BUDDLE FINDLAY

Legal update on health law - August 2016

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Carer support funding does not result in employment relationship

On 1 August 2016, the Court of Appeal held that the relief care that Ms Lowe provided pursuant to the government's Carer Support Scheme did not make her a "*homeworker*", and that she is therefore not an employee of either the Ministry of Health or Capital and Coast District Health Board, who fund the Carer Support Scheme. The Court overturned a decision of the Full Employment Court, which held that Ms Lowe was a homeworker and therefore deemed to be an employee under the Employment Relations Act 2000. The Ministry and District Health Board had appealed that decision.

The Carer Support Scheme is a government programme that supports full time carers of disabled persons by assisting with the costs of a relief carer so that full time carers can have a break from providing care. Relief carers are chosen by the full time carer and the relief carer "*has no relationship with the appellants prior to or while carrying out the work*".

The Employment Relations Act 2000 provides that homeworkers are employees for the purposes of the Act. Section 5 of the Act defines a homeworkeras "*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*". The Court's analysis turned on whether Ms Lowe had been engaged by the appellants.

Considering the nature of the Carer Support Scheme and the relationship that Ms Lowe had with the appellants the Court concluded that Ms Lowe was not engaged by the appellants within the meaning of section 5. It stated:

To hold that third party funding amounts to engagement would be to stray so far from the natural and ordinary meaning of the work "engage" as to ignore it.

The Court of Appeal's judgment is significant. As the Court explains "*if Ms Lowe is a homeworker, she would be entitled to the rights accorded to employees under the Act as well as other employment legislation such as the Minimum Wage Act and the Holidays Act.*" E tū, the union representing homeworkers, has stated that it will appeal this decision to the Supreme Court.

Ministry of Health v Lowe [2016] NZCA 369 / 2016

ACC cover for failed sterilisation does not extend to childcare

J became pregnant following a failed sterilisation. ACC granted J cover for her pregnancy and compensation for the pregnancy's physical effects. J also claimed compensation for loss of earnings on the basis that she had to stay home and care for her child, which ACC declined. The High Court upheld ACC's decision.

J's pregnancy constituted a personal injury, and it was the effects of the pregnancy that attracted cover under the Accident Compensation Act. The Court found that as personal injury is the basis for entitlement under the Act, *"there can be no entitlement where a personal injury is no longer affecting a claimant"*. Accordingly, once J's pregnancy ended, she was no longer entitled to compensation.

In addition, the ACC scheme does not compensate "*all consequences that follow from the covered injury*". The Court considered the history of the ACC legislation, and found that the need to care for a child in circumstances of this nature is not a consequence of personal injury which the scheme was designed to compensate.

Further, after the birth J's inability to work was not because of her pregnancy. In assessing whether J was "unable" to work because of her personal injury (the pregnancy), the Court found that:

"*Once a mother has recovered physically from her pregnancy and giving birth to her child, she will not be 'unable' to work because of her pregnancy… [Her] inability to work is almost certainly not going to be because of the… effects of the pregnancy but… [because of] factors such as childcare arrangements, the unavailability of the other parent and parenting choices.*"

The Court noted that any extension to cover under the ACC scheme is a matter for Parliament rather than the courts.

Accident Compensation Corporation v J [2016] NZHC 1683

Compensation claim for care of disabled son successful

On 20 July 2016, the High Court ruled that Margaret Spencer is entitled to be compensated for care she provided to her adult son Paul Spencer, who suffers from Down syndrome. The decision follows a number of cases in which the Ministry of Health's former policy of not paying individuals who provide disability support services to family members (referred to as family caregivers) was found to be unjustified discrimination under the New Zealand Bill of Rights Act 1990. In response to those cases, Parliament passed legislation in 2013 that provides for payments to be made to family caregivers (Part 4A of the New Zealand Public Health and Disability Act 2000). Part 4A expressly limits the ability of family caregivers to bring claims but also provides for some existing claims, including Mrs Spencer's claims, to be heard by the courts.

The Ministry challenged Mrs Spencer's claim on various grounds, including fiscal concerns about the precedent that a damages award would set. A key concern was that awarding damages would set a precedent that the courts could retrospectively extend eligibility for funding under a social program set by a Ministry. The Ministry was also concerned that a damages award might result in more claims.

The Court did not agree that fiscal concerns ruled out damages for Mrs Spencer. The Court found that the 2013 legislation expressly limits the risk of future claims, while preserving Mrs Spencer's existing claims. This indicated that the legislature accepted that a damages award would not be inconsistent with the requirements of fair public administration or the government's obligation to balance competing fiscal demands. However, the Court declined to award damages for care provided from December 2001, instead awarding damages for care provided from October 2005. It was relevant that, until at least 2005, the year when the first legal challenge against the Ministry's family caregiver policy was filed, the Ministry had, in good faith, attempted to develop a policy on paying family caregivers. It found that a damages award going back to 2001 would cut across the requirements of fair public administration and could have a significant fiscal effect.

The Court also took the unusual measure of making an order under the Human Rights Act requiring that the Ministry educate its officers in the importance of the human rights of disabled persons and their caregivers.

The case is significant as, for the first time, the Courts considered whether damages should be awarded if a government policy is systematically discriminatory, taking into account the potential for such an award to have large fiscal consequences. In our view, the case does not provide the definitive answer to this general issue. In this case, the opportunity to seek damages for a limited category of claimants was expressly preserved by Parliament in the 2013 amendments (the High Court and Court of Appeal previously having decided that the 2013 amendments do not apply retrospectively to the Ministry's former policy to which Mrs Spencer's claim relates). This, combined with the fact that there would be relatively few claimants in the category, meant that any broader fiscal implications did not outweigh the justification for damages for Mrs Spencer.

Spencer v Ministry of Health [2016] NZHC 1650 / 2016

Anaesthetist not "situationally aware" but not guilty of professional misconduct

Following a decision by the Health and Disability Commissioner, in which an anaesthetist was found to have breached Right 4 of the Code of Rights by failing to provide sufficient anaesthesia in connection with a caesarean section (13HDC00515), the anaesthetist was referred to the Director of Proceedings. The Director laid a charge of professional misconduct against the anaesthetist.

The Health Practitioners Disciplinary Tribunal dismissed the charge, concluding that there was insufficient evidence that the patient's pain had been adequately communicated to the anaesthetist such as to call for additional intervention. Among other factors, the Tribunal considered that there was a "significant element of judgment call" in the anaesthetist's response to the situation, and that after the baby had been delivered (and before the suturing) the attending obstetrician could have stopped the procedure and requested further analgesia if she had significant concerns about the patient's pain or discomfort.

The Tribunal did, however, note that the anaesthetist's "situational awareness was below the standard expected," as the anaesthetist claimed he was unaware of certain physical indications of the patient's pain levels during the procedure. Others present at the time recounted the patient moving her legs and having unusually tight abdominal muscles. However, the Tribunal did not think that the anaesthetist's "inadequate situational awareness" amounted to malpractice or negligence or were likely to bring discredit to the profession such as to warrant disciplinary action.

The Tribunal also commented on subsequent meetings where the obstetrician, midwife and patient discussed the event, and the obstetrician and midwife indicated that they were unhappy with the anaesthetist's actions. The anaesthetist was not present at these meetings. The Tribunal viewed these meetings as setting the framework for their perception of the events, and the basis for

their written reports and evidence. This reiterates the importance of carefully managing any situation where concerns are raised about care. (760/Med15/323D)

Coroners Act

Following an extensive review process, changes to the Coroners Act 2006 have now come into effect, as of 22 July 2016. Among other things, the changes include a relaxation of the restrictions on the public reporting of deaths that are suspected to be self-inflicted. Under the new provisions, publication of details about the method of death remains restricted, but the death may now be reported as a suspected suicide. There are also changes to the reporting of death obligations. In particular, where a patient dies during or as a result of a medical procedure, or while affected by anaesthetic, the death must only be reported if it was also "*medically unexpected*" (as further defined in the Act). Other changes include a new ability for a preliminary (non-invasive) inspection of a body before a full post mortem, and more flexibility on whether or not to hold a formal inquest when a person dies in official custody or care. For full information about the wide range of changes, see the Coroners Amendment Act 2016.

Replacement of the Medicines Act

Details of the government's proposal to replace the *Medicines Act* were released in late April. The proposal comes after a series of attempts to reform and update the Act since the 1990s that has resulted in various minor fixes to the regime but not a complete overhaul. The current Act is considered to be dated and inflexible with significant gaps in coverage. The Act is also structured in a way that does not allow separation of responsibilities for accountability purposes and makes the Minister responsible for technical decisions. Key aspects of the new regime include devolving product and licencing decisions to an independent regulator with a clear and principled legislative mandate, bringing all therapeutic products and related activities within scope of regulation and clearly distinguishing medicines and therapeutic products. The new regime will also take an approach to regulation that is comprehensive (whole of lifecycle) and risk appropriate (regulatory scrutiny will be proportionate to risk). A draft of the *Therapeutic Products Bill* that will replace the Medicines Act will be released for consultation in 2016 and it is proposed to be passed in 2017.

New proposal for pharmacy licencing regime

The proposed replacement of the *Medicines Act* has presented an opportunity to review the current regime for pharmacy licencing. Currently, there are ownership restrictions that require pharmacies (with few exceptions) to be majority owned by pharmacists, and limit pharmacists to majority ownership of no more than five pharmacies. There is also a broad prohibition on prescribers holding an interest in pharmacies. The Regulatory Impact Statement prepared by the Ministry of Health suggests the restrictions are not necessary to achieve safety objectives and may be hindering innovation and competition. Under the proposed new regime, there will be no requirement for pharmacist ownership and no restriction on the number of pharmacies that can be owned by an individual. Instead, pharmacy licence holders will be required to appoint qualified pharmacists to ensure that professional standards are met. The prohibition on prescribers having an interest in a pharmacy will be retained, but with amendments to ensure integrated health services are not restricted. Licences will also no longer be restricted to physical premises.

Implementation of the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016

This Act implements the settlement reached between the Crown, DHBs, healthcare workers and healthcare providers regarding payment to healthcare workers for time spent travelling between home-based care and support clients. The Act came into force in February this year and places an obligation on providers to compensate healthcare workers providing certain home-based care and support services for time spent traveling between clients. As part of the settlement agreement, the Crown and DHBs have obligations to assist providers to meet their obligations to pay healthcare workers in accordance with the Act. The Act has been in force for a number of months, and new in between travel provisions would have been included in new home-based care and support contracts coming into effect from 1 July.

National Health IT Board

The Ministry of Health has recently announced that the National Health IT Board will, from 12 August 2016, be replaced with a new digital advisory group. The National Health IT Board was established to provide strategic leadership on information systems

across the health and disability sector.

While aspects of the operation of the digital advisory group are yet to be finalised, such as governance arrangements and work programme, we presume that many of the policies of the National Health IT Board will remain in place.

One such policy is the Board's policy on *Use of cloud or hosted services for managing health information*. Until recently, this policy provided that health care providers could not store health information on cloud servers located overseas without first getting an exemption from the Board. However the policy now lists a number of cloud computing products and services that have been approved by the Ministry of Health as being appropriate for storing health information. IT vendors are also able to apply to the Ministry to have their products and services accepted for this purpose.

Conflict of interest guidelines

On 30 June 2016, the Ministry of Health published the new *Conflict of Interest Guidelines for District Health Boards (DHBs)*. All DHBs must comply with conflict of interest requirements set out in the New Zealand Public Health and Disability Act 2000 and the Crown Entities Act 2004. The guidelines are intended to assist DHBs to comply with those obligations, and to meet good practice governance expectations.

The guidelines acknowledge that "*the New Zealand health and disability sector is an inherently close community, where people with specialist skills and knowledge are in high demand*". However, the guidelines emphasise that conflicts are not a cause for concern if they are recognised, disclosed and managed appropriately.

DHBs may find some of the examples given in the guidelines about managing conflicts of particular use. For example, the guidelines list different ways that a DHB might respond to a disclosure of a conflict, which range from deciding that a situation does not amount to a conflict to imposing additional oversight on the conflicted member, excluding the member from parts of a meeting, reassigning the member's tasks or restricting access to confidential information, or bringing the conflict to the Minister's attention.

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