IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 67/2021
[2021] NZSC 184

BETWEEN	GILL PIZZA LIMITED First Appellant
	SANDEEP SINGH Second Appellant
	JATINDER SINGH Third Appellant
	MANDEEP SINGH Fourth Appellant
AND	A LABOUR INSPECTOR (MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT) Respondent
AND BETWEEN	MALOTIA LIMITED First Appellant
	SANDEEP SINGH Second Appellant
	MANDEEP SINGH Third Appellant
	JATINDER SINGH Fourth Appellant
AND	A LABOUR INSPECTOR (MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT) Respondent

Hearing: 4 November 2021

Court: William Young, Glazebrook, O'Regan, Ellen France and Williams JJ

Counsel: G G Ballara and S P Radcliffe for Appellants
J C Catran and H T N Fong for Respondent

S C Langton and R M Tomkinson for Restaurant Brands Ltd as Intervener

Judgment: 21 December 2021

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs of $15,000 plus usual disbursements.

REASONS
(Given by O'Regan J)

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Jurisdiction issue

[1] This appeal deals with the jurisdiction of the Employment Court and the Employment Relations Authority (the Authority) respectively to determine the employment status of workers.

Background

[2] The jurisdiction question arose when a Labour Inspector commenced an action in the Authority under s 228(1) of the Employment Relations Act 2000 (the Act) to recover wages and holiday pay entitlements said to be owing by two Pizza Hut franchisees,[1] Gill Pizza Ltd (Gill) and Malotia Ltd (Malotia), under the Minimum Wage Act 1983 and the Holidays Act 2003.[2] The action was brought on behalf of 28 pizza delivery drivers. Gill had told the Labour Inspector during her investigation that the delivery drivers were not employees but contractors, and therefore not covered by the Minimum Wage Act and the Holidays Act. Thus, the core of the dispute between the appellants and the Labour Inspector was whether the delivery drivers were contractors, as the appellants said, or employees, as the Labour Inspector said.

[3] The agreement between Gill and each of its delivery drivers provides that the relationship between Gill and the delivery driver is that of principal and independent contractor, and not that of employer and employee. It records that the delivery driver is not entitled to any overtime payments, sick leave, superannuation benefits, holiday pay, redundancy pay or any other reimbursements from Gill, other than those specified in the agreement.

[4] In the Authority, the appellants argued that the Authority did not have jurisdiction to determine whether the delivery drivers were employees; rather, that issue would have to be determined by the Employment Court under s 6(5) of the Act, on an application by, or with the consent of, each delivery driver. The Authority agreed.[3] The Employment Court dismissed the Labour Inspector's challenge to the Authority's decision.[4]

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1 Claims were also brought in relation to other workers for failure to issue employment agreements, failure to keep and maintain accurate holiday and leave records and failure to keep and maintain accurate wage and time records. However, those claims are not the subject of this appeal.

2 For the purposes of this appeal, the position of Gill Pizza Ltd (Gill) and Malotia Ltd (Malotia) is the same and therefore we will not differentiate them. So, any references to Gill should be interpreted as applying to Malotia as well. The other appellants were directors of Gill and Malotia at the relevant time or were said to be involved in managing those companies.

3 *A Labour Inspector of the Ministry of Business, Innovation and Employment v Gill Pizza Ltd* [2018] NZERA Wellington 113 (Member MacKinnon) [Authority determination].

4 *Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2019] NZEmpC 110, (2019) 16 NZELR 659 (Chief Judge Inglis, Judges Smith and Holden) [EmpC judgment].

[5] The Court of Appeal reversed the decision of the Employment Court and found for the Labour Inspector.[5]

Leave

[6] This Court granted leave to appeal against the Court of Appeal decision.[6] The approved question is:

> … whether the Court of Appeal was correct to conclude that the Employment Court erred in finding that, if a defendant asserts there is no employment relationship, the Labour Inspector must first seek a declaration of employment status from the Employment Court under s 6(5) of the Employment Relations Act 2000 before commencing or continuing a proceeding under s 228(1) of that Act.

Intervener

[7] The franchisor for the businesses of Gill and Malotia is Restaurant Brands Ltd. It was granted leave to intervene. Its counsel made both written and oral submissions supporting the appellants' position.

The Act

[8] Section 3(ab) of the Act describes one of its objects as follows:

> (ab) to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court; …

[9] The scheme of the Act generally is to provide the means by which employment relationship problems can be resolved quickly, cost-effectively and without unnecessary judicial intervention. This is reflected in the institutional framework set out in Part 10 of the Act. In this Court's recent decision in *FMV v TZB*, the majority observed in relation to Part 10:[7]

> [53] … Part 10 of the Act (in which s 161 is located) provides for the two specialist employment institutions: the Employment Relations Authority

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5 *Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2021] NZCA 192, (2021) 11 NZELC ¶79-134 (Cooper, Clifford and Courtney JJ) [CA judgment].

6 *Gill Pizza Ltd v A Labour Inspector (Ministry of Business, Innovation and Employment)* [2021] NZSC 97 (William Young, Ellen France and Williams JJ).

7 *FMV v TZB* [2021] NZSC 102, (2021) 11 NZELC ¶79-135 per Winkelmann CJ, O'Regan and Williams JJ (footnotes omitted).

and the Employment Court. They are intended to give effect to the Act's overall object [set out in s 3(a)] of building productive employment relationships through the promotion of good faith:

> …
>
> (v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
>
> (vi) by reducing the need for judicial intervention…

[54] In short, the Act is designed to empower parties to employment relationships to resolve their own problems where possible and to avoid unnecessary adversarialism. These aims are also evident in s 143 (the object of Part 10), which provides that the Act's dispute resolution regime and specialist institutions are intended relevantly to:

> (a) support successful employment relationships and the good faith obligations that underpin them; and
>
> (b) recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves; and
>
> (c) recognise that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available at short notice to the parties to those relationships; and
>
> (d) recognise that the procedures for problem-solving need to be flexible; and
>
> …
>
> (e) recognise that there will always be some cases that require judicial intervention; and
>
> (f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
>
> (fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; and
>
> (g) recognise that difficult issues of law will need to be determined by higher courts.

[55] Thus, the focus of Part 10 is on practical, specialised, speedy and informal dispute resolution that is accessible to all parties.

[10] Section 157(1) provides that the Authority is:

> … an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

[11] Section 161(1) deals with the jurisdiction of the Authority. It provides that the Authority has exclusive jurisdiction "to make determinations about employment relationship problems generally",[8] including:

> …
>
> (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):[9]
>
> …

[12] The parenthesised words in s 161(1)(c) are of some significance, as will become apparent.

[13] Section 187(1) sets out the matters over which the Employment Court has exclusive jurisdiction. These include:

> …
>
> (f) to hear and determine, under section 6(5), any question whether any person is to be declared to be—
>
> (i) an employee within the meaning of this Act; or
>
> (ii) a worker or employee within the meaning of any of the Acts referred to in section 223(1):
>
> …

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8 In *FMV v TZB*, above n 7, at [22], the majority said that, when read alongside the definition of "employment relationship problem" in s 5, s 161(1) of the Employment Relations Act 2000 (the Act) effectively reads: "The Authority has exclusive jurisdiction to make determinations about any problems relating to or arising out of employment relationships, generally…".

9 As here, actions to recover minimum wage or holiday pay entitlements.

[14] Section 6 provides (relevantly) as follows:

> **6 Meaning of employee**
>
> (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; …
>
> …
>
> (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.
>
> (3) For the purposes of subsection (2), the court or the Authority—
>
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
>
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.
>
> …
>
> (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.
>
> …

[15] In the present case, s 6(5) and (6) are key provisions. As can be seen, these provisions have two important features. First, s 6(5) requires an application to the

Employment Court, not the Authority. Second, s 6(6) requires that the application is made personally or, if made by another person applying for the order (such as a Labour Inspector), that written consent is obtained from the person or persons on whose behalf the application is brought.

[16] Part 11 of the Act contains a scheme for ensuring compliance with nine specified Acts, including (relevantly to this case) the Minimum Wage Act and the Holidays Act.[10] The statutory obligation to ensure compliance with these Acts falls on Labour Inspectors, whose statutory functions include:[11]

> (a) determining whether the provisions of the relevant Acts have been complied with; and
>
> (b) taking all reasonable steps to ensure that the relevant Acts are complied with; and
>
> (c) monitoring and enforcing compliance with employment standards; and
>
> (d) performing any other functions conferred by or under the relevant Acts.

[17] As noted by the Court of Appeal:[12]

> [15] A suite of tools is provided for this purpose: enforceable undertakings,[13] improvement notices,[14] demand notices,[15] the right to bring an action to recover wages or holiday pay[16] and the power to issue infringement notices.[17] These provisions are supplemented by pt 9A, which provides further enforcement measures to promote the more effective enforcement of employment standards, especially minimum entitlement provisions.[18]
>
> [16] Labour Inspectors have extensive powers to enable them to discharge their statutory functions. These include the power to enter premises where any person is employed or where the Labour Inspector has reasonable cause to believe that any person is employed and the power to require production of

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10 The other legislation, listed in s 223(1), is the Act itself; the Support Workers (Pay Equity) Settlements Act 2017; the Equal Pay Act 1972; the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016; the Parental Leave and Employment Protection Act 1987; the Volunteers Employment Protection Act 1973; and the Wages Protection Act 1983.

11 Employment Relations Act, s 223A.

12 CA judgment, above n 5.

13 Employment Relations Act, s 223B.

14 Section 223D.

15 Section 224.

16 Section 228.

17 Section 235C.

18 Section 142A.

> wage and other records.[19] The breadth of these tools and powers is intended to allow a Labour Inspector the flexibility to respond to a range of non-complying conduct in the most efficient way, avoiding lengthy and costly litigation.[20]

[18] This brings us to s 228(1), under which the Labour Inspector commenced the action against the appellants that is in issue in this appeal. It provides that:

> 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.

[19] The appellants stressed that this provision allows an action on behalf of "an employee", in contrast to s 6(5) and (6), which refer to an application in relation to "a person".

Issue on appeal

[20] In summary, s 161(1)(q) confers on the Authority exclusive jurisdiction to determine actions brought under s 228(1), while s 187(1)(f) confers on the Employment Court exclusive jurisdiction to make declarations under s 6(5) as to employment status. The issue before us is this: when a Labour Inspector commences an action under s 228(1) on behalf of persons said to be employees, but that status is challenged by the person said to be their employer, can the Authority consider and determine the action, or must an application first be made to the Employment Court under s 6(5) to resolve whether the persons on whose behalf the action is commenced are, in fact, employees? The issue is significant in practice, not just because of the cost and delay inherent in a two-stage process, but because a Labour Inspector cannot proceed under s 6(5), in the Employment Court, unless all of the people on whose behalf the action is commenced consent in writing, as required by s 6(6). There is no such requirement for an action commenced in the Authority under s 228(1).

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[19] Sections 229(1)(a) and (c). Subsequent to the Employment Court decision, a new provision, s 229A, was enacted, which empowers a Labour Inspector to exercise the investigatory powers conferred by s 229 to investigate whether any person performing work is an employee, "as distinct, for example, from an independent contractor or a volunteer".

[20] *Labour Inspector of the Ministry of Business, Innovation and Employment v IT-Guys NZ Ltd* [2019] NZEmpC 115, (2019) 16 NZELR 933 at [23], referring to Office of the Minister of Labour, Cabinet Business Committee "Proposals to Amend the Employment Relations Act 2000 and Related Work" (July 2010) Appendix 1 at [126].

Employment Court decision

[21] The Employment Court noted the attraction of having the status issue resolved more cheaply and quickly in the Authority, as the Labour Inspector argued.[21] The Labour Inspector said the status issue could be dealt with by the Authority as a preliminary issue.[22] But the Employment Court held that the Labour Inspector's argument cut across the scheme of s 6(5) and (6), under which Parliament had conferred jurisdiction on the Employment Court, not the Authority, to determine whether a person is an employee.[23]

[22] The Employment Court considered that the Authority's exclusive jurisdiction under s 161(1)(q) to determine an action under s 228(1) did not extend to actions in which status was in issue.[24] This was because ss 161(1)(q) and 228(1), read together, enable the Labour Inspector to commence an action on behalf of an "employee". That wording presupposed that there was an employee and that status is not in issue. The Employment Court contrasted the wording of s 228(1) with that of s 6(5), the latter of which refers to an application for a declaration as to whether "the *person or persons* named in the application"[25] are "employees or workers" within the meaning of the Acts specified in s 223(1).

[23] The Employment Court considered that the fact that a declaration as to status cannot be made without the consent of the person or persons concerned supported this interpretation, having regard to the legislative history of s 6(5) and (6).[26] We discuss this in more detail below.[27]

[24] The Employment Court did not consider that its interpretation risked either an absurd result or undue complexity.[28] It was not concerned that the defendant in a

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21 EmpC judgment, above n 4, at [10].

22 This approach was taken by the Employment Relations Authority (the Authority) in *Hairland Holdings Ltd v The Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZERA Christchurch 196 at [67].

23 EmpC judgment, above n 4, at [11].

24 At [13]. It considered that the Authority's general power under s 161(1)(c) to determine employment status did not apply in s 228(1) actions, given that the power to determine s 228(1) actions was specifically conferred by s 161(1)(q): at [12].

25 Emphasis added.

26 At [15]–[18].

27 See below at [55]–[63].

28 EmpC judgment, above n 4, at [19].

s 228(1) action would put the status of the persons said to be employees in issue for tactical reasons.[29]

[25] The practical effect of the Employment Court decision was that, where status was put in issue in a s 228(1) action, a Labour Inspector was required to make an application under s 6(5) (with the written consent of all those on whose behalf it was made), with the Authority staying the s 228(1) action pending the outcome of that application or removing the whole matter to the Employment Court.[30]

Court of Appeal decision

[26] The Court of Appeal considered the plain wording of ss 228(1) and 161(1)(q) supported the proposition that the Authority could determine an action by a Labour Inspector under s 228(1), whether or not the status of those on whose behalf it was commenced was in issue.[31] Status was just a matter that had to be proved, like any other aspect of the Labour Inspector's case. It did not see the qualifying words in s 161(1)(c), which carves out from the Authority's jurisdiction "matters arising on an application under section 6(5)", as affecting that conclusion: the carve-out applied only if an application had, in fact, been made under s 6(5).[32]

[27] The Court noted that, in practice, status was often put in issue in response to Labour Inspectors' actions under s 228(1) and, prior to the present case, was routinely resolved by the Authority.[33] It considered that the Authority had been influenced in departing from its previous practice by the Employment Court's decision in *GSTech Ltd v Labour Inspector of the Ministry of Business, Innovation and*

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29 At [22].
30 At [20].
31 CA judgment, above n 5, at [32].
32 At [34].
33 At [35], citing *A Labour Inspector v Southern Taxis Ltd* [2018] NZERA Christchurch 104; *A Labour Inspector v Ways Electronics Ltd* [2018] NZERA Wellington 76; *A Labour Inspector v Karamea Holiday Homes Ltd (in liq)* [2017] NZERA Christchurch 226; *A Labour Inspector v Gengy's Management Ltd* [2017] NZERA Auckland 333; *A Labour Inspector of the Ministry of Business, Innovation and Employment v Dai's Food Ltd* [2017] NZERA Christchurch 172; *A Labour Inspector of the Ministry of Business Innovation and Employment v Cheap Deals on Wheels Ltd* [2017] NZERA Auckland 196; *A Labour Inspector v Griffin* [2017] NZERA Auckland 40; and *A Labour Inspector with the Ministry of Business Innovation and Employment v Alpine Motor Inn & Café (2008) Ltd* [2016] NZERA Christchurch 130. See also, in a different context, *Hairland Holdings Ltd*, above n 22, as discussed in the CA judgment, above n 5, at [36].

Employment.[34] However, the Court of Appeal considered this was based on a misunderstanding of what was decided in *GSTech*.[35]

[28] The Court considered that s 161(1)(c) and (q) and s 228(1) contemplate that status may be put in issue in a s 228(1) action and will be determined by the Authority under its exclusive jurisdiction to determine all the issues in such an action, unless there has actually been an application under s 6(5).[36]

[29] The Court noted that the requirement in s 6(6) for consent by persons whose status is in issue in an application brought under s 6(5) could be seen as a response to the concern expressed during parliamentary debates over the possible effect of s 6(5) on contractors who did not wish to be declared employees.[37] However, it did not see this as significant. Its conclusion was bolstered by four factors.

[30] First, ss 161(1)(q) and 228(1) are the more specific provisions. They are directed solely towards an action by a Labour Inspector for the recovery of wages or holiday pay or other money owing under the Minimum Wage Act and Holidays Act. In comparison, s 6(5) makes no reference to either ss 161(1)(q) or 228(1).[38]

[31] Secondly, the Employment Court's approach has implications beyond s 228(1). A Labour Inspector has powers under some of the other Acts specified in s 223(1) to take actions that fall within the Authority's exclusive jurisdiction.[39] The Authority has exclusive jurisdiction to determine those actions.[40]

[32] Thirdly, a declaration in s 6(5) cannot have the effect of determining the substantive s 228(1) action, and determination of a s 228(1) action is not within the jurisdiction conferred on the Employment Court under s 187.[41] It is also possible

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34 *GSTech Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 84, (2018) 16 NZELR 689 [*GSTech*].
35 CA judgment, above n 5, at [37]–[38].
36 At [40].
37 At [41].
38 At [46].
39 At [47]. For example, a Labour Inspector may bring an action to recover penalties imposed under ss 75 and 76 of the Holidays Act 2003 and s 25 of the Home and Community Support (Payment for Travel Between Clients) Settlement Act.
40 Employment Relations Act, s 161(1)(m).
41 CA judgment, above n 5, at [48].

that the Employment Court could decide against making a declaration under s 6(5), given that declaratory relief is flexible and discretionary.[42] The Employment Court's approach would also raise the possibility that no remedy would be available where an individual's status is put in issue by the alleged employer in the context of a s 228(1) action, and the individual concerned does not consent to an application under s 6(5). Such a situation would cut across the statutory role of Labour Inspectors to ensure compliance with minimum standards, which serves a broad public purpose beyond particular cases.[43] It would also run the risk of baseless challenges to the employment status of people for whom a s 228(1) action has been commenced to delay and complicate the process.[44]

[33] Fourthly, requiring a Labour Inspector to obtain a declaration before proceeding with the s 228(1) action would bring significantly greater procedural complexity and cost to all parties.[45]

[34] The Court of Appeal considered that conferring on the Employment Court the exclusive jurisdiction to determine status was inconsistent with the express object of the Act to recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements.[46]

[35] It also noted that the Employment Court's approach would limit appeal rights in the event of a factual error by the deciding body.[47] The Authority's determinations are amenable to challenge in the Employment Court on a de novo basis or for error of either fact or law.[48] However, a decision of the Employment Court is subject only to a right of appeal, with leave, on a question of law.[49]

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42 At [49].
43 At [50].
44 At [50].
45 At [51].
46 At [54].
47 At [55].
48 Employment Relations Act, s 179.
49 Section 214.

Our approach

[36] We have set out in some detail the decisions of the Employment Court and of the Court of Appeal because the contrast between them illustrates the competing arguments before us. We consider that the Court of Appeal was correct in its analysis and agree, for the most part, with its reasoning. We now set out our reasons for this conclusion.

Approach to interpretation

[37] There was no dispute about the approach to statutory interpretation: the meaning of an enactment must be ascertained from its text and in the light of its purpose.[50]

[38] The provisions of the Act that are in issue are ss 6(5) and (6), 161(1)(c) and (q), 187(1)(f) and 228(1).

Section 228(1)

[39] We do not consider that the existence of a dispute about whether the person on whose behalf a Labour Inspector is pursuing an action under s 228(1) is an employee can be controlling of the jurisdiction either of the Labour Inspector to commence the action, or that of the Authority to deal with it. In effect, the interpretation pressed by the appellants would allow the defendant to determine the issue of the jurisdiction of the Labour Inspector and that of the Authority merely by raising such a dispute. We do not think that is likely to have been Parliament's purpose.

[40] What if the defendant said nothing about status before the action was commenced? There would be no reason to question the Labour Inspector's power to commence the action in such a case. But, on the appellants' argument, the defendant could signal a challenge to the status of the person on whose behalf the action was commenced after the Authority is seized of it, retrospectively depriving the

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[50] Interpretation Act 1999, s 5(1). The Interpretation Act has now been repealed by the Legislation (Repeals and Amendments) Act 2019, with effect from 28 October 2021, but was in force at the time this case was considered by the Authority, the Employment Court and the Court of Appeal. Section 10(1) of the Legislation Act 2019 is to similar effect, though it expressly refers to context in addition to purpose.

Labour Inspector of jurisdiction to commence it and prospectively depriving the Authority of jurisdiction to address and resolve it.

[41] As we see it, the Labour Inspector is required to prove in the action under s 228(1) any disputed matter, including:

(a) whether the person or persons on whose behalf the action is brought is an employee/are employees;

(b) whether the amount paid meets the requirements of the Minimum Wage Act; and

(c) whether there has been compliance with the entitlements under the Holidays Act.

[42] It is true that proving the person on whose behalf the action is brought is an employee is a jurisdictional fact and that the action will be dismissed without further consideration if that element is not established. But that does not mean that the mere fact that this element is disputed deprives the Labour Inspector of the power to commence the action under s 228(1) or the jurisdiction of the Authority to deal with that action.

Jurisdiction of Labour Inspector

[43] Counsel for the appellants, Mr Ballara, pointed out that, after the Employment Court decision, a new section, s 229A, was added to the Act. Section 229A gives Labour Inspectors power to use their investigative powers under s 229 to assess whether a person performing work is an employee. The section expands the definitions of "employee" and "employer" for the purposes of the power granted by the section. Mr Ballara argued this supported the view that a Labour Inspector's power to commence an action under s 228(1) applies only in relation to a person whose status as an employee was not in issue.

[44] We do not see s 229A as assisting our construction of s 228(1). The fact that it was passed after the events in issue in this case is one reason. But, even putting that

to one side, we see it as addressing a completely different situation from s 228(1). Section 229A is about a Labour Inspector exercising intrusive powers of investigation. Section 228(1) is about a Labour Inspector initiating a proceeding which triggers an investigation under the control of the Authority.

Section 161(1)(q)

[45] Once it is established that the action may be brought by a Labour Inspector under s 228(1), s 161(1)(q) expressly gives the Authority jurisdiction to deal with it. There is nothing in s 187 that gives the Employment Court jurisdiction to deal with such an action.[51]

The carve-out in s 161(1)(c)

[46] The Employment Court considered that an action by a Labour Inspector under s 228(1) in circumstances where the status of the person on whose behalf it is brought is under challenge is, in effect, an application for a declaration as to the status of the person, which can be made only under s 6(5).[52] As noted earlier, s 6(5) requires an application to the Employment Court, not the Authority. If the Employment Court were correct, then the Authority would not have jurisdiction to determine the status of the delivery drivers in this case. Section 161(1)(c) empowers the Authority to deal with matters about whether a person is an employee, but specifically excludes from that power "matters arising on an application under section 6(5)". The Employment Court's jurisdiction to deal with an issue raised under s 6(5) is confirmed by s 187(1)(f), which specifically refers to applications under s 6(5).

[47] As just mentioned, s 161(1)(c) specifically carves out from the Authority's jurisdiction "matters arising on an application under section 6(5)". The Court of Appeal considered that this excluded from the Authority's jurisdiction only matters arising on an application that had actually been made to the Employment Court under

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51 Section 187(1) does, however, give the Employment Court jurisdiction to deal with matters removed into the Court under s 178 and challenges under s 179.

52 See EmpC judgment, above n 4, at [11].

s 6(5).[53] In this respect, it differed from the Employment Court, which said in relation to this carve-out:[54]

> 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).

[48] The Employment Court considered that the protective mechanisms built into s 6 suggested that Parliament intended that the Employment 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 where the status of the person on whose behalf the action was commenced was in issue.[55]

[49] For our part (and in agreement with the Court of Appeal),[56] we do not see any reason to adopt an interpretation that differs from the plain meaning of the words in s 161(1)(c) in order to exclude from the jurisdiction of the Authority matters relating to status that are not, in fact, raised in the context of an application under s 6(5).

[50] The Court of Appeal observed that it would be hard to see what residual purpose s 161(1)(c) would serve if it were interpreted as the Employment Court found and as the appellants submit it should be.[57] Mr Ballara said the residual purpose would be to empower the Authority to address a claim brought personally (such as a personal grievance claim under s 103) by a person claiming to be an employee. If there were a dispute as to whether the person was an employee or a contractor, s 161(1)(c) would allow the Authority to resolve that dispute. On this argument, the identity of the applicant (the person concerned or a Labour Inspector acting on behalf of the person) would be the determining factor in defining the Authority's jurisdiction.[58]

[51] We do not consider that the clear wording of s 161(1)(c) leaves room for that interpretation. And, if it were correct, it would undermine the appellants' argument

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53 CA judgment, above n 5, at [34].
54 EmpC judgment, above n 4, at [14].
55 At [15].
56 CA judgment, above n 5, at [34].
57 At [34].
58 As counsel for the Labour Inspector, Ms Catran, pointed out, neither the Minimum Wage Act (s 11) nor the Holidays Act (s 77) draws any distinction between actions by individuals and actions by a Labour Inspector.

that the matter at issue in a dispute about status is so fundamental, it should be addressed by the more formal procedure inherent in a proceeding before the Employment Court. It that were true, it could be expected that applications by individuals should be channelled into the s 6(5) procedure too.

Section 6: a code?

[52] The appellants and the intervener argued that s 6 should be regarded as a code in relation to issues concerning the status of a person alleged to be an employee. We do not see anything in s 6 that would justify the finding that it is a code. Rather, it sets out a specific procedure to allow for a declaration to be made, which is quite different from an enforcement action under s 228 or, in the case of an individual, under s 131. And, if s 6 were a code, it would apply in respect of cases commenced by individuals too. The appellants accepted that the s 6(5) procedure was not required where an individual applicant pursued a case in the Authority in which status was in issue.

GSTech

[53] The Authority cited the decision of the Employment Court in *GSTech* to support the proposition that the Authority's jurisdiction under s 228(1) is constrained to matters brought by the Labour Inspector where those matters are already properly within s 228(1) (that is, it has been established, or is accepted, that the person on whose behalf the application is brought is an employee).[59]

[54] *GSTech* was not mentioned in the decision of the Employment Court in the present case, but the argument that had found favour in the Authority was made again by the appellants in the Court of Appeal. The Court of Appeal considered that the Authority had incorrectly interpreted *GSTech*.[60] In that case, the Employment Court held that the Authority's jurisdiction under s 228(1) was limited to amounts owed under the specific statutes referred to in s 228(1)—that process could not therefore be used for a claim by a Labour Inspector for other amounts owing by an employer.[61] We agree with the Court of Appeal that the Authority was in error in concluding that

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59 *GSTech*, above n 34, as cited in the Authority determination, above n 3, at [31].
60 CA judgment, above n 5, at [37]–[38].
61 *GSTech*, above n 34, at [9] and [13].

GSTech was an authority that applied in the circumstances arising in this case. It dealt with quite a different issue, and we do not consider it has any bearing on the present decision.

Legislative history

[55] Both counsel for the appellants and counsel for the intervener said that the legislative history, as recorded in the parliamentary debates on the passage of the Bill that became the Act, supported their (and the Employment Court's) interpretation.[62] Counsel for the Labour Inspector, Ms Catran, said the exchanges that occurred in the parliamentary debates had the opposite effect and supported the interpretation advanced by the Labour Inspector and adopted by the Court of Appeal.

[56] Opposition MPs expressed concern during the parliamentary debates that the Bill would provide that a person's employment status could be determined on the application of a union or Labour Inspector without that person's consent.[63] This concern was addressed by the inclusion in cl 6 of what is now s 6(6) and the carve-out in what is now s 161(1)(c).[64]

[57] During the Committee of the whole House stage, an Opposition MP pointed out that cl 6(6) applied to applications under cl 6(5), but did not prevent a similar challenge to the status of contractors being made by a Labour Inspector in an action for arrears of wages.[65] He proposed on three occasions amendments that would have made cl 6(6) apply to any proceeding in which a determination of employment status was required. Each of these amendments was rejected.[66]

[58] In short, a Member of Parliament predicted the very situation that now confronts this Court and suggested amendments that would have resolved the position in favour of the interpretation proposed by the appellants and the intervener. Such

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62 The relevant Bill is the Employment Relations Bill 2000.

63 (10 May 2000) 583 NZPD 2109 (Question to Minister by Hon Richard Prebble MP); and (11 May 2000) 583 NZPD 2181–2182 (Question to Minister by Hon Max Bradford MP).

64 See Employment Relations Bill 2000 (8-2), cl 6(6).

65 (9 August 2000) 586 NZPD 4118–4119 (Stephen Franks MP); and (9 August 2000) 586 NZPD 4487 (Stephen Franks MP).

66 (9 August 2000) 586 NZPD 4129–4130; (9 August 2000) 586 NZPD 4521–4522; and (15 August 2000) 586 NZPD 4863–4864.

amendments were defeated. The respondent submitted this indicates that the parliamentary history supports its interpretation and the view that Parliament did not consider it necessary to require all disputes relating to employee/contractor status to be channelled into the s 6(5) procedure. However, the appellants and the intervener argued to the contrary.

[59] The argument for the appellants is that the legislative history should be interpreted as indicating Parliament's intention that any dispute about employee/contractor status must be channelled through s 6(5).

[60] Mr Ballara argued that s 187(1)(f) and the carve-out in s 161(1)(c) should be interpreted, in light of the legislative history, as a requirement that any matter requiring a decision about a person's status that is initiated by a union or a Labour Inspector must be channelled through the s 6(5) process. The flaw we see in this argument is that both ss 161(1)(c) and 187(1)(f) specifically refer to s 6(5). Mr Ballara effectively asks this Court to read the parenthesised words in s 161(1)(c) to mean the Authority lacks jurisdiction to deal with applications brought by a Labour Inspector or union on behalf of another person where resolving the application would require a determination about employment status, until status has been resolved by the Employment Court. Section 187(1)(f) would require the converse reading, conferring on the Employment Court exclusive jurisdiction for any matter relating to status arising in the context of an application by a Labour Inspector or union, not just s 6(5) applications.

[61] However, we do not consider that to be an available reading. The references to s 6(5) in both ss 161(1)(c) and 187(1)(f) cannot simply be ignored. Nor can s 6(5) itself bear the meaning contended for by Mr Ballara, as we have already noted. If Parliament had the intention that Mr Ballara attributes to it, then it failed to express that intention.

[62] In the parliamentary debates, the Minister was criticised on the basis that she had provided an assurance that a person's status could not be changed without their involvement or consent, but that the draft Bill had not given effect to that assurance.[67]

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[67] (9 August 2000) 586 NZPD 4117–4119, 4487 and 4845–4846.

Mr Ballara said that the legislation should be interpreted in a way that gives effect to the assurance the Minister was said to have made. We do not consider that an available interpretation of the Act.

[63] We accept the respondent's argument in relation to the statutory history, as set out above at [58].

Policy matters

[64] As noted earlier, the Court of Appeal considered that there were a number of policy factors supporting its interpretation of the provisions in issue.[68] In particular:

(a) Allowing the Authority to determine an action under s 228(1) reflected the express object of the Act to ensure that decisions are made as efficiently and cheaply as possible and are not inhibited by strict procedural requirements. It also ensured that Labour Inspectors could take action to protect vulnerable people without potentially costly procedural impediments or a requirement that such vulnerable people must put their head above the parapet and risk reprisals from the defendant.[69]

(b) The Court of Appeal's interpretation meant appeal rights were preserved. There is a full right of appeal against the decision of the Authority but only a limited right of appeal against the decision of the Employment Court.[70]

[65] We agree that these factors make the interpretation we favour attractive, but we do not see them as decisive. The objective of the legislation for efficient and inexpensive decision-making is balanced by some decisions being entrusted to the more formal and expensive process undertaken by the Employment Court. And appeal rights against Employment Court decisions are the same for all decisions of that body,

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68 See the discussion above at [31]–[35].
69 CA judgment, above n 5, at [50].
70 At [55].

with very limited exceptions.[71] The fact that those appeal rights are limited is not a reason to find against the Employment Court having jurisdiction.

[66] The appellants argue that policy reasons suggest their interpretation is preferable. They say there is a risk that a Labour Inspector could bring an action under s 228(1) on behalf of a group of people who wanted to be contractors but became at risk of being found to be employees. If the Authority found for the Labour Inspector, the people found to be employees against their will would not be able to challenge the decision in the Employment Court because they would not have been parties to the action in the Authority.[72] This is the concern raised by Opposition MPs during the parliamentary debates.

[67] This issue would arise only if the Authority classified as an employee a person who (a) had wished to resist such classification and (b) had not been told about the s 228(1) action and given the opportunity to apply to be joined as a party under s 221.[73] In any event, it seems unlikely that a Labour Inspector would commence an action on behalf of a person the Labour Inspector knew would be better off as a contractor than as an employee. And, in the present case, the delivery drivers on whose behalf the action was commenced stand to gain considerably if found to be employees and therefore entitled to the minimum wage and holiday entitlements. So, it is hard to see why they would want to challenge a decision that ensured they obtained those benefits.[74] There is therefore an air of unreality to the policy consideration urged on us.

[68] We do not consider there is a compelling public interest reason to adopt what we consider to be the strained interpretation advocated for by the appellants.

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71 Employment Relations Act, s 214AA.

72 See s 179(1) of the Act.

73 If joined as a party, such a person would have a right to challenge the decision in the Employment Court. In any event, if a person whose status was determined in the Authority had not been notified of the proceeding, they could apply for review under s 194 or for a declaration under s 6(5).

74 The intervener argued that considerations relating to Kiwisaver, PAYE tax and child support payments were reasons why a person may prefer to be a contractor.

Result

[69] The appeal is dismissed.

[70] The appellants must pay the respondent costs of $15,000 plus usual disbursements.

Solicitors:
McBride Davenport James, Wellington for Appellants
Crown Law Office, Wellington for Respondent
LangtonHudsonButcher Lawyers, Auckland for Intervener