

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 24
5417307

BETWEEN	JANET ELSIE LOWE Applicant
A N D	DIRECTOR-GENERAL OF HEALTH, MINISTRY OF HEALTH First Respondent
A N D	CHIEF EXECUTIVE, CAPITAL AND COAST DISTRICT HEALTH BOARD Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Peter Cranney, Counsel for Applicant
Joanna Holden, Counsel for First Respondent
Hamish Kynaston, Counsel for Second Respondent

Investigation Meeting: 25 July 2013 at Wellington

Date of Determination: 11 March 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Janet Lowe worked as an intermittent relief support carer in the homes of clients over a number of years. She provided relief support to the family member who was the client's primary caregiver. Mrs Lowe received payment for her work either from the Ministry of Health or from the primary caregiver.

[2] Mrs Lowe asks the Authority to determine whether she was engaged as a homeworker, within the meaning of the Employment Relations Act, by either the Ministry of Health or Capital and Coast District Health Board, either on their own behalf or in combination with other persons.

[3] She says that throughout her engagement the Ministry of Health and/or Capital and Coast District Health Board were required to comply with the provisions of the Minimum Wages Act 1983, the Holidays Act 2003, and the Government Service Equal Pay Act 1960, but did not do so. She claims wage arrears and compliance orders, the particulars of which are as yet unspecified.

[4] The Ministry of Health (the Ministry) says it did not engage or employ Mrs Lowe in any capacity at any time. There was no contractual relationship between them.

[5] The Ministry says Mrs Lowe received payments by way of the Carer Support Subsidy. This is a sum of money available to the primary caregiver, or full-time carer, of a disabled or elderly person (the client) requiring care in their home. The purpose of the subsidy is to reimburse some of the costs the primary caregiver will incur when using a support person to care for the disabled person while the primary carer takes a break.

[6] Capital and Coast District Health Board (CCDHB) also denies ever having engaged or employed Mrs Lowe in any capacity. It says it funded Carer Support in respect of two clients over 65 years of age to whom Mrs Lowe provided care.

Issues

[7] The issues for the Authority to determine are:

- (i) whether Mrs Lowe was a homemaker in terms of the Employment Relations Act 2000 definition of that term; and, if so,
- (ii) who engaged, employed or contracted her.

The Act

[8] Section 5 of the Employment Relations Act 2000 (the Act) specifies that a homemaker:

- (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.*

Background facts

[9] The parties provided the Authority with written material to provide the background and context of payments for Carer Support. Much of this material is available on the Ministry of Health's website which describes the payments as a subsidy that is only a contribution to the full cost of support care.

[10] Carer Support is needs-based, and is designed to provide relief support to an unpaid¹ primary caregiver of a disabled person or older people assessed as having a need for such support because of an age-related condition (the client). It can take a number of forms, one of which is support care in the home of the client. Another form it may take is respite care in a residential facility.

[11] A client's eligibility for Carer Support is assessed by an organisation (a Needs Assessment Co-ordination organisation or NASC) contracted for that purpose by the Ministry. The NASC then informs the Ministry how many days per year it has allocated to a client for such support.

Evidence

[12] Mrs Lowe gave evidence of her extensive experience as a home care support worker. She referred to specific clients for whom she had provided support care since 1994, all of whom were over the age of 65. In each case she provided relief to a family member who was the full-time unpaid caregiver of the client.

[13] On the Ministry's Carer Support Claim forms, which the primary carer would provide to her for recording the date and hours she worked, Mrs Lowe was described as a "friend" of the client. However, she said she did not always know the client before she started in that position. In some cases she would be contacted by a mutual friend or relative of the primary caregiver.

¹ However, since 1 October 2013, funding has been made available for some family members who provide personal care and household management to a disabled adult assessed as having high or very high needs.

[14] Mrs Lowe would complete the form, if it had not already been completed by the primary caregiver, and sign it. The primary caregiver would then send it on to the Ministry of Health.

[15] Mrs Lowe confirmed that she was never contacted by anyone from either the Ministry or CCDHB. She, however, had contacted the Ministry on more than one occasion when she had not received prompt payment for the carer support relief she provided.

[16] Evidence was given by a manager in the Ministry of Health that the payments made to Mrs Lowe were the Carer Support subsidy allocated to the primary caregivers for the clients she supported. The payments came through Sector Services, a shared payment agency that administers payments on behalf of the Ministry of Health and all District Health Boards. Generally, if a client is under 65 years of age, the subsidy is funded by the Ministry of Health and, if the client is over 65 years, it is funded by the relevant DHB.

[17] Sector Services simply processes claim forms and has no direct involvement in the provision of Care Support services. It checks the Carer Support subsidy form to ensure that it fits within the Carer Support policy, and determines whether the funding for the payment is to come from the Ministry or the DHB, depending on the age of the client.

[18] The manager's evidence was that the only time the Ministry would have direct contact with a Support Care person would be if that person had elected direct payment from the Ministry, rather than payment from the primary caregiver. If a payment failed to go through, the Ministry would contact the person. Otherwise, all communication relating to carer support would be with the primary caregiver.

[19] Three different rates were paid for Carer Support. In all cases Mrs Lowe received the subsidy at the daily rate for a non-family member, which was \$75.56. The Ministry's evidence was that the money paid as the Carer Support subsidy is not a wage, and nor is it based on an hourly rate. Accordingly, it is paid in full without the deduction of PAYE. The Carer Support Subsidy form specifies that the person providing carer support is responsible for any income tax or Goods and Services Tax liability.

[20] Sector Services has no involvement in the appointment of relief support carers or carry out checks on their competence. It is not informed of the services they provide to the client. It is the primary caregiver who is responsible for informing the relief support carer about the scope of the support/services to be undertaken.

[21] The primary caregiver is also responsible for any issues around a relief support carer's competence and quality of work. If the primary caregiver became dissatisfied with the services their relief carer provided, they could appoint a different person to take on the relieving duties. The only notification required by Sector Services would be the name and bank deposit details of the new person.

[22] Evidence was given on behalf of Capital and Coast District Health Board by one of its managers who had knowledge of Carer Support through her responsibility for contract management of the NASC established for assessing the needs of "Older People". She confirmed that Carer Support was a subsidy, not a wage. Its purpose was to assist with the costs of alternative care arranged by the full-time carer of a client, to enable them to take a break from caring for that person.

[23] Her evidence was that CCDHB had no part in the selection of the support carer, or in any of the arrangements made as to the timing, nature or extent of the support to be provided or any of the financial arrangements. The District Health Board had no control over Mrs Lowe or any other relief support carer. It did not routinely receive information about the relief support carer, or about the timing of, and payment for, the support that person provided.

[24] The manager said CCDHB would receive information about a relief support carer only infrequently. She noted, as an example, that she had occasionally been asked to validate a Carer Support payment if the claim had been made outside the 90 day time frame allowed for such claims. The manager was not aware of any occasion when CCDHB had had to contact a relief support carer.

[25] A full-time carer had the right to change to a different support carer without advance notification. The full-time carer had to provide details of the new support carer only at the time of making a claim for payment of the subsidy.

[26] CCDHB's Business Support team authorised all contract payments that were processed through Sector Services on a monthly basis. It would receive an electronic extract, normally containing aggregated information, rather than information relating

to individual claims. The manager noted that CCDHB had no contact with Mrs Lowe, and held no information about her in relation to her relief carer support role until she filed these proceedings.

Submissions of the Parties

The Applicant

[27] Submissions for Mrs Lowe set out the statutory framework under which District Health Boards are established, namely the New Zealand Public Health and Disability Act 2000. DHBs can enter into “service agreements” under the provisions of that Act with, for example, rest homes whereby a DHB provides money to the rest home to provide services to the DHB and those for whom it has responsibility. Counsel for Mrs Lowe submitted that model of providing money in return for services was relevant to the definition of a homemaker in s. 5 of the Act.

[28] Mr Cranney referred to the Court of Appeal’s judgment in *Cashman v Central Regional Health Authority*.² He submitted the judgment conclusively determined the issues of whether relief support care workers were engaged, employed or contracted by DHBs and whether such engagement, employment or contracting was in the course of the DHBs’ business. In that case the Court of Appeal rejected the argument that carer relief services were provided to and received only by the service users and considered that they were provided to both the patients and the Regional Health Authority.

[29] In Mr Cranney’s submission the facts of *Cashman* were materially indistinguishable from those in Mrs Lowe’s situation. He noted that the DHBs:

- Arranged for the workers to provide the services.
- Required that the workers concerned be on a list of care support workers and comply with Care Support Guidelines.
- Required that the DHB must first agree that the services be provided.

[30] Mr Cranney submitted that similar considerations applied to the Ministry of Health. The workers concerned supplied services to the service users (the clients) on the Ministry’s behalf and, through that process, also provided services to the Ministry in accordance with the Court of Appeal’s judgment in *Cashman*.

² [1997] 1 NZLR 7

The First Respondent

[31] The Ministry disagreed with Mr Cranney's analysis of Carer Support payments being made pursuant to service agreements entered into by either the Ministry or CCDHB under the New Zealand Public Health and Disability Act. Ms Holden also disagreed that Mrs Lowe fitted the definition of a homemaker in s. 5 of the Act. She acknowledged that the s. 5 definition included those persons whose contracts were technically those of vendors and purchasers where the substance of the arrangement was one of employment, engagement or contracting (s. 5(b) of the Act). However, Ms Holden noted that there needed to be a legal relationship between the entity employing, engaging or contracting the care support reliever that was lacking in Mrs Lowe's situation.

[32] Ms Holden submitted that the current situation was different from that in *Cashman* where the carers had been contracted by an organisation to provide home support and care and relief services to people in their own homes. In Mrs Lowe's case, it was the full-time carer who applied for a Carer Support subsidy and was allocated a specified number of days per year.

[33] Ms Holden submitted that Mrs Lowe's situation fell within the category of people identified by the Court of Appeal in *Cashman* as not coming within the definition of "homemaker". I will return to this later.

[34] Payments of the Carer Support subsidy were usually, but not always, made directly to Mrs Lowe by the shared payment services agency referred to above, at the request of the full-time carer. On other occasions the payments were made to the fulltime carer who paid Mrs Lowe. Other than supplying her bank account details to the shared payment services agency, Mrs Lowe had little contact with it, while the agency's contact with Mrs Lowe consisted of those payments it made directly to her at the full-time carer's request.

[35] The Ministry disputed Mr Cranney's factual analysis noting that:

- Neither the Ministry nor CCDHB arranged for Mrs Lowe to provide Carer Support services;

- There was no “list of care support workers”, and the full-time carer could arrange for anyone to be a support carer provided the person was not excluded by limits set by the Ministry;³
- Neither the Ministry nor the DHB agreed to services being provided: rather they agreed, through the NASC, to subsidise relief care for the full-time carer to a certain level.

Submissions of the Second Respondent

[36] Submissions made on behalf of CCDHB supported those made by the Ministry and denied any contractual relationship existed between the DHB and Mrs Lowe. It considered that, if a contract or engagement existed, it was between the full-time carer and Mrs Lowe.

[37] Mr Kynaston noted that CCDHB was not involved in the selection of the relief support carer, any of the arrangements made as to the timing, nature or extent of the support to be provided, or any of the financial arrangements. The DHB had no control over such carers and rarely knew who they were. The DHB was neither notified when relief support care was provided to a client nor when it was paid for by a full-time carer.

[38] Mr Kynaston submitted that CCDHB had no legal relationship with a relief support carer, including Mrs Lowe, and that none of the elements required to form a contract were present. The extent of CCDHB’s role was to arrange for a client’s eligibility for Carer Support to be assessed and, where eligibility had been determined (by NASC), to provide a subsidy to the full-time carer.

Discussion

[39] The Court of Appeal’s *Cashman* judgment was cited by all parties in their submissions. It found that providers of home support services contracted by a Regional Health Authority (RHA⁴) were homeworkers in the ordinary and natural meaning of the words in the context of the definition in s. 2 of the Employment Contracts Act 1991. I note there is no substantial difference in the definition of a homemaker between the Employment Relations Act and the Employment Contracts

³ For example the Ministry of Health’s pamphlet “How to Claim Carer Support” specifies, *inter alia*, that a person living at the same address as the client cannot be a Support Carer.

⁴ An entity established by the Health and Disability Services Act 1993 which was, in part, a predecessor of the current DHBs.

Act and such workers remain homeworkers under s. 5 of the current Act. Homeworkers are deemed employees, pursuant to s. 6 of the Act.

[40] The Court of Appeal held that Mrs Cashman and the other appellants worked for the Central RHA and Sunderland Community Support Services Limited (Sunderland), a private company that took over responsibility for home support and carer relief schemes from the RHA in the Wanganui area. The appellants provided support and carer relief to people living in their own homes who required assistance to maintain that level of independence.

[41] Initially the RHA directly contracted with, and paid, the appellants for their services. Later it contracted Sunderland to provide the homecare services and required the appellants to contract with that organisation. The relationships between the appellants and both the RHA and Sunderland were expressed as contracts for service.

[42] The Court referred to Mrs Cashman and the other appellants as “professional homecare workers”.⁵ In deciding that they came within the definition of homeworkers, the Court noted people to whom its interpretation would not extend, including artists, journalists or designers who chose to work from home. The Court also stated that:

“Nor does it follow that family members, neighbours or friends who are paid under a home support scheme to look after a sick or disabled person, but are not otherwise engaged in similar work for remuneration, will be regarded as homeworkers. The legislation must be applied in a commonsense way which takes account of the realities of a particular situation and does not treat a non-professional carer as a homemaker simply because some financial assistance is paid and received. It is only when it can be seen that the carer makes a living in whole or material part from the provision of homecare that, as a matter of fact and degree in each individual case, the care can be regarded as falling within the definition of a homemaker”⁶

[43] After considering the evidence, I conclude that Mrs Lowe’s situation fits better into the category of non-professional carer regarded by the Court of Appeal in *Cashman* as not to be included in the definition of a homemaker. In forming this view I have particularly taken into account the lack of any evidence of a contractual

⁵ Id, at page 160

⁶ Id, at page 167

relationship between Mrs Lowe and the Ministry or CCDHB as well as evidence provided by Mrs Lowe of the intermittent nature of the work she undertook.

[44] Mrs Lowe's situation can be distinguished from that of Mrs Cashman and others who, in the time to which their claims related, had contractual relationships, initially with the Central RHA, and later with Sunderland (the purchasers). Their contracts for service set out in some detail the obligations of the home support contractors in relation both to the clients and the purchaser. The nature of the services and how they were to be provided were specified. There was a significant degree of control by the purchasers in the relationship. This element of control was entirely lacking in Mrs Lowe's situation in relation to both the Ministry and CCDHB.

[45] By her evidence Mrs Lowe had no contact with CCDHB. Her contact with the Ministry was confined to queries about late payments. Neither organisation approved her appointment as a relief support carer or specified the services she was to provide her clients. She was not accountable to either organisation for the manner in which she provided her services, or for the quality of her work.

[46] The Ministry's contact with her, through Sector Services, was confined to payment of the Carer Support subsidy where the primary caregiver elected not to make payment directly to Mrs Lowe. If the primary caregiver had elected to make payments directly to Mrs Lowe, there would have been no contact between her and either of the respondents. It is difficult to infer a contractual relationship between Mrs Lowe and either, or both, of the respondents in that factual scenario. The necessary elements for the formation of a contract⁷ are absent between Mrs Lowe and either the Ministry or CCDHB.

[47] Mrs Lowe rejected the notion that she was a "friend" of all the clients for whom she provided services, as she was described on the Carer Support Subsidy forms. However, in all the cases she cited, she either knew the client or a family member of the client or obtained the relief work by word of mouth from someone who knew her or knew of her. The primary caregiver informed Mrs Lowe what care she was to provide in each situation and, if dissatisfied with her services, could dispense with them without recourse to either the Ministry or CCDHB.

⁷ Offer, acceptance, an intention to create legal relations, and consideration

[48] The evidence provided of the payments made to Mrs Lowe by the Ministry shows that she worked irregularly for most of the period between 30 March 2009 and August 2012. In that period of three years and four months the payments she received from the Ministry for providing relief care support totalled less than \$9,000, most of which related to the period from 1 April 2009 to 31 March 2010. In my view this is a situation far removed from that of the professional carers found by the Court in *Cashman* to be homeworkers.

[49] I am not persuaded that Mrs Lowe was employed, engaged or contracted by either the Ministry of Health or Capital and Coast District Health Board when she provided care support relief services at the request of the full-time carer of a client. Nor can I find from the evidence before the Authority that any such relationship existed between Mrs Lowe and either or both of the respondents in conjunction with any other person.

[50] The only such persons could be the full-time unpaid caregivers who were assessed as eligible for the Carer Support subsidy for whom Mrs Lowe provided relief support. However, their eligibility for the Care Support subsidy does not provide sufficient nexus to imply a relationship between Mrs Lowe and the respondents, either individually or jointly.

Determination

[51] Mrs Lowe was not a homeworker in terms of ss. 5 and 6 of the Employment Relations Act.

Costs

[52] While the issue of costs is reserved my understanding is that Mrs Lowe's case was brought as a test case and it may therefore be appropriate for costs to lie where they fall.

Trish MacKinnon
Member of the Employment Relations Authority