IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA553/2022
[2023] NZCA 81

BETWEEN	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Appellant
AND	HAIRLAND HOLDINGS LIMITED Respondent

Court: French and Courtney JJ

Counsel: K F Radich for Appellant
T P Cleary for Respondent

Judgment: (On the papers) 28 March 2023 at 10.30 am

JUDGMENT OF THE COURT

A The appellant's application for an extension of time to file an application for leave to appeal is granted.

B The application for leave to appeal under s 214 of the Employment Relations Act 2000 is granted on the following question of law:

> **Does the Employment Relations Authority have jurisdiction to hear an application, brought by a purported employer against the Chief Executive of the Ministry of Business, Innovation and Employment, the Labour Inspector and/or its workers, for a bare declaration that its workers are not employees under s 6(1) of the Employment Relations Act 2000?**

C Leave to appeal a second proposed question is declined.

D Costs on the application for leave to appeal are reserved pending determination of the substantive appeal.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] The Chief Executive of the Ministry of Business, Innovation and Employment (the Chief Executive) seeks leave under s 214(1) of the Employment Relations Act 2000 to appeal a decision of Judge Smith in the Employment Court.[1]

[2] Due to oversight, the application for leave to appeal was filed three days out of time. While the respondent Hairland Holdings Ltd (Hairland) opposes the application for leave to appeal on its merits, it abides the decision of the Court as regards the granting of an extension of time. The delay was short and has not prejudiced Hairland. We accordingly grant an extension of time.

[3] The case arises out of the investigation of a complaint made to the Labour Inspector by five hairstylists who had worked for Hairland. The Labour Inspector formed a preliminary view that the hairstylists were employees and that Hairland had breached certain minimum employment standards. Her report of 16 August 2018 gave Hairland a further opportunity to be heard before any enforcement action was taken.

[4] On 3 September 2018 Hairland filed what the Chief Executive describes as a "pre-emptive application" in the Employment Relations Authority (the Authority). The application named the Chief Executive as respondent and sought a declaration that the workers were independent contractors and not employees.

[5] On 20 September 2018, the Labour Inspector filed her own application in the Authority. The application asserted the hairstylists were employees, claimed wage arrears and holiday pay and sought the provision of records.

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[1] *Hairland Holdings Ltd v The Chief Executive of the Ministry of Business, Innovation and Employment* [2022] NZEmpC 169 [Employment Court decision].

[6] The parties raised jurisdictional objections to each other's proceeding and both contended the other's proceeding was an abuse of process.

[7] The Authority held it did not have jurisdiction to determine Hairland's application for a declaration, but that it did have jurisdiction to hear the Labour Inspector's proceeding. It considered the correct approach was for the Authority to deal with the Labour Inspector's proceeding and as a preliminary matter to investigate and determine whether the workers were employees. If the Authority were to determine there was an employment relationship it would continue to investigate and determine the Labour Inspector's claims. The Authority further found that the Labour Inspector's proceeding was not an abuse of process.[2]

[8] Hairland challenged all aspects of the Authority's determination in the Employment Court. The challenge was then stayed by consent pending the outcome of the Supreme Court appeal in *Gill Pizza Ltd v Labour Inspector*.[3]

[9] The Supreme Court delivered its decision in December 2021. It confirmed that when a Labour Inspector brings an action under s 228(1) of the Employment Relations Act on behalf of persons said to be employees, the Authority has jurisdiction to determine their employment status.[4]

[10] Once the Supreme Court decision was issued, the Chief Executive filed an interlocutory application in the Employment Court seeking an order lifting the stay of proceedings, dismissing the challenge and removing the matter to the Authority for determination.

[11] Hairland opposed the application. It conceded that *Gill Pizza* resolved that part of its challenge regarding the Authority's jurisdiction to hear the Labour Inspector's proceeding but maintained that the remainder of its challenge was still alive.[5]

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2 *Hairland Holdings Ltd v The Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZERA Christchurch 196 [Employment Relations Authority decision] at [53]–[56] and [65]–[68].

3 *Gill Pizza Ltd v Labour Inspector* [2021] NZSC 184, [2022] 1 NZLR 1.

4 At [39]–[49] and [69].

5 Employment Court decision, above n 1, at [14].

[12] It is the Employment Court's decision on the interlocutory application (which it treated as a strike-out application) that is the subject of the proposed appeal.[6]

[13] For present purposes, the key findings in the Employment Court judgment are as follows:

(a) The Authority did have jurisdiction to entertain Hairland's application for a declaration.[7]

(b) While there were deficiencies in Hairland's pleadings (it had named the wrong respondent and failed to join the five stylists) these were deficiencies capable of being cured by an amended pleading and therefore not grounds for a strike-out.[8]

(c) Although Hairland would have difficulty meeting the high threshold required to establish an abuse of process in relation to the Labour Inspector's proceeding, the Authority had not addressed the concern over duplication and it was possible Hairland might succeed on this ground.[9]

[14] The Chief Executive's application to strike out the challenge was accordingly dismissed.[10]

The application for leave to appeal

[15] In order to obtain leave to appeal the decision, the Chief Executive must persuade us that the proposed appeal involves a question of law which is of general or public importance or which for any other reason ought to be submitted to the Court for determination.[11]

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6 At [12]–[14] and [39].
7 At [30]–[32].
8 At [34].
9 At [37]–[38].
10 At [39].
11 Employment Relations Act 2000, s 214(3).

[16] The application involves two proposed questions of law as follows:

> 1.1 Does the Employment Relations Authority have jurisdiction to hear an application, brought by a purported employer against the Chief Executive of the Ministry of Business, Innovation and Employment, the Labour Inspector and/or its workers, for a bare declaration that its workers are not employees under s 6(1) of the Act?
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> 1.2 If the answer is "yes", is it nevertheless an abuse of process for the purported employer to make or maintain such an application when there are other more appropriate statutory mechanisms (such as ss 194, 223E and 228) for contesting the issue of employment status, which are already on foot or otherwise available?

[17] Contrary to a submission made by Hairland, we consider the first proposed question of law is reasonably arguable. It is also self-evidently a question of general and public importance which should appropriately be determined at an interlocutory stage.

[18] The position is not as clear-cut in relation to the proposed second question. The Authority's determination did not address the issue of whether Hairland's proceeding was an abuse of process. Nor was that issue a specific ground of the Chief Executive's "strike-out" application in the Employment Court and it was not addressed by the Employment Court.[12] The latter appears to have assumed that *as argued* the issue of abuse of process stood and fell with the jurisdiction point. We do not interpret the Judge's decision as articulating some absolute proposition that so long as a party has the jurisdictional right to file a proceeding, that proceeding can never amount to an abuse of process. That would obviously be wrong and cannot have been intended.

[19] If the proposed second question was designed to correct an error that on our interpretation of the Employment Court decision has not in fact occurred, then leave would not be granted. The wording of the proposed second question does however purport to go further than that. What it seeks is a ruling that even if there is jurisdiction to entertain Hairland's proceeding, as a matter of law it will always be an abuse of

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[12] Employment Court decision, above n 1, at [35].

process to bring such an application where there are other more appropriate statutory mechanisms already on foot or otherwise available. We are not persuaded that is a tenable proposition. An abuse of process is an intensely factual inquiry and each case will turn on its own facts.

[20] We therefore decline leave in relation to the second proposed question.

Outcome

[21] The appellant's application for an extension of time to file an application for leave to appeal is granted.

[22] The application for leave to appeal under s 214 of the Employment Relations Act 2000 is granted on the following question of law:

> Does the Employment Relations Authority have jurisdiction to hear an application, brought by a purported employer against the Chief Executive of the Ministry of Business, Innovation and Employment, the Labour Inspector and/or its workers, for a bare declaration that its workers are not employees under s 6(1) of the Employment Relations Act 2000?

[23] Leave to appeal a second proposed question is declined.

[24] As regards costs on the application for leave to appeal, we consider the most appropriate course of action is to reserve these pending determination of the substantive appeal.

Solicitors:
Clancy Fisher Oxner & Bryant, Tokoroa for Respondent