New Zealand Employment Relations Authority Decisions

Moody v Chamberlain (Auckland) [2018] NZERA 288; [2018] NZERA Auckland 288 (13 September 2018)

Last Updated: 19 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 288
3038932

BETWEEN DIANE MOODY Applicant

AND SHANE CHAMBERLAIN Respondent

Member of Authority: Robin Arthur

Representatives: Paul Dale, Counsel for the Applicant

Jane Carrigan, Advocate for the Respondent

Nicola Wills, Counsel for the Ministry of Health

Conference: 12 September 2018

Determination: 13 September 2018

DETERMINATION OF THE AUTHORITY

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

Employment Relationship Problem

[1] Diane Moody has applied to the Authority seeking a number of declarations about whether she is in an employment relationship with her son, Shane Chamberlain, or with the Ministry of Health that provides funds for her to provide care of him.

[2] These questions arise because Mrs Moody, aged 76, cares for Mr Chamberlain, aged 51, in their family home. The operation of the Ministry of Health's Family Funded Care policy, under which funding is provided to support Mrs Moody's work in caring for Mr Chamberlain, was the subject of a judgment of the Court of Appeal delivered on 7 February 2018.1 The judgment referred to a Ministry Notice that described how funding was arranged under the policy. The Notice

described the required arrangements for the Ministry "to pay a disabled person to

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

Chamberlain v Ministry of Health [2017] NZHC 1821.

receive funded family care, and for that disabled person to use that funding to employ a family carer". Commenting on this description the Court noted the following:2

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

do not have the necessary capacity in law to employ another person.

The named parties to the Notice are the Minister of Health and the person with disabilities. The Notice also recognises the responsibilities of the family carer, the Ministry and its agents, including the [needs assessment service co- ordination] NASC agencies and the so-called Host assigned by the Ministry to facilitate the arrangement and provide ongoing advice.

[3] Despite the Crown's apparent concession during the Court of Appeal hearing Mrs Moody, in her application to the Authority, alleged the FFC policy remained unchanged and the Ministry, through its operation of the policy, continued to treat Mr Chamberlain as her employer and her as his employee. Mrs Moody stated that, despite the Court's decision, nothing has changed for her or other parents who receive funding for the care of relatives under the requirements of the policy. She stated that the Ministry "still insists Shane, my profoundly intellectually disabled son is my employer".

[4] Jane Carrigan lodged a statement in reply to Mrs Moody's application. Ms Carrigan has acted as an advocate for Mrs Moody and Mr Chamberlain and as Mr Chamberlain's litigation guardian in earlier litigation. The statement Ms Carrigan lodged on Mr Chamberlain's behalf supported the facts and position set out in Mrs Moody's application.

Request for removal

[5] Mrs Moody asked the Authority to either make the declarations she sought or to refer the matter to the Employment Court to hear and decide.

[6] In considering that request I held a brief telephone conference with Ms Carrigan, Mr Dale who had meanwhile accepted instructions to act for Mrs Moody, and with Nicola Wills of Crown Law on behalf of the Ministry of Health. I asked for

a Ministry representative to attend because one declaration Mrs Moody sought was

2 At [48] and [49].

that her employment relationship, as a result of the funding and terms on which it was provided, was really with the Ministry.

[7] There was no opposition to the prospect of removing this matter to the Court. I was satisfied that this was a matter that easily met the ground that important questions of law were likely to arise other than incidentally. It involves fundamental questions about the nature of the employment relationship, how it is formed and what capacity is required to be an employer or meaningfully form an employment relationship. Answers to those questions will be of consequence to other families affected by how the Ministry is said to currently operate its FFC policy and, potentially, other arrangements the Ministry funds for caregiving duties to be carried for severely disabled people who are supposedly then the direct employer of caregivers who are not members of their family.

[8] Although the application lodged had not identified the Ministry of Health as a respondent, Mr Dale advised that, on removal, Mrs Moody would probably seek to amend her application in that way. Even if that were not so, I anticipate the Ministry would at the very least seek to be heard as an intervener if the matter remained, formally at least, as being one between Mrs Moody and Mr Chamberlain.

[9] The potential impact on other deemed employment relationships between non- family caregivers and disabled people receiving that care, funded by the Ministry directly or indirectly through other agencies, may also make this a matter of wider import. Other parties, such E tu or the Council of Trade Unions, might seek to be heard as interveners on the wider policy and employment law issues. The circumstances of the present case are different from those in the line of cases that culminated in the Supreme Court decision in *Lowe v Director General of Health* [2017] NZSC 115 which did not involve issues of the capacity of the parties said to have entered employment relationships.

[10] The issues raised by Mrs Moody's application are complex. She is frustrated by what she understandably sees as an elaborate bureaucratic fiction, which is apparently admitted, that her son was in any meaningful way her employer. However, if she were found not to be an employee of anyone, other concerns could arise about a lack of protections for leave, pay and such like that are presently provided through the

employment standards legislation. Those complexities are a factor favouring removal too.

[11] Another such factor was that Mrs Moody could have, in any event, applied directly to the Court for a declaration on whether she was an employee: s 6(5) and (6) of the Act. This would have dealt with at least part of what she asked to have determined.

[12] Having concluded grounds for removal were established, I also considered whether the discretion not to remove this matter should be exercised for any reason. I was satisfied there was no reason to do so. Consideration of this matter by the Court at first instance would be more effective for the parties and, because of its potential wider import, was appropriate.

Robin Arthur

Member of the Employment Relations Authority