "employee" to ensure their rights are protected. Ms Lowe was successful in the Employment

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1 *Lowe v Director-General of Health* [2017] NZSC 115, [2018] 1 NZLR 691 at [115] [*Lowe* (SC)].

2 John Weekes "Supreme Court battle plans after setback for relief carers" *Stuff* (online ed, Auckland, 2 August 2016).

3 *Lowe* (SC), above n 1, at [116].

Court,[4] but that decision was overturned in the Court of Appeal.[5] The Supreme Court dismissed her appeal in August 2017.[6]

A successful claim of employee status would have expanded Ms Lowe's rights. She would become entitled to holiday and sick leave (depending upon her hours worked); entitled to be paid the minimum wage for every hour worked; would be able to pursue a personal grievance if she was unjustifiably dismissed from her employment; and her employer would owe her a duty of good faith. As she was held not to be an employee, her rights are those provided by the contract, and she has no recourse to the cheaper and more specialised employment relations institutes if there is a dispute regarding her working arrangements.

II CONTEXT

Eligibility for Carer Support is assessed by a Needs Assessment Co-ordination (NASC) organisation, which decides on eligibility and its extent.[7] Clients are approved for a certain number of days per year. These days can be used by the full-time carer of the client to engage a support carer.[8] A support carer can be anyone who is over 16 years of age, who is not the legal guardian, parent, spouse or partner of the client, and who does not live at the same address as the client.[9] The support carer is not approved by the Ministry or DHB in any way. The support carer, client and full-time carer determine how the support carer will provide services.[10]

Payment for the support carer is made by way of subsidy.[11] The support carer can claim the payment directly from the Ministry or DHB, or the full-time carer pays the support carer and then claims the payment.[12] It is open to the full-time carer to pay more than the relevant subsidy rate if they wish. The payment rate varies depending upon whether the support carer is GST[13]

4 *Lowe v Director-General of Health* [2015] NZEmpC 24, [2015] ERNZ 210.

5 *Director-General of Health v Lowe* [2016] NZCA 369, [2016] 3 NZLR 799.

6 *Lowe* (SC), above n 1.

7 At [9].

8 At [105].

9 At [107].

10 At [110].

11 See, for example, *Lowe* (SC), above n 1, at [30].

12 At [45].

13 Goods and services tax.

registered, a family member or a non-family member and whether the client is DHB or Ministry funded.[14] The daily rates range from $64.50 to $85.50 per day.[15] A "full day" is defined as providing between eight and 24 hours of care and a "half day" is four to eight hours of care.[16]

III LEGISLATIVE FRAMEWORK

This case turned on the definition of "homeworker" under s 5 of the Act. A homeworker is deemed to be an employee by virtue of s 6(1)(b) of the Act. A "homeworker" is defined as:[17]

> i) […] 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
>
> ii) 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.

Justices Arnold and O'Regan in the Supreme Court noted that provisions relating to homeworkers have been included in employment legislation since 1987.[18] They were originally designed to protect pieceworkers in the textile industries who worked from home and were often employed by an intermediary agent to carry out that work. These workers were seen as particularly vulnerable to exploitation, "resulting in long hours, underpayment and erratic pay as well as lack of training, lack of job security, [and] no promotion prospects".[19] While the relevant employment legislation provisions were originally intended to protect pieceworkers, the provisions of the Labour Relations Act 1987, Employment Contracts Act 1991 and the 2000 Act applied to a wider class of workers than just pieceworkers.[20]

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14 *Lowe* (SC), above n 1, at [116].

15 At [116].

16 At [108]; and see "How to Claim Carer Support" (2009) Ministry of Health <www.health.govt.nz>.

17 Employment Relations Act 2000, s 5, definition of "homeworker".

18 *Lowe* (SC), above n 1, at [11].

19 At [12].

20 At [13].

IV SUPREME COURT JUDGMENT

For Ms Lowe to be considered a homeworker and therefore an employee of the Ministry or the DHB, the following had to be established:[21]

i) She was engaged, employed or contracted by the Ministry or the DHB. Ms Lowe argued that she was "engaged" by those entities.

ii) The engagement was in the course of the Ministry or the DHB's trade or business. There was no argument that this was not the case.

iii) The engagement was to do work for the Ministry or the DHB.

iv) The work was to be done in a dwellinghouse. "Dwellinghouse" is defined in s 5 of the Act as:

> … any building or any part of a building to the extent that it is occupied as a residence; and, in relation to a homeworker who works in a building that is not wholly occupied as a residence, excludes any part of the building not occupied as a residence.

v) As an alternative to (i), she was in substance, engaged, employed or contracted as described above even though the contractual arrangement was one of vendor and purchaser.

Justice O'Regan, on behalf of Arnold J and himself, held that the appeal turned on points (i) and (iv) and dismissed the appeal.[22] The majority also held that Ms Lowe was not a "vendor" so ground (v) did not apply.[23] Justice William Young also dismissed the appeal, but on grounds (ii) and (iii) that "the 'trade or business' of the Ministry does not encompass the provision of respite care and the 'work' carried out by respite carers is not 'for' the Ministry."[24] As grounds (i) and (iv) were the main source of difference between the majority and minority, these are discussed below.

A "Engagement" by the Ministry or DHB — majority decision

In relation to point (i), O'Regan J held that oversight or control by one party over the other was not a necessary element of a contractual relationship.[25] His

21 At [7].

22 At [8].

23 At [39].

24 At [85].

25 At [43].

Honour recognised that independent contractors are often engaged because the contractor has expertise the hirer does not.[26] However, his Honour went on to state that the word "engage" contemplates the hirer selecting the person engaged.[27] In relation to the support carers, the Ministry and DHBs have no say in who is selected to be a client's support carer. That selection is left to the full-time carer of the client.

Justice O'Regan went on to comment that three other factors supported the view that the primary carer, not the Ministry or the relevant DHB, in fact engages the support carer. These were the fact that payments made by the Ministry or DHB could be made by way of reimbursement to the primary carer, that primary carers could elect to pay the support carer at a higher rate than the relevant support carer subsidy rate and that the primary carer could engage the relief carer for longer periods than those for which the Ministry or DHB were required to pay.[28]

Justice O'Regan contrasted this situation with an earlier decision of the Court of Appeal (*Cashman v Central Regional Authority*)[29] where the Court of Appeal held that some support workers who made the whole or part of their living providing care to aged or disabled people living in their own home were homeworkers.[30] The judgment distinguished between professional carers, and those that were caring for family members or friends. Only professional carers were considered employees.[31] *Cashman* was distinguishable on the basis that those carers were directly and undoubtedly contracted by the Regional Health Authorities (the predecessors to the DHBs).[32]

His Honour held that the concept of engagement requires that an event occurs which creates a relationship between the hirer and the engaged person.[33] In the case of Ms Lowe, there was no such event. His Honour noted that when Ms Lowe was engaged, the Ministry and DHB had no knowledge of the

26 At [43].

27 At [44].

28 At [45].

29 *Cashman v Central Regional Authority* [1997] 1 NZLR 7 (CA).

30 At 14.

31 At 14.

32 *Lowe* (SC), above n 1, at [69].

33 At [63].

engagement.[34] Their first notice was when Ms Lowe requested payment for her services. His Honour also dismissed the argument raised by the respondents that there were classes of professional and non-professional support carers and the professional carers were homeworkers.[35]

On point (i), O'Regan J held that any engagement of Ms Lowe was by the full-time carer and not the DHB or Ministry.[36] This particular scenario was not the subject of submissions.

Justice William Young would also have dismissed the appeal, but for different reasons to O'Regan J. He would have held that there was a contractual relationship between the Ministry or the DHB and Ms Lowe on the basis that Ms Lowe was entitled to be paid by them if the full-time carer did not pay her directly.[37] His Honour nonetheless held that she was not a homeworker because she was not "engaged" by the DHB or Ministry. His Honour considered that the full-time carer would need to be an agent of the Ministry or DHB if this were the case, that it would be "artificial" to regard a primary carer as the agent of the state when they were looking after a family member and that it was the primary carer, not the Ministry or DHB, that engaged Ms Lowe.[38] The Ministry or DHB were said to simply subsidise the cost of the primary carer doing so. His Honour went further and said that, on this basis, the "trade or business" of the Ministry does not encompass the provision of respite care and the "work" carried out by respite carers is not "for" the Ministry.[39] Justice William Young therefore found that requirements (ii) and (iii) were not satisfied.

B Nature of the relationship between the Ministry or DHB and the support carer — minority judges

Justice Glazebrook, for the minority of Elias CJ and herself, would have allowed the appeal.[40] Her Honour took as a starting point the fact that access to the Carer Support scheme was based on an assessment of the needs of the client

34 *Lowe* (SC), above n 1, at [44].
35 At [83]–[84].
36 At [44].
37 At [81].
38 At [85].
39 At [85].
40 At [178].

performed by a NASC organisation.[41] Her Honour noted that while the support carer gave the full-time carer a break, the service is for the client rather than the carer.[42] On this point, Glazebrook J disagreed with the majority judges and the Court of Appeal below, that the work is undertaken "for" the full-time carer.[43]

Her Honour held that the Ministry and DHBs were clearly paying for the support work to be performed for the client (of the DHB or Ministry, being the person with the disability).[44] It was irrelevant what that payment was called or whether the primary responsibility for payment lay with the full-time carer. The claim form made it clear that the Ministry and DHB promised to pay for the carer services if the full-time carer did not pay.

Justice Glazebrook also held that a contractual relationship existed between the Ministry or DHB and support carer on the basis that all parties understood the Ministry or DHB would pay for the services.[45] Alternatively, her Honour held there was offer and acceptance through the Ministry or DHB providing a claim form and the carer providing care and returning the claim form.[46] Her Honour found the work was clearly within the trade of the Ministry and the DHBs, as the respite care is a service provided for those entities' clients.[47] On this basis (provided the dwellinghouse requirement was met), the minority judges considered the definition of "homeworker" was met.[48]

The minority did not consider it necessary to determine whether support carers were also "engaged" but considered, under a purposive approach, that they were.[49] Justice Glazebrook considered that the definitions of "engage" and "homeworker" should be read widely to ensure employers could not use technicalities to avoid responsibilities under the Act.[50] Her Honour also noted that the terms "engaged, employed or contracted" are composite terms designed to cover all means of getting a person to work for an employer.[51]

41 At [137].
42 At [138].
43 At [138].
44 At [138]–[139].
45 At [141].
46 At [142].
47 At [143].
48 At [143].
49 At [144].
50 At [144].
51 At [146].

Her Honour rejected the submission that control was required for a homeworker to be engaged, because control is required for an employment relationship, whereas the homeworker definition is explicitly designed to capture workers who would not otherwise be considered employees.[52]

Her Honour considered it was misguided to focus on whether the Ministry or DHB specifically selected the support carer.[53] The Ministry or DHB specifically authorise the use of a support carer when the NASC organisation performs the needs assessment. Justice Glazebrook also held that an agency relationship between the Ministry or DHB and the full-time carer was present and the carer's authority was no broader than that of a manager of a company with agency to engage a new worker.[54] Her Honour rejected the conclusion of the majority judges that there was no agency relationship.[55]

C Dwellinghouse requirement

Regarding the fourth requirement under s 6(1)(b) of the Act that the work be performed in a dwellinghouse, O'Regan J for the majority noted that there was no requirement under the support carer arrangement that the work be performed at the client's house.[56] Justice William Young agreed with the majority judges on this point. The Ministry's witness in cross-examination said that clients could be taken out if they were well enough to do so. Had the case turned on this issue, the matter would have been referred back to the Employment Court for the issue to be argued fully, but O'Regan J expressed doubt that the support carers were required to undertake work in a dwellinghouse.[57]

The minority judges were of the view that work was performed in a dwellinghouse.[58] They specifically rejected the respondent's submission that for a person to be treated as a homeworker, they were required to work in a dwellinghouse.[59] The minority relied upon the fact that many of the carers do

52 *Lowe* (SC), above n 1, at [146].
53 At [153]–[154].
54 At [163].
55 At [166].
56 At [73]–[74].
57 At [74].
58 At [167].
59 At [170].

perform the work in a dwellinghouse and there was no requirement that all workers of a class be performing all of their work in a dwellinghouse before an individual in that class could be considered a homeworker.[60] Taking a purposive approach, the minority held that it should not be open to an employer to say that their workers could work from anywhere thereby avoiding workers being defined as "homeworkers" and therefore employees.[61]

On the basis of the majority judges' conclusion that the support carers were not "engaged" by the Ministry of Health or DHBs, the appeal was dismissed.[62]

V COMMENT

The Supreme Court's decision in *Lowe* will affect some 35,000 paid carers nationwide, who assist 24,000 people with disabilities.[63] These workers are paid significantly below minimum wage and have minimal statutory protections. Like those in the aged care industry, the Union that represents Ms Lowe has identified that these workers are predominantly women.[64]

The majority of the Supreme Court took a strict approach to the interpretation of the Employment Relations Act, an Act with the explicit objective of addressing the inherent inequality of power in employment relations. The majority failed to take a purposive approach to the definition of "homeworker" and did not consider whether contemporary forms of work should be captured by s 6 of the Act.

As a result, support workers are not entitled to the numerous protections of the employment relationship, including the Minimum Wage Act 1983, the Holidays Act 2003, and the protections against unjustified dismissals and disadvantages contained in the Employment Relations Act itself. In addition to the more regularly engaged employment rights, the Court's decision means that workers are unable to access any remedies under the Pay Equality Act 1972, which only applies to employees. Given the high number of women engaged as support carers and the clear analogies to residential care workers, this is a section of the workforce that could reasonably be expected to suffer pay parity

60 At [170].

61 At [171].

62 At [75].

63 At [115].

64 Weekes, above n 2.

issues. The Supreme Court's decision makes such a claim impossible.

Ms Lowe herself is on public record saying that the Ministry and DHBs are hiding behind "semantics"[65] which permit them to pay as little as $2.69 per hour for workers to provide respite care.[66] Carer Support is an essential service, particularly for full-time carers who are themselves compensated inadequately for their work and have brought legal challenges regarding their remuneration.[67]

Support workers represent the modern equivalent of exactly the type of workers the homeworker protections were originally intended to capture. They are workers who are isolated, unable to easily organise, and prone to working long hours for little pay. A purposive approach and broad application of the statute was needed and was available to the majority judges. It is disappointing that the Court's decision means that a public agency can construct a series of contractual relationships to avoid the obligations and responsibilities that should be owed to homeworkers. The Supreme Court's decision cuts across the very objective of legislative protections for homeworkers.

The Supreme Court's judgment is particularly disappointing, given it came after the *Terranova* case and after the settlement of that pay equity claim.[68] The *Lowe* decision has resulted in a two-tiered system, where those carers employed in rest homes are employees receiving an equitable wage, and those who are employed as relief carers in homes are paid a fraction of the minimum wage. This is work that may be attractive to women due to the potential for flexibility, notwithstanding the low remuneration. The Supreme Court's position creates the risk that support workers will not be prepared to provide their services at such rates, and primary carers will be unable to find support workers to provide relief work. Given that primary carers are often women too, this judgment represents a double blow for women caring for people with disabilities.

65 Weekes, above n 2.

66 *Lowe* (SC), above n 1, at [116].

67 See for instance, *Atkinson v Ministry of Health* (2010) 8 HRNZ 902 (HRRT).

68 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437.