Determining whether a worker is an employee – an overlapping jurisdiction?

The recent decision of the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) and Hairland Holdings Limited raises some interesting issues.

The Court of Appeal delivered a split decision with MBIE being successful on appeal.

The Facts

Hairland Holdings Limited (**HHL**) operates a walk-in hairdressing business. In 2018, when the proceedings began, it had approximately 150 hairstylists working in 25 salons nationwide.

The business was investigated by a Labour Inspector who concluded that the workers were 'employees' and that there had been a breach of minimum entitlements. She sought a response from HHL on possible enforcement action on the basis that the employees had not received their minimum statutory entitlements.

HHL considered the hairstylists were independent contractors and that there had been no breach of minimum entitlements.

Rather than wait for the Labour Inspector to take further steps (such as a claim for breach of minimum entitlements), HHL pre-emptively filed a Statement of Problem with the Employment Relations Authority (**Authority**) seeking a determination that the hairstylists were not employees. MBIE argued that the Employment Relations Authority did not have jurisdiction to determine the claim because there was no employment relationship problem between the Labour Inspector and HHL.

The legal issues

The arguments centered around s161 of the Employment Relations Act (**Act**). That section deals with jurisdiction. Section 161(1)(c) provides the Authority has exclusive jurisdiction to make *determinations about employment relationship problems generally, including – matters about whether a person Is an employee.*

There is a limitation to that aspect of the jurisdiction. Specifically, the Authority does not have jurisdiction in relation to matters arising under an application under s6(5).

Section 6(5) allows the Court, on application of a Union, Labour Inspector or one or more other persons, to declare whether the person or persons named in the application are employees under the Act.

The Labour Inspector subsequently filed a claim seeking unpaid minimum entitlements. HHL argued that the Authority did not have jurisdiction to determine that claim because the workers were not employees and their status could only be determined by the Employment Court under Section 6(5).

The Authority decided that it did not have jurisdiction to determine HHL's claim but did have jurisdiction to determine the status of the hairstylists in the context of the Labour Inspector's claim.

HHL pursued the matter to the Employment Court, which determined that the Authority did, in fact, have jurisdiction to determine HHL's application. MBIE then appealed the matter to the Court of Appeal.

The Court of Appeal

The Court of Appeal observed that both the Authority and the Employment Court had jurisdiction to determine the status of workers, although the jurisdiction of each is distinct.

Under s161 of the Act the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. That includes, at subsection 1(c), matters about whether a person is an employee subject to the s6(5) carve out. The

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Employment Court has exclusive jurisdiction to determine applications made under s6(5).

The Authority held that because there was no employment relationship between HHL and MBIE, there was no employment relationship problem. The Employment Court however ruled that an employment relationship is not necessary for an employment relationship problem to arise – all that is needed is a problem or controversy arising in the work context. HHL maintained that the disagreement between it and the Labour Inspector fell within this definition and therefore fell within s161(1)(c).

There was extensive argument regarding the Supreme Court's decision of *FMV v TZB* [1].

The Court of Appeal noted that Justice Williams, writing for the majority, confirmed that the Employment Relations Authority has exclusive jurisdiction to make determinations about problems generally but that the only requirement is that the problem must be an employment relationship one, that is, it must relate to or arise from the employment relationship.

The Court of Appeal ruled that the Authority's jurisdiction under s161(1) only arises where there is both an employment relationship and a problem that relates to or arises from that relationship, in the work context. If there is no employment relationship, there can be no employment relationship problem.

The Court went on to observe that, in terms of the tests articulated in *FMV v TZB,* there is no employment relationship problem. HHL rejected the possibility of its workers being employees yet, at the same time, relied on the Labour Inspector's assertion of an employment relationship as the basis for an employment relationship problem.

Interestingly, if HHL had not filed pre-emptively and had waited for MBIE to file its claim for unpaid minimum entitlements, then there would clearly have been an employment relationship problem relating to minimum entitlements and the Authority would have had exclusive jurisdiction to determine HHL's counter-argument that its workers were not employees.

However, because HHL's claim pre-empted MBIE's claim, it was left arguing that the Labour Inspector's assertion that HHL was an employer gives rise to an employment relationship problem and, as a result, it should be able to seek a determination without waiting for the Labour Inspector to take action.

In issuing its judgment, the Court of Appeal acknowledged the apparent tension between the s5 definition of 'employment relationship problem' and the s161(1)(c) jurisdiction of the Authority to determine whether a person is an employee.

However, the Court of Appeal ruled that this tension could be readily reconciled by interpretation of the relevant provisions.

The threshold requirement for bringing a claim before the Authority is that one of the parties asserts that there is an employment relationship problem. If the other party denies the existence of an employment relationship (as HHL did) then, in essence, that is a challenge to the Authority's jurisdiction.

However, in the Court's view, the scheme of the Act does not contemplate a person in HHL's position accessing the Authority for a bare declaration as to employment status, independent of any allegation of a substantive employment relationship problem. Allowing a person in HHL's position to seek a determination from the Authority as to the existence of an employment relationship could expose workers to the expense, inconvenience and stress of contesting the proceedings, or risking an outcome that may be contrary to their interests.

The Court also believed that allowing status to be determined by the Authority in the absence of any other

1 *FMV v TZB* - [2021] NZSC 102

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problem would undermine s6(5) which confers on the Employment Court exclusive jurisdiction to make declarations as to status.

In conclusion, the Court found that the Labour Inspector's assertion of an employment relationship has no practical effect unless the Labour Inspector brings proceedings. In those proceedings, the worker status will be a jurisdictional factor for the Labour Inspector to prove and which HHL can contest. Therefore, HHL is not disadvantaged by the Court of Appeal's ruling.

The minority judgment

In my opinion, Justice Cooke delivered a compelling dissenting judgment.

In summary, Justice Cooke's view was that s161 is clear. The Authority is given jurisdiction to determine whether a worker is an employee. There does not need to first be an employment relationship before the Authority has that jurisdiction. That argument would be circular and deprive the legislation of its plain meaning. Justice Cooke stated that whether or not there is an employment relationship is precisely the issue that the Authority is given jurisdiction to determine. By definition, a disagreement over whether a worker is an employee is an employment relationship problem.

Justice Cooke referred to the decision of the Supreme Court in *Gill Pizza*[2] in which the Court stated that it did not see any reason to adopt an interpretation that differs from the plain meaning of the words in s161(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 s6(5).

Justice Cooke indicated that the jurisdiction to determine whether someone is an employee contained in s6(5) and s161(1)(c) is overlapping. Both the Court and the Authority have jurisdiction to determine that question. The Authority's jurisdiction is only excluded if there is, in fact, an application on foot before the Court.

Justice Cooke further noted that the Court's jurisdiction under s6(5) is broader than that of the Employment Relations Authority as it enables the Court to make declaratory orders binding non-parties and on the application of parties other than the alleged employer or workers in question.

The Authority's power, on the other hand, is confined to addressing individual employment problems between parties.

Summary

The arguments advanced by the Appellant and Respondent are interesting. The Court's split determination perhaps raises more questions than provides answers. While the pre-emptive steps taken by HHL were probably designed to avoid the cost and effort of defending wage arrears claims, the fact that the proceedings progressed to the Employment Court and ultimately to the Court of Appeal, likely resulted in substantial legal costs. Had HHL simply waited for the Labour Inspector to bring its claim, then the Authority's jurisdiction would have been unequivocal.

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[2] *Gill Pizza Limited v A Labour Inspector (MBIE)* [2021] NZSC 184