IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 110
EMPC 8/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR (MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT) Plaintiff
AND	GILL PIZZA LIMITED First Defendant
AND	SANDEEP SINGH Second Defendant
AND	JATINDER SINGH Third Defendant
AND	MANDEEP SINGH Fourth Defendant
AND BETWEEN	A LABOUR INSPECTOR (MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT)
AND	MALOTIA LIMITED First Defendant
AND	SANDEEP SINGH Second Defendant
AND	MANDEEP SINGH Third Defendant
AND	JATINDER SINGH Fourth Defendant

Hearing:	23 May 2019 (Heard at Wellington)
Court:	Chief Judge Christina Inglis Judge K G Smith Judge J C Holden
Appearances:	C English, counsel for plaintiff G Ballara, counsel for defendants S Langton and R Tomkinson, counsel for Restaurant Brands Ltd as intervener
Judgment:	26 August 2019

JUDGMENT OF THE FULL COURT

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[1] The key issue in this case is whether the Labour Inspector may pursue a claim in the Employment Relations Authority for unpaid wages on behalf of 28 pizza delivery drivers in circumstances where the defendants assert that the drivers are independent contractors rather than employees. The defendants (who are the companies that own the restaurants the drivers work for, and their directors) and the intervener (Restaurant Brands Ltd, the franchisor) say that the status issue must first be determined by the Employment Court. It is only where employment status has been formally declared, or is not in dispute, that a claim of the present sort can be progressed in the Authority at first instance.

[2] In essence the Labour Inspector says that there is nothing in the Employment Relations Act 2000 (the Act) that requires the Labour Inspector to obtain a declaratory judgment before commencing an application in the Authority. Rather, he says the Authority can deal with such matters under its broad, and exclusive, jurisdiction as a preliminary matter. The circuitous procedural route advanced on behalf of the defendants for resolving minimum entitlement claims brought on behalf of vulnerable workers cannot, it is said, have been intended by Parliament when enacting the legislation.

[3] While the Authority expressed some support for the Labour Inspector's analysis, it concluded that it did not have jurisdiction to determine the claim without the workers' employment status having first been determined by the Court.[1] The Labour Inspector has challenged the Authority's determination.

[4] A significant number of cases, including from overseas, were put before the Court. However, we have found them of marginal utility in resolving the matters at issue. That is because the challenge is answered by applying well-established principles of statutory interpretation.

[5] The Labour Inspector has a number of powers, some of which are far-reaching and coercive. It was common ground that those powers are conferred and limited by the Act. It was also common ground that the powers of the Authority are constrained. The legislation accordingly sets the framework for assessing what actions the Labour Inspector can pursue, and how, and for assessing what actions the Authority can entertain, and when.

[6] Section 228 of the Act sets out the Labour Inspector's power to bring actions before the Authority/Court. It provides:

> **228 Actions by Labour Inspector**
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> (1) A Labour Inspector *may commence an action on behalf of an employee to recover any wages* or holiday pay or other money *payable by an employer to that employee* under the Minimum Wage Act 1983 or the Holidays Act 2003.
>
> (2) If a Labour Inspector commences an action under subsection (1), the Labour Inspector must not issue an improvement notice under section 223D or serve a demand notice under section 224 in respect of the same wages or holiday pay or other money.
>
> (3) Sections 131 and 132 apply, with the necessary modifications, to actions commenced under subsection (1).
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> (emphasis added)

[7] Section 161 deals with the jurisdiction of the Authority. It provides:

> **161 Jurisdiction**
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> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—

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[1] *A Labour Inspector of the Ministry of Business, Innovation and Employment v Gill Pizza Ltd* [2018] NZERA Wellington 113.

…

(c) matters about whether a person is an employee (not being matters arising on an application under section 6(5)):

…

(q) actions of the type referred to in section 228(1):

…

[8] Section 6 defines "employee" and provides:

> **6 Meaning of employee**
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> (1) In this Act, unless the context otherwise requires, **employee**—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; …
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> …
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
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> …
>
> (5) The court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—
>
> (a) employees under this Act; or
>
> (b) employees or workers within the meaning of any of the Acts specified in section 223(1).
>
> (6) The court must not make an order under subsection (5) in relation to a person unless—
>
> (a) the person—
>
> (i) is the applicant; or
>
> (ii) has consented in writing to another person applying for the order; and
>
> (b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

[9] The Labour Inspector says that the combined effect of these three provisions enables the Labour Inspector to bring a claim for minimum entitlements before the Authority in circumstances where the existence of an employment relationship is unclear or disputed. The Labour Inspector says the status issue can be dealt with as a preliminary issue. If the Authority finds that an employment relationship exists, it can go on to determine the substantive claim. If not, the substantive claim cannot proceed.

[10] There is, as the Authority Member observed, some attractiveness to the Labour Inspector's argument, most notably the streamlining effect it would have on the

process involving a claim where employment status was in issue. The question, rhetorically asked, is whether Parliament would have intended that, in cases involving minimum entitlements pursued by the Labour Inspector on behalf of vulnerable workers, the Labour Inspector would (1) need to seek a declaration from the Court, and (2) if found to be employees, need to return to the Authority for determination as to the workers' substantive entitlements. The procedural complexity and its associated costs, including time, effort and financial costs (filing fees in the Court for a s 6(5) application being $306.67, together with a hearing fee for each half day of $250.44; $71.56 (filing fee) and $153.33 (hearing fee) respectively in the Authority together with any legal costs of representation involved) might be said to tell against such an intention. The rhetorical question is answered by a close reading of the provisions in context.

[11] The fundamental difficulty with the Labour Inspector's position is that it cuts across the scheme in s 6(5) and s 6(6). Parliament has expressly conferred on the Court (not the Authority) the statutory power to determine, on application, whether a person or persons on whose behalf a claim is made are employees or workers within the meaning of any of the Acts specified in s 223(1). The Minimum Wage Act 1983 and the Holidays Act 2003 are two of the listed statutes. Both are said by the Labour Inspector to have been breached by the defendants in the present case. The defendants have responded to the claims by contending that the persons on whose behalf the action is brought are not employees. The Act points squarely to the Court, not the Authority, determining that issue in this context.

[12] While the Authority has a general jurisdiction under s 161(1)(c) to determine matters about whether a person is an employee, we do not see that jurisdiction as extending to actions brought by a Labour Inspector under s 228(1). That is because jurisdiction to determine s 228(1) actions has been specifically conferred on the Authority under s 161(1)(q).

[13] Sections 161(1)(q) and 228(1), read together, enable the Labour Inspector to commence an action on behalf of "an employee". That wording presupposes that there is an "employee" and that status is not in issue. The wording of s 228(1) can be contrasted with the different formulation in s 6(5), which refers to an application by a

union, a Labour Inspector, or "1 or more other persons" for a declaration as to whether "the person or persons named in the application" are "employees or workers" within the meaning of the Acts specified within s 223(1).

[14] The qualification in s 161(1)(c) "*not* being matters arising on an application under section 6(5)" (emphasis added) also supports this interpretation. We do not think this phrase can sensibly be read as only including those matters which have in fact been pursued by way of application under s 6(5).

[15] The protective mechanisms built into the s 6 scheme further suggest that Parliament intended that the Court, rather than the Authority, would make declarations of employment status in the context of representative claims for minimum entitlements under the Minimum Wage Act and the Holidays Act in circumstances where status is in issue. Relevantly, the Act provides that while the Labour Inspector may pursue an application for a declaration that a person is an employee for the purposes of those Acts, the Court *must not* make such an order unless the person to whom the application relates has consented in writing to the Labour Inspector making application on his/her behalf.[2] Notably no such protections apply under s 228.

[16] As the Parliamentary debates reflect, the proposed wording of s 6 gave rise to a considerable amount of angst as to its potential impact, including that people would be declared to be employees against their wishes.[3] That concern led to the inclusion in s 6(6) of the requirement for consent before a declaration can be made. The concern does not arise where a person makes a claim him/herself under s 131. No consent is, of course, required for an action under s 228 where there is no issue in respect of employment status.

[17] The Minister of Labour expressed the matter in the following way:[4]

> It is only if one of the parties to the contract – one's contractor, courier, or whatever – is unhappy with the existing arrangement and believes that he or she is suffering an injustice, that we have provided a legal remedy for that

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2 Employment Relations Act 2000, s 6(6).

3 (9 May 2000) 583 NZPD 1962; (10 May 2000) 583 NZPD; (11 May 2000) 583 NZPD 2181-2182; and (16 May 2000) 583 NZPD 2225-2227. Note that the original proposal was to amend Part 9 of the Act.

4 (9 May 2000) 583 NZPD 1963.

person to have the arrangement tested – not assumed – in the courts, on the specific facts.

[18] Adopting the interpretation advanced on behalf of the Labour Inspector would undermine the statutory safeguards that have been put in place in s 6(6). The point is, however, that Parliament has seen fit to incorporate a protective procedural mechanism where the threshold issue of status falls to be determined in the context of an action taken on behalf of purported employees. That process requires Court, not Authority, intervention. The Labour Inspector's interpretation would provide a direct route to s 228, bypassing the additional protections contained in s 6(6), and undermining those protections which Parliament has deliberately put in place.

[19] Counsel for the Labour Inspector, Ms English, emphasised the underlying statutory purposes, including to ensure the efficient and timely despatch of Authority investigations and to facilitate the expeditious processing of minimum entitlement claims under the Act. We agree that these are all policy objectives that can clearly be discerned in the empowering legislation and which should all be supported. We also accept that an interpretation which would lead to an absurd result will generally be avoided. We do not, however, accept that requiring an application for a declaration of employment status from the Court, where the Labour Inspector wishes to advance a claim on behalf of a person where status is disputed, would lead to the sort of undesirable complexities Ms English foreshadowed.

[20] Where status is raised in response to an action brought by a Labour Inspector under s 228(1), the Authority could stay the action pending resolution by the Court of the status issue under s 6(5). Alternatively, it might well be that the entire matter is removed to the Court for determination.[5] And, flipping it on its head, if the Authority were to determine status, a determination of the Authority might well give rise to a challenge, meaning the claimed efficiencies are lost.

[21] Insofar as a degree of procedural complexity would arise, it is a result which Parliament appears to have turned its mind to and intended, having regard to the broader protective mechanisms it wished to put in place. It is not for the Court to say

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5 Employment Relations Act 2000, s 178.

that Parliament should have enacted a more direct pathway and proceed to read it into the empowering legislation on that basis.

[22] We recognise that requiring a Court declaration where there is contested status might give rise to unmeritorious strategic manoeuvring by a limited number of employers. It is unlikely that any such steps would be warmly received by the Court and may well give rise to orders of increased costs.

[23] In summary, the Act confers limited powers on the Labour Inspector to take legal action on behalf of certain categories of person – namely employees. Where the status of the alleged employee is in dispute, that issue must be determined via the statutory route Parliament has provided for, namely an application for a declaration under s 6(5). The Court, not the Authority, has the jurisdiction to make such orders. Reading ss 228 and 161 as enabling the Authority to effectively declare employment status as a precursor to determining a claim by the Labour Inspector for unpaid wages, would run counter to that statutory route and we decline to adopt such a reading.

[24] The Labour Inspector's challenge is accordingly dismissed.

[25] Costs are reserved.

Christina Inglis
Chief Judge
for the full Court

Judgment signed at 4.45 pm on 26 August 2019