IN THE SUPREME COURT OF NEW ZEALAND

SC 97/2016
[2017] NZSC 191

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

Hearing:	23 November 2017
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	P Cranney and S N Meikle for Appellant A L Martin and K L Orpin-Dowell for Respondents
Judgment:	18 December 2017

JUDGMENT OF THE COURT

A The application for recall of this Court's judgment of 7 August 2017 (*Lowe v Director-General of Health* [2017] NZSC 115) is dismissed.

B There is no order for costs.

REASONS

[1] Ms Lowe's appeal to this Court was dismissed in a judgment issued on 7 August 2017.[1] On 28 August 2017, she applied for the recall of the judgment. The Court set the matter down for oral argument, which took place on 23 November 2017.

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1 *Lowe v Director-General of Health* [2017] NZSC 115 [*Lowe* (SC)].

[2] The application for recall was advanced on the ground that the appeal was dismissed on a point that had been conceded by the respondents and had not therefore been argued. This was said to be a "very special reason" justifying the recall and reissuing of the judgment.[2]

[3] Some background information is required to give context to the argument.[3]

[4] Ms Lowe provided relief care for disabled or elderly people under a government programme known as the Carer Support Scheme, allowing the primary carer a break. Under that scheme, the Ministry of Health either reimbursed the primary carer for the amount paid to the relief carer or made payment directly to the relief carer.[4]

[5] The issue on appeal was whether Ms Lowe was a "homeworker" within the definition of that term in s 5 of the Employment Relations Act 2000.[5] The Court found by a majority of 3:2 that she was not. Arnold and O'Regan JJ held Ms Lowe was not a homeworker because the Ministry did not engage her to work for it.[6] Rather, the engagement was by the primary carer of the disabled or elderly persons for whom Ms Lowe cared.[7] Elias CJ and Glazebrook J, dissenting, concluded that Ms Lowe was employed, engaged or contracted by the Ministry to provide relief care to disabled or elderly persons.[8] In the alternative, they would have held Ms Lowe's services were secured by the primary carers as agent of the Ministry or DHB.[9]

[6] William Young J agreed with Arnold and O'Regan JJ as to the result but for

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2 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2], citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) (Wild CJ) at 633. Ms Lowe's counsel argued that a modified approach to the "very special reason" category may be appropriate where the recall application relates to a decision of a final appellate court. It is not necessary to decide that in the present case.

3 The full factual background is set out in the appeal judgment and not repeated in this judgment: see *Lowe* (SC), above n 1, at [9]–[10] and [97]–[117].

4 Ms Lowe undertook relief care subsidised by both the Ministry of Health and the Capital and Coast District Health Board. There was no material difference between the two and for brevity we will refer to the Ministry only.

5 Section 5 of the Employment Relations Act 2000 relevantly defines "homeworker" as "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".

6 *Lowe* (SC), above n 1, at [63]–[64].

7 At [65].

8 At [166].

9 At [166].

different reasons. He said the statutory requirements of the homeworker definition that the worker must be "engaged, employed, or contracted" by the Ministry in the course of its "trade or business" "to do work for" the Ministry should be "read as a whole, expressing a single concept".[10] William Young J said he considered a contractual relationship existed between the Ministry and relief carers such as Ms Lowe.[11] However, the primary carer, not the Ministry, engaged the relief carer to do work for him or her (and the primary carer did not do so as agent for the Ministry). The role of the Ministry was to subsidise the cost of the primary carer engaging the relief carer. On that basis, the "trade or business" of the Ministry did not encompass the provision of relief care and the work carried out by the relief carers was not carried out for the Ministry.[12]

[7] In their judgment, Arnold and O'Regan JJ recorded a concession by the respondent that, if Ms Lowe had been engaged by the Ministry, the engagement would have been in the course of the trade or business of the Ministry.[13] That concession was also recorded in the judgment of Elias CJ and Glazebrook J.[14] The concession was said to have been properly made.[15]

[8] Counsel for Ms Lowe, Mr Cranney, argued that the conclusion reached by William Young J as recorded at [6] above was inconsistent with the concession. We do not agree that it was. The concession as recorded in the judgment applied in the event that relief carers like Ms Lowe had been engaged, employed or contracted by the Ministry. In that event, the concession operated so that the question as to whether the engagement was within the Ministry's trade or business was conceded.

[9] It is important to read the judgment of William Young J as a whole, rather than focus on a single paragraph as Mr Cranney did. William Young J found there was a contractual relationship between the Ministry and relief carers such as Ms Lowe, at least where the Ministry paid the relief carer directly.[16] But the nature of the

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10 At [80].
11 At [81].
12 At [85].
13 At [7](b).
14 At [89].
15 Arnold and O'Regan JJ at [16], Elias CJ and Glazebrook J at [89].
16 At [81].

contractual relationship he concluded existed between the Ministry and the relief carers involved an obligation by the Ministry to pay a relief carer engaged by a primary carer for the work done by the relief carer as long as the relief carer did the work, filled in the forms and had not been already paid by the primary carer. He expressly found that it was the primary carers who engaged relief carers, not the Ministry.[17] Thus Ms Lowe was not engaged, employed or contracted by the Ministry to do work for the Ministry. That meant the concession that, if Ms Lowe had been so engaged, employed, or contracted by the Ministry, it would have been in the course of the trade or business of the Ministry did not apply.

[10] In these circumstances, we conclude that the analysis adopted by William Young J was not contrary to the concession made by the respondents. The ground for recall is not therefore made out and the application is dismissed.

[11] There is no order for costs.

Solicitors:
Oakley Moran, Wellington for Appellant
Crown Law Office, Wellington for Respondents

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17 At [85].