IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA488/2019
[2021] NZCA 192

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

Hearing: 22 September 2020

Court: Cooper, Clifford and Courtney JJ

Counsel: A E Scott-Howman and C R English for Appellant
G G Ballara and S P Radcliffe for Respondents
S C Langton and R M Tomkinson for Intervener

Judgment: 17 May 2021 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The answer to the question of law set out at [3] is "yes".

C We make no order as to costs.

REASONS OF THE COURT

(Given by Courtney J)

[1] A Labour Inspector brings an action in the Employment Relations Authority (the Authority) under the Employment Relations Act 2000 (ERA) to recover wages said to be owing under the Minimum Wage Act 1983 and the Holidays Act 2003. The respondent denies that those on whose behalf the action is brought are employees. Does the Authority have jurisdiction to determine the question of employment status? This issue has not previously been considered at appellate level.

[2] The action in question was brought on behalf of 28 pizza delivery drivers.[1] The pizza companies responded that the drivers were not employees but contractors. They said that the Authority did not have jurisdiction to determine whether the drivers were employees; that issue would have to be determined by the Employment Court on

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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. They are not the subject of the appeal.

application by, or with the consent of, each driver. The Authority agreed.[2] The Employment Court dismissed the Labour Inspector's challenge.[3]

[3] This Court granted leave under s 214 of the ERA for the Labour Inspector to appeal on the following question of law:[4]

> Whether 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.

[4] The respondents are the companies for which the pizza drivers work and the directors of those companies. The companies' businesses are franchised to Restaurant Brands Ltd, which has leave to intervene.

The statutory scheme

[5] The objects of the ERA relevantly include:[5]

> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
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> …
>
> (vi) by reducing the need for judicial intervention; and
>
> (ab) to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court; …
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> …

[6] The scheme of the ERA 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 pt 10, which promotes mediation (except for enforcing

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2 *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2018] NZERA Wellington 113 [Preliminary Determination].

3 *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2019] NZEmpC 110 [Employment Court decision].

4 *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2019] NZCA 655 [Leave decision].

5 Employment Relations Act 2000, s 3.

employment standards) as a way of resolving such problems and which requires the chief executive to provide mediation services accordingly.[6] At the same time, the procedures and institutions established by pt 10 also:[7]

> …
>
> (e) recognise that there will always be some cases that require judicial intervention; and
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> (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.

[7] Part 10 established the Authority and continued the Employment Court accordingly.[8]

[8] 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".[9] The Court continues to be the court of record with inherent powers established under the Employment Contracts Act 1991 and has the jurisdiction and powers given by the ERA.[10]

[9] The Authority has extensive powers that reflect its central role as the investigative body, fact finder and determiner of substantial merits. Section 160 provides:

> (1) The Authority may, in investigating any matter,—
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> (a) call for evidence and information from the parties or from any other person:

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6 Section 144.
7 Section 143.
8 Sections 156 and 186.
9 Section 157(1).
10 Section 186.

(b) require the parties or any other person to attend an investigation meeting to give evidence:

(c) interview any of the parties or any person at any time before, during, or after an investigation meeting:

(d) in the course of an investigation meeting, fully examine any witness:

(e) decide that an investigation meeting should not be in public or should not be open to certain persons:

(f) follow whatever procedure the Authority considers appropriate.

…

[10] Under s 161(1) the Authority has exclusive jurisdiction "to make determinations about employment relationship problems generally", 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).[11]

…

[11] Section 187(1) identifies the exclusive jurisdiction of the Employment Court, which includes:

…

(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):

…

[11] As here actions to recover minimum wages.

[12] At issue here is the implication for the Authority's jurisdiction of s 6(5).

[13] Section 6 first provides a definition of an employee for the purposes of the Act:

> (1) In this Act, unless the context otherwise requires, **employee**—
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> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
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> (b) includes—
>
> (i) a homeworker; or
>
> (ii) a person intending to work; but
>
> (c) excludes a volunteer who—
>
> (i) does not expect to be rewarded for work to be performed as a volunteer; and
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> (ii) receives no reward for work performed as a volunteer; and
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> (d) excludes, in relation to a film production, any of the following persons:
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> (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:
>
> (ii) a person engaged in film production work in any other capacity.
>
> (1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.
>
> …

The section continues:

> …
>
> (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.

…

Of specific relevance to this appeal, the section then provides:

…

(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.

…

[14] The significance of s 6(5) arises here in the context of pt 11 of the ERA, which contains a scheme for ensuring compliance with nine specified Acts, one of which is the Minimum Wage Act.[12] The statutory obligation to ensure compliance with these Acts falls on Labour Inspectors, whose statutory functions include:[13]

(a) determining whether the provisions of the relevant Acts have been complied with; and

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[12] The relevant legislation, listed in s 223(1), is the ERA itself, the Support Workers (Pay Equity) Settlements Act 2017; the Equal Pay Act 1972; the Holidays Act 2003; the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016; the Minimum Wage Act 1983; the Parental Leave and Employment Protection Act 1987; the Volunteers Employment Protection Act 1973; and the Wages Protection Act 1983.

[13] Section 223A.

(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.

[15] A suite of tools is provided for this purpose: enforceable undertakings[14], improvement notices,[15] demand notices,[16] the right to bring an action to recover wages or holiday pay[17] and the power to issue infringement notices.[18] 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.[19]

[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 wage and other records.[20] 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.[21]

[17] As noted, this case concerns the power to bring actions under s 228(1), which relevantly 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 under the Minimum Wage Act 1983 or Holidays Act 2003.

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14 Section 223B.
15 Section 223D.
16 Section 224.
17 Section 228.
18 Section 235C.
19 Section 142A.
20 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".
21 *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].

[18] Thus, whilst section 161(q) confers on the Authority exclusive jurisdiction to determine actions brought under s 228(1), section 187(f) confers on the Employment Court exclusive jurisdiction to make declarations under s 6(5) as to employment status. The ERA does not make clear which jurisdiction prevails where a dispute over employment status arises in the context of s 228(1) action.

The Employment Court's decision

[19] The Labour Inspector argued that the combined effect of ss 6, 161 and 228(1) allowed her to bring an action before the Authority for minimum entitlements even where the existence of an employment relationship is disputed. In such cases the Authority would deal with employment status as a preliminary issue. If satisfied an employment relationship exists, the Authority can proceed to determine the claim. If not, the claim will fail.[22]

[20] Notwithstanding the attraction of having the status issue resolved more cheaply and quickly in the Authority, the Employment Court held that the Labour Inspector's argument cut across the scheme of s 6(5) and (6):[23]

> Parliament has expressly conferred on the Court (not the Authority) the statutory power to determine, on application, whether a person or person on whose behalf a claim is made are employees or workers within the meaning of any of the Acts specified in s 223(1).

[21] 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 an issue:

> [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).

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22 Employment Court decision, above n 3, at [9]. This approach was taken by the Authority in *Hairland Holdings Ltd v Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZERA Christchurch 196 at [67].

23 Employment Court decision, above n 3, at [11].

[22] 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). This aspect was central to the Court's reasoning:

> [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. Notably no such protections apply under s 228.
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> [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. 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.
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> …
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> [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.
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> (Footnotes omitted.)

[23] Acknowledging the policy objectives of efficient and timely resolution of Authority investigations, the Employment Court nevertheless considered that its interpretation did not risk either an absurd result or undue complexity.[24] Nor was it concerned at the risk of status being put in issue for tactical reasons, foreshadowing the potential for an award of increased costs against employers who did so.[25]

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24 At [19].
25 At [22].

[24] The effect of the Court's conclusion is that where status is put in issue in a s 228(1) action, the Labour Inspector must make an application under s 6(5) with the Authority staying the action pending the outcome of that application or removing the whole matter to the Employment Court.[26]

Appeal

The appellant's submissions

[25] Mr Scott-Howman, for the Labour Inspector, submitted that the Employment Court had misunderstood the nature of the s 228 action. He argued that the Court effectively treated the s 228 action as one to determine employment status but because that question was raised by the respondents in defence rather than by the Labour Inspector, the overall statutory scheme brings it within the Authority's jurisdiction under s 161(1)(q). The issue of status is simply an ingredient of the action to be proved.

[26] Key to these submissions is the statutory role of the Authority and the Labour Inspector as outlined earlier. The power under s 228(1) to recover underpayment of statutory entitlements is intended to protect those who cannot, whether through lack of sophistication or disparity in bargaining power, protect themselves. The enforcement of minimum entitlements by Labour Inspectors is intended to be within the jurisdiction of the Authority rather than the Court.

The respondents' and Intervener's submissions

[27] The respondents and the Intervener support the interpretation adopted by both the Authority and the Employment Court but advance slightly different arguments.

[28] The respondents say that, in bringing a s 228(1) action where status is disputed, the Labour Inspector is purporting to seek a declaration as to status from the Authority. However, that is not something that the Labour Inspector is entitled to do under s 228(1) and, in any event, the Authority does not have the jurisdiction to make such a declaration. Further, a s 288(1) action can only be brought in respect of an employee

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[26] At [20].

and where that status is disputed a declaration must be sought from the Employment Court under s 6(5) of the ERA.

[29] The Intervener says that the s 228(1) actions are effectively a class action on behalf of the pizza drivers and status should therefore be determined under s 6(5), which operates as a code for the determination of status in the first instance. Until a declaration has been sought under s 6(5), the Labour Inspector has no power to commence an action under s 228(1) and the Authority has no jurisdiction to determine such an action. Even then, the Labour Inspector's powers are only to act on behalf of a single employee, not a class.

[30] The Intervener cautioned that the s 6(6) procedural safeguards for individuals should not be overridden by allowing status to be determined in the context of a s 228(1) action. The persons on whose behalf a s 228(1) action is brought are not party to the proceeding, and therefore have no opportunity to appeal any determination the Authority may make on their employment status.[27] It is incumbent upon a Labour Inspector wanting to bring a s 228(1) action to resolve employment status issues through the Employment Court first. This does not undermine the access to justice policy underpinning the Labour Inspector's role but allows it to accommodate the procedural safeguards contained in ss 6(5) and (6). This means that a claim brought on behalf of an individual under s 228(1) whose status is disputed can only proceed once a declaration has been obtained under s 6(5).

The correct interpretation

[31] The approach to questions of statutory interpretation is settled; as a matter of principle, the meaning is informed by the text of the legislation in light of its purpose.[28] We consider that the Employment Court's conclusion is wrong because it is inconsistent with the text and with the purpose of both s 6(5) and the scheme of the enforcement provisions.

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[27] Under s 179 of the Employment Relations Act, only a "party" to a determination of the Authority can challenge the determination in the Employment Court.

[28] Interpretation Act 1999, s 5; and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

[32] We start with the wording of s 228(1). As noted, this provision forms part of the suite of tools provided to enable Labour Inspectors to discharge their statutory functions. We agree with the appellants that, in order to succeed in an action brought under s 228(1), a Labour Inspector must establish the status of the person on whose behalf the action is brought. Even if the status is unchallenged, that is a plainly a matter on which the Labour Inspector must still satisfy the Authority. Given the Authority's exclusive jurisdiction to determine s 228(1) actions, it follows that it must have the jurisdiction to determine status in the context of such a claim. There is nothing in s 161(1)(q), which is directed specifically towards s 228(1) actions, to suggest that such an action is to be treated differently when status is disputed from when status is not in issue. Had that been intended, we would have expected to see a specific qualification.

[33] Section 161(1)(c) does not affect this conclusion. Section 161(1)(c) provides that the Authority has exclusive jurisdiction to make determinations about whether a person is an employee, except "matters arising on an application under [s] 6(5)". The respondents submit that s 161(1)(c) only provides the Authority with "incidental" or "oblique" jurisdiction to determine questions of status in a matter already properly before the Authority; it does not confer "substantive jurisdiction" to declare status under s 6. Similarly, the Intervener submits that in s 161(1)(c) Parliament expressly provided for a "carve-out" of the Authority's exclusive jurisdiction for matters which arise on an application under s 6(5). The Intervener suggests that the present case is such a matter, and so a declaration is necessary before the s 228(1) action can proceed.

[34] We do not consider that s 161(1)(c) goes this far. There is nothing in the ERA to suggest that a s 6(5) declaration is a requirement in a s 228 action, even where employment status is at issue. The natural and ordinary meaning of s 161(1)(c) is that the question of employment status is only taken out of the ERA's hands *if* a s 6(5) application has been made. In other words, 6(5) is the "carve-out" provision, not s 161(1)(c). On the respondents' and Intervener's approach, it is difficult to see what residual purpose s 161(1)(c) would serve.

[35] Further, we were advised from the bar that, in practice, status is not infrequently put in issue in response to Labour Inspectors' actions under s 228(1) and,

prior to this case, was routinely resolved by the Authority. That is evident from the several cases that Mr Scott-Howman provided.[29] For example, *A Labour Inspector v Southern Taxis Ltd* concerned an action brought on behalf of four taxi drivers for arrears and penalties for breaches of the Minimum Wage Act and the Holidays Act.[30] The respondent defended the action on the basis that the taxi drivers were contractors, not employees. The Authority undertook an orthodox examination of the relevant factors, concluded that they were employees and made the orders sought.

[36] To like effect, though in a slightly different context, is the Authority's decision in *Hairland Holdings Ltd v Chief Executive of the Ministry of Business Innovation and Employment*.[31] In that case, a Labour Inspector investigated the employment practices of a company, concluded that the workers were employees and demanded employment records. The company maintained that the workers were independent contractors and sought a determination from the Authority to that effect. The Labour Inspector brought a separate application seeking, among other things, orders for both the production of records and payment of minimum wage arrears. The Authority concluded that it had jurisdiction to determine status; although the Labour Inspector could apply under s 6(5) for a declaration as to employment status, she was not bound to do so.[32] Moreover, she was entitled to bring proceedings in the Authority knowing that the issue of employment status was disputed.[33] If the Authority were to find that the workers were not employees, then neither it nor the Labour Inspector would have any further jurisdiction. If the Authority were to find that they were employees, it would proceed to investigate and determine the claims.[34]

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29 *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.

30 *A Labour Inspector v Southern Taxis Ltd,* above n 29. It was not explicit that the action was brought under s 228(1) but it is clear from the judgment that this was the statutory basis for the claim.

31 *Hairland Holdings Ltd v The Chief Executive of the Ministry of Business Innovation and Employment*, above n 22.

32 At [55].

33 At [56].

34 At [68].

[37] It appears that, in departing from its previous practice of determining status in the context of s 228(1) actions, the Authority was influenced by the Employment Court's decision in *GSTech Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment*, decided a few months before it heard this case.[35] *GSTech* concerned an action brought by a Labour Inspector under s 228(1) for unpaid minimum wages. The claim failed but the Authority found that wages and holiday pay other than those owing under the Minimum Wage Act and Holidays Act were due. These amounts were not minimum entitlements that could be recovered by the Labour Inspector — they could only be recovered by the employee himself bringing a claim. The question in *GSTech* was whether the Authority had jurisdiction to determine a claim for the recovery of wages under the employment agreement where the issue had arisen in the course of a s 228(1) action but was held not to engage s 228(1). The Court held that the Authority's jurisdiction was limited to the s 228(1) action, which was "the only matter the Labour Inspector was statutorily entitled to bring before the Authority".[36]

[38] The decision in *GSTech* was not controversial but the Authority took the view that it had the effect of precluding jurisdiction to determine the status question because s 228(1) did not empower the Labour Inspector to bring this question before the Authority — this could only be done by application to the Employment Court under s 6(5).[37] This was not a correct interpretation of *GSTech*.

[39] The Employment Court does not appear to have considered the Authority's previous approach to resolving questions of status in s 228(1) actions. As outlined earlier, the Court's primary concern was that the Labour Inspector's argument would cut across the protective mechanisms in s 6(6).

[40] In our view ss 161(1)(c) and (q) and 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 been an application under s 6(5). We therefore turn to consider how those provisions relate to

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35 *GSTech Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 84.

36 At [16].

37 Preliminary determination, above n 2, at [37]–[40].

s 6(5). Section 6 was introduced against the background of increasing prevalence of contracts for services under which the autonomy of the self-employed contractor was limited to the extent that it more closely resembled an employment relationship.[38] It represented a significant departure from the previous definition of "employee", which had been applied so as to more strongly reflect the contractual form adopted by the parties and acceptance of the parties' choices.[39] The policy considerations that led to the changed definition were canvassed at length by this Court in *Three Foot Six Ltd v Bryson*.[40] The Court observed that the policy underlying s 6 is to stop employees inappropriately limiting the reach of the Act by resort to artificial contractual form, and to focus on the "real nature of the relationship".[41]

[41] The requirement in s 6(6) for consent by persons whose status is in issue in an application brought under s 6(5) can 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 to be employees (the contrary risk, that people would be declared to be contractors against their wishes, appears not to have been considered). The expressions of concern focussed mainly on the possibility of a union seeking a declaration in respect of some workers, against the will of others. However, the intended purpose of ss 6(5) and (6) appears from the statements made during the debate by the then Minister of Labour, the Hon Margaret Wilson:[42]

> The bill gives an opportunity to people to seek a determination of their status, if that is what they want to do.

And in response to the question whether it would be possible for a union to seek to change the status of a worker without the worker wishing it to be changed:[43]

> … [C]lause 154 does provide an opportunity for people who feel that their legal status is not clear to take a case before the court. That case can be taken on behalf of individuals by a union, which has to identify the class of people who would be affected and thereby notify them that they would be affected.

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38 John Hughes *Mazengarb's Employment Law (NZ)* (online looseleaf ed, LexisNexis) at [ERA 6.4.1].

39 *Cunningham v TNT Worldwide Express (NZ) Ltd* [1993] 3 NZLR 681 (CA). See also the discussion in *Three Foot Six Ltd v Bryson* (2004) 2 NZELR 29 (CA) at [69].

40 *Three Foot Six Ltd v Bryson*, above n 39.

41 At [79]. There was, however, no specific discussion about ss 6(5) and (6). An appeal against this decision was successful on an unrelated point: *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

42 (9 May 2000) 583 NZDP 1962.

43 (11 May 2000) 583 2181.

[42] Although a declaration can be sought in respect of a class of persons, s 6(5) is not specifically directed or limited to class actions. The wording is clear that an individual may seek a declaration or another person (with consent) may seek a declaration on behalf of that individual.

[43] In *Lowe & Tarawhiti v New Zealand Post Ltd* Judge Colgan (as he then was) made the following observations about s 6(5) and the importance of allowing those affected by any declaration to be heard on the matter:[44]

> … [Section] 6 for the first time in New Zealand employment law establishes a means for determining the legal status of a working relationship by a form of statutory declaration. Inherent in a legal and institutional structure that emphasises the importance of immediate parties (individual and corporate) nominated in a particular case, is now a process that acknowledges and requires the Court to cater for the reality that there may be a substantial number of persons who, although not named parties in the litigation, will or may be significantly affected by a decision under s 6(5). So the Court must not only do justice according to law between the nominated parties to a proceeding, but must also acknowledge and take into account the consequences of both the litigation and the decision of it upon others in other working relationships.

[44] In *Leota v Parcel Express Ltd*, which concerned an application by a courier driver for a declaration that he was an employee, Chief Judge Inglis observed:[45]

> [54] … [I]f Parliament had intended those working within a whole industry to be categorised as independent contractors, it is likely it would have said so rather than imposing a fact-specific, case-by-case test which the Court must work through, applying s 6. In this regard, it is notable that Parliament has not chosen to make special provision for courier drivers, unlike sharemilkers and real estate agents (s (6)(4)), volunteers (s 6(1)(c)) and certain persons engaged in film production (s 6(1)(d)).
>
> …
>
> [72] Every worker in New Zealand has the statutory right to seek a declaration as to whether they are an employee. …

[45] Against that background, we see the following as relevant.

[46] 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

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44 *Lowe & Tarawhiti v New Zealand Post Ltd* [2003] 2 ERNZ 172 (EmpC) at [16].
45 *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395.

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). Instead, it refers only to s 223(1) which, in turn, identifies the Minimum Wage Act and other enactments as ones in respect of which Labour Inspectors may be designated. But the reference to s 223(1) is as the means of identifying the scope of the declaration the Court may make (i.e. whether the person is an employee within the meaning of the ERA or one of the Acts specified in s 223(1). There is nothing in s 6(5) aimed directly at s 228(1) actions.

[47] Secondly, the arguments by the respondents and the Intervener have 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. For example, a Labour Inspector may bring an action to recover penalties imposed under the Holidays Act[46] and the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016.[47] The Authority has exclusive jurisdiction to determine those actions.[48] On the argument for the respondents and the Intervener, the Authority would be precluded from doing so unless the Labour Inspector had the consent of the person involved or had first obtained a declaration under s 6(5). This is a significant intrusion into the (apparently) unqualified exclusive jurisdiction of the Authority. Yet there is no indication in the text that this is the intention; if this was the intended operation of the statutory scheme, one would expect to see an express qualification to s 161.

[48] 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. Even if status were the only live issue between the parties, they would still have to go the Authority for the orders sought under s 228(1) unless the Authority removed the entire matter to the Court under s 178. The Employment Court considered this a realistic alternative.[49] But removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the

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46 Holidays Act, ss 75 and 76.
47 Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016, s 25.
48 Employment Relations Act, s 161(1)(m).
49 Employment Court decision, above n 3, at [20].

Authority. It seems very unlikely that a s 228(1) action would satisfy the pre-requisites.

[49] Related to this point is the fact that a court may decide against making a declaration under s 6(5). Declaratory relief is flexible and discretionary.[50] While general principles have developed to guide the exercise of the discretion, it is always open to a court, in the individual circumstances of a particular case, to conclude that special features justify departing from that guidance.[51] Moreover, the courts have traditionally treated the power to grant declaratory relief as "one that should be exercised with utmost caution",[52] particularly where the party seeking a declaration "can without real difficulty have the matter in dispute disposed of in any ordinary action".[53] As discussed above, questions of status arising in the context of s 228(1) actions are often dealt with by the Authority. Parliament cannot have intended the singular nature of the relief provided for in s 6(5) to cut across the efficient resolution of such actions in the Authority.

[50] In particular, the approach contended for by the respondents and the Intervener raises 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. It would also run counter to the underlying purpose of s 228(1) to protect vulnerable workers; one type of vulnerability is the fear of reprisal by the person or entity named in the s 228(1) action as an employer. The fact that a Labour Inspector can act without the consent of the employee is a distinct advantage for both vulnerable workers and the public interest in having minimum standards enforced. This advantage would be lost if consent were required. It would also expose vulnerable employees to tactical assertions by employees regarding employment status. We do not consider that the

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50 Lord Woolf, Jeremy Woolf and Lord Eassie (eds) *The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at 4–01.

51 At 4–06.

52 At 4–13, quoting *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 (HL) at 445 per Viscount Finlay.

53 *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85 per McCarthy P.

risk of adverse costs awards an adequate deterrence; that assumes that the matter will proceed but the greater risk is that of the worker being deterred from proceeding.

[51] 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. Mr Langton, for the Intervener, accepted the costs would be greater but submitted that the level of speed and efficiency would be the same. He argued that it would be more expeditious to have the Employment Court determine status at the outset than for the s 228(1) claim to be determined and the result appealed. We do not accept that submission. One of its underlying premises is that the Court would find the person the subject of the application not to be an employee. There is no basis for that assumption and, as already noted, if the person was found to be an employee the parties would have to return to the Authority for a final determination of the action, thereby increasing the cost, delay and inconvenience for all.

[52] We note the Employment Court's view that inefficiencies arising from requiring status to be determined in the Court would be reduced by the Authority staying the action pending resolution of that issue or, alternatively removing the entire matter to the Court under s 178. We have already commented on the latter. As to the former, having parties determine different issues in the same action in different fora is plainly inefficient and would usually be regarded as an abuse of process.

[53] The other underlying premise of the submission was that the Authority's determination would be appealed. Again, there is there no reason to think that the Authority's determination of status is more likely to be appealed than its determination of any other issue. The cases to which we referred earlier, in which the Authority had determined status as part of a s 228(1) action, suggest that parties do tend to accept the Authority's determination of this issue.

[54] Related to this point was Mr Langton's suggestion that parties would have the benefit of greater expertise in the Court. The Authority and the Court have very different roles under the ERA and the Authority's decisions are of course subject to challenge in the Court. However, the Authority is expressly recognised as the primary

investigative body with the power and expertise to make factual findings regarding status. Conferring on the Court the exclusive jurisdiction to determine status is inconsistent with the express object of the ERA 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.

[55] Moreover, precluding the Authority from determining status in a s 228(1) action would seriously limit the recourse available to parties in the event of error by the fact finder. 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.[54] This is not insignificant, given the intensely fact-specific nature of the inquiry into status. But a decision of the Employment Court is subject only to a right of appeal, with leave, on a question of law.[55] A party who considers that the Court has made an error in its factual findings will have no recourse.

[56] In our view the proper interpretation of ss 6(5), 161(1)(q) and 228(1) requires the Authority to determine all aspects of an action brought under s 228(1). This does not undermine the efficacy of s 6(5), which we see as complementary to s 161(1). Section 6(5) provides a stand-alone means by which the status of an individual or a class of persons can be determined other than in the context of actions that are specifically provided for elsewhere in the ERA, such as an action under s 228(1).

[57] It is clear that the status issue arises in a variety of other contexts. *McGreal v Television New Zealand Ltd* concerned the (unsuccessful) application by a sound engineer as to his status, apparently to determine the correct forum for proceedings that the applicant wished to bring against Television New Zealand Ltd.[56] In *Leota v Parcel Express Ltd*, the courier-driver applicant applied (successfully) for a declaration that he was an employee, apparently so he could access statutory entitlements.[57] Interpreting s 6(5) as complementary to s 161(1) allows these kinds of claims to proceed while still allowing the Authority to determine s 228(1) actions as it always has done.

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54 Employment Relations Act, s 179.
55 Section 214.
56 *McGreal v Television New Zealand Ltd* (2007) 4 NZELR 345 (EmpC).
57 *Leota v Parcel Express Ltd*, above n 45.

The new s 229A

[58] Section 229A was introduced after this case was decided in the Employment Court.[58] It provides that a Labour Inspector may exercise his or her investigatory powers under s 229 to investigate whether any person performing work is an employee, "as distinct, for example, from an independent contractor or a volunteer".[59] This new provision was not advanced as having any direct application to this appeal. Mr Scott-Howman simply submitted that the new power would enable a Labour Inspector to make a determination in terms of that provision before bringing an action under s 228(1), in which case the Authority would unquestionably be seized of the status issue. The appeal therefore may be more of an academic interest than practical significance in future cases.

[59] Although s 229A cannot affect the outcome in this case, we nevertheless reject the suggestion that it would be open to a Labour Inspector to make a status determination on the same terms as the Authority or the Court. Section 229A empowers a Labour Inspector to use its powers under s 229 to *investigate* whether a person performing work is an employee. As observed in the Parliamentary debate, the new provision:[60]

> … enables labour inspectors to use their investigative powers to ascertain whether workers are employees so they can ensure workers are paid the minimum wage, get their full leave entitlements, and have a safe workplace. As the number of contractors rises, determining whether someone is an employee or not is becoming increasingly important.

[60] It may be that the new investigatory power increases the likelihood of an employer accepting from the outset that the person involved is an employee, based on the information gathered by the Labour Inspector, thereby reducing the likelihood of status being put in issue. There is, however, no basis on which to conclude that greater investigatory powers were intended to disturb the existing provisions relating to

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58 Clause 5 of the Regulatory Systems (Workforce) Amendment Bill (No 2) 2018 (101-2) was before the House while this matter was being litigated in the Employment Court. The Bill received royal assent on 13 November 2019 and came into force on 13 January 2020.

59 Employment Relations Act, s 229A(1)(b).

60 (7 November 2019) 742 NZDP (Regulatory Systems (Workforce) Amendment Bill (No 2) – Third Reading, Iain Lees-Galloway).

determining employment status or to confer the power to make a binding declaration comparable to that available to the Employment Court to make under s 6(5).

Result

[61] The appeal is allowed.

[62] The answer to the question of law set out at [3] is "yes".

[63] We make no order as to costs.

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