

IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI O AOTEAROA

SC 62 / 2025

BETWEEN

HAIRLAND HOLDINGS LIMITED

APPELLANT

AND

THE CHIEF EXECUTIVE OF THE MINISTRY OF  
BUSINESS, INNOVATION AND EMPLOYMENT

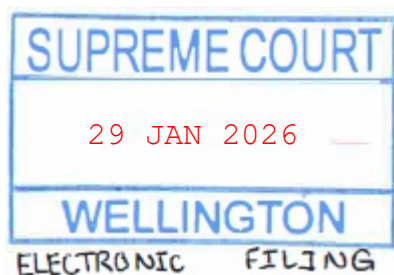
RESPONDENT

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SYNOPSIS OF SUBMISSIONS FOR THE RESPONDENT

29 January 2026

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## May it please the Court

### Summary of argument

1. The respondent submits that the Court of Appeal was correct in determining that the Employment Relations Authority (the **Authority**) does not have jurisdiction to hear an application by a purported employer for a bare declaration that its workers are not employees.
2. The Authority is designed to enable the determination of claims or disputes that arise in the context of employment relationships, not to make bare declarations about status. Section 161 of the Employment Relations Act 2000 (the **Act**) only provides the Authority with exclusive jurisdiction to “... make determinations about employment relationship problems ...”.
3. The respondent submits that the Court of Appeal was correct to hold that a purported employer seeking orders that its workers are **not** employees, outside of an existing claim or dispute, does not comprise an employment relationship problem. Absent a claim or a dispute having arisen, it is not the Authority’s role to determine a worker’s status.
4. In the same way that courts or tribunals are not called upon to make declarations about arrangements for matters such as local body, tax, resource management, competition, tenancy etc,<sup>1</sup> the respondent submits that the organisations or persons entering into contractual relationships with workers are themselves responsible for correctly structuring those arrangements. The Authority is an institution designed to enable the determination of claims or disputes that arise in the context of employment relationships, not to make bare declarations about status. Absent a claim or a dispute having arisen, it is not the Authority’s role to determine a worker’s status.
5. The respondent denies that a dispute was created by the appellant arguing that its hairdressers were independent contractors such that s 161 applied. The appellant was submitting that its workers were **not** employees; so was

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<sup>1</sup> *Chief Executive of Ministry of Business, Innovation and Employment v Hairland Holdings Limited* [2025] NZCA 219, [2025] 3 NZLR 162 (**MBIE v Hairland Holdings, CA**) at [64].

denying there being an employment relationship. There could not in turn be an employment relationship problem. In effect, the appellant is seeking a s 6(5) declaration<sup>2</sup> through another means which is not provided by the Act.

6. Section 161 establishes the jurisdiction of the Authority. The equivalent provision for the Employment Court is in s 187 of the Act. This is relevant because where *a worker* seeks a declaration that they are an employee, this falls within the jurisdiction of the Employment Court (rather than the Authority) under s 187(1)(f). This section in turn imports the consent protections in s 6(6) of the Act. The respondent submits that section 161 must be read in this context.

#### **Pathways for seeking determinations of worker status**

7. Employment status is “the gate” through which a worker must pass before they can access the suite of minimum statutory entitlements, such as the minimum wage, rest and meal breaks, holidays, and other leave types. An employee can also pursue a personal grievance. A Labour Inspector must also pass through this gate “before taking action on behalf of a worker, or against a workplace”.<sup>3</sup>
8. The respondent submits that there are only two pathways through this gate:
  - (a) Employment Court: Where a worker seeks a declaration that they are an employee, they (or another person(s) or Labour Inspector) must apply to the Employment Court. The Employment Court must not make such an order unless the person seeking the order is themselves the applicant or has consented in writing – s 6(6) of the Act. This is not a pathway available to a purported employer.
  - (b) Employment Relations Authority: Where a claim is filed arising from an employment relationship problem, the Authority has exclusive

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<sup>2</sup> Appellant’s statement of problem filed in the Employment Relations Authority, paragraph 3, Case on Appeal (COA) at 101.0012-101.0013.

<sup>3</sup> *E tū Incorp and Ors v Rasier Operations BV and Uber Portier BV and Ors* [2022] NZEmpC 192 at [4].

jurisdiction to determine (as part of that) “whether a person is an employee” under s 161(1)(c) of the Act.<sup>4</sup> This sub-section specifically excludes jurisdiction for matters arising on an application to the Employment Court under s 6 (see (a) above).

9. The respondent submits that there is no mechanism in the Act for an organisation or person (purported employer) to seek a bare declaration that its own workers are not employees. It is only where the issue of employment status arises in claim proceedings filed under the Act, that the Authority has jurisdiction to determine that issue under s 161(1)(c). This was confirmed in *Gill Pizza*,<sup>5</sup> where the Supreme Court held that the Authority had jurisdiction to determine employment status as part of an ingredient of a Labour Inspector action under s 228 of the Act.
10. It is notable too that it is the Employment Court (rather than the Authority) that is specifically granted jurisdiction to declare the status of workers *in rem*, under s 6(5) of the Act. This can occur only if the worker or workers are the applicant(s) or have consented in writing (s 6(6)). The requirement for consent is an important procedural safeguard which would be circumvented if a purported employer could make an application to the Authority instead.
11. The respondent submits that if the Authority had an inherent jurisdiction, or specific jurisdiction under s 161(1)(c), to make such declarations then s 6(5) and s 6(6) would be superfluous.
12. The appellant has referred to the Select Committee report on the Employment Relations Bill 2000.<sup>6</sup> In the commentary regarding clause 154 (which was deleted) the report notes (on page 32) that section 6 is to be amended to provide that actions may be taken only with the consent of the parties to that action. The respondent disputes the appellant’s

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<sup>4</sup> This was confirmed in *Gill Pizza Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment (Gill Pizza, SC)* [2022] 1 NZLR 1; [2021] NZSC 184 where the Supreme Court held that the Authority had jurisdiction to determine employment status as part of an ingredient of an action under s 228 of the Act.

<sup>5</sup> *Gill Pizza, SC* n 4.

<sup>6</sup> Appellant’s submissions, para 44-45.

suggestion that the purpose of this was to protect contractors from a class action.<sup>7</sup> The discussion on page 32 regarding deleted clause 154 (with s 6 being amended instead) also states that:

*“It is intended that the provisions of the bill that define “employee” will allow an individual or group to apply to have their employment status clarified, as is the current situation under the ECA.”<sup>8</sup>*

13. There is no suggestion in this report that an employer can apply to clarify the employment status of its own workers.
14. With reference to the appellant’s subsequent submission at paragraph [50]-[51], there was also no suggestion in *Gill Pizza* that contractors or purported employers/principal contractors should be able to access the Authority to seek declarations of contractor status. The “air of unreality” that the Supreme Court referred to as being contained in the employer’s submission was a reference to the employer submitting that a Labour Inspector might bring an action on behalf of a group of people who wanted to be contractors, rather than employees. The Court noted that it seems unlikely that a Labour Inspector would commence an action on behalf of a person that they knew would be better off as a contractor than as an employee.<sup>9</sup>
15. The respondent submits that only workers are able to bring proceedings which give rise to this question. The Act provides no mechanism for a purported employer to do so; the purported employer can raise that issue only at the point of defending proceedings.
16. This is not a ‘narrow interpretation’ or a ‘circular argument’ as the appellant claims.<sup>10</sup> As the Court of Appeal found, a matter under s 161(1)(c) of the Act must still involve an employment relationship problem, which is necessarily founded on an employment relationship.<sup>11</sup>

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<sup>7</sup> Select Committee report on the Employment Relations Bill 2000, page 32.

<sup>8</sup> Reference to the Employment Contracts Act 1991.

<sup>9</sup> *Gill Pizza* SC n 4 at [66]-[67].

<sup>10</sup> Appellant’s submissions, para 13.

<sup>11</sup> *MBIE v Hairland Holdings, CA*, n 1.

17. The fact that the purported employer disputes there being employment status *ahead of* claim proceedings being filed by or for the employee, does not give rise to a separate dispute about which the purported employer can itself file proceedings. The question of status is a defence it can raise, once proceedings are underway.
18. This is reflected in the wording of s 6(6)(b) of the Act, which prevents the Employment Court from making an order as to employment status unless the “other person who is alleged to be the employer” is a party to the application or has an opportunity to be heard. Section 6 does not provide for an employer to be an applicant. They are described in s 6(6) as “the other person”.
19. It is notable too that while there is a specific natural justice protection in s 6(6)(b), requiring an opportunity to be heard, this is only provided to the “other person” who is alleged to be “the employer of the person”. The wording of s 6(6) demonstrates that it is only the non-employer party (e.g. worker or Labour Inspector) who is envisaged to be able to apply for a declaration that the person(s) named are employees.

### **Narrative of Facts**

20. A Labour Inspector employed by the respondent investigated whether hairstylists who worked for the appellant were employees and whether, if they were employees, they had received the relevant minimum statutory entitlements. The Labour Inspector issued an investigation report<sup>12</sup> to the appellant which concluded that the hairstylists were employees, in which case the appellant had breached minimum employment standards. The Labour Inspector proposed an improvement notice (s 223D of the Act).<sup>13</sup>
21. The appellant disagreed with the investigation report on the basis that it believed its hairstylists were not employees and, therefore, it considered that the Labour Inspectorate had no jurisdiction.<sup>14</sup> Rather than awaiting,

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<sup>12</sup> COA at 101.0001.

<sup>13</sup> COA at 101.0008.

<sup>14</sup> *Hairland Holdings Limited v Chief Executive of the Ministry of Business, Innovation and Employment and Hairland Holdings Limited v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2022] NZEmpC 169 (**Hairland Holdings, EC**) at [2].

then challenging, any further steps taken by the Labour Inspector, the appellant filed a pre-emptive application in the Authority seeking a declaration that the hairstylists were not employees.<sup>15</sup> The respondent in this proceeding (the Chief Executive) was named as respondent and the hairstylists were not named as parties. The respondent argued that the Authority had no jurisdiction to make such a declaration and that the wrong parties were named.<sup>16</sup>

22. Shortly after this, the Labour Inspector filed an action for unpaid minimum entitlements on behalf of the hairstylists under s 228 of the Act.<sup>17</sup> The appellant protested the Authority's jurisdiction.
23. The Authority case-managed and heard the two problems together and issued a single determination on the jurisdictional issues.<sup>18</sup> The Authority decided that it did not have jurisdiction to determine the appellant's application, being an application brought by the purported employer, but that it did have jurisdiction to determine the Labour Inspectorate's applications.<sup>19</sup> In making this decision, the Authority noted that there cannot be an "employment relationship problem" where there is no employment relationship, as between the appellant and the respondent, or the appellant and the Labour Inspector. Therefore, s 161 did not confer jurisdiction on the Authority. It found in addition that it did not gain jurisdiction through the general provisions in s 5 or s 129 of the Act.
24. The appellant challenged the Authority's determination in the Employment Court. It argued that the Authority did have jurisdiction to determine its application for a declaration that the hairstylists were not employees, and

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<sup>15</sup> COA at 101.0009.

<sup>16</sup> *Hairland Holdings*, EC n 14 at [3]-[4].

<sup>17</sup> COA 101.0019.

<sup>18</sup> *Hairland Holdings Ltd v The Chief Executive of the Ministry of Business, Innovation and Employment (Hairland Holdings, ERA)* [2018] NZERA Christchurch 196 at [22](i).

<sup>19</sup> *Hairland Holdings*, EC n 14 at [6]-[9], and *Hairland Holdings*, ERA at [37] and [39].

that the Labour Inspector's s 228 action for unpaid wages was an abuse of process.<sup>20</sup> The respondent applied to strike out the appellant's challenge.<sup>21</sup>

25. The Employment Court determined the respondent's strike out application in favour of the appellant. At the same time, it went ahead and determined the key questions about the Authority's jurisdiction that would have arisen in the substantive challenge to the Employment Court.<sup>22</sup> The Employment Court held that the Authority had jurisdiction to determine the appellant's application that the hairstylists were not employees.
26. The respondent was granted leave to appeal this decision to the Court of Appeal, where the majority found that the mere assertion by the Labour Inspector that the hairstylists were employees does not, in itself, give rise to an employment relationship problem for the purposes of s 161(1) of the Act and that the Authority therefore did not have jurisdiction to hear the appellant's application.

### **Statutory framework and purpose**

27. As the Employment Court noted in the 'Uber' case in 2022, the Act is social legislation serving a purpose beyond the particular parties and particular relationship. The Supreme Court confirmed in the appeal decision of the Uber case in 2025 that the Act pursues its object of building productive employment relationships by promoting good faith in all aspects of the employment environment and relationship in a number of ways, including by "addressing the inherent inequality of power in employment relationships" and by "protecting the integrity of individual choice".<sup>23</sup> Interpreting the Act must be approached in a way that recognises and supports the broader legislative purpose, rather than undermining its place within the fabric of society.<sup>24</sup>

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<sup>20</sup> *Hairland Holdings*, EC, n 14 at [10].

<sup>21</sup> The challenge was paused as the Supreme Court was considering *Gill Pizza Ltd v Labour Inspector* (n 4) which concerned the jurisdiction of the Authority to determine employment status as an ingredient of a section 228 application.

<sup>22</sup> His Honour Judge Smith of the Employment Court issued a Minute indicating his intention to issue such a rolled-up judgment and neither party objected: COA at 101.0065.

<sup>23</sup> *Rasier Operations BV and ors v E tū Incorp and ors* [2025] NZSC 162 at [87].

<sup>24</sup> *E tū Incorp and ors v Rasier Operations BV & ors*, EC n 3 at [8].

***Acknowledging and Addressing the inherent inequality of power in employment relationships***

28. The objects of the Act are set out at section 3 and include the need to acknowledge and address the inherent inequality of power in employment relationships 3(a)(ii). The worker is the party that has less power in the relationship. Providing a purported employer a right to issue proceedings against their own worker, naming the worker as a party to those proceedings, or enabling the purported employer to circumvent the steps for enforcement available to a Labour Inspector, are wholly inconsistent with this objective. Allowing this course provides additional power to a purported employer and creates further inequality.
29. Providing this right would also have the effect of deterring vulnerable employees with limited power from seeking to assert employment rights. Those workers (who could in fact be employees) may be deterred by a purported employer, being the party with power, who could issue or threaten to issue proceedings for tactical reasons.

***Reducing the need for Judicial Intervention***

30. Providing a purported employer with a right to issue proceedings naming a purported employee, that raises the issue of employment status, is inconsistent with section 3(a)(iv) as it will increase the need for judicial intervention rather than reduce it. This is because the party with power is more likely exercise a right, so more proceedings brought by employers can be expected if the application to the Authority is permitted by the employer in this case, as the party with the resources and power to issue such proceedings.
31. This risks retaliatory action by employers too, should an employee raise a personal grievance about something else altogether, e.g. unjustified disadvantage or sexual harassment.<sup>25</sup>
32. Providing a purported employer with a right to issue proceedings against a purported employee to seek a finding that the purported employee does

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<sup>25</sup> Employment Relations Act 2000, s 103.

not have employment rights and is not subject to the jurisdiction of the Act is therefore contrary to the object of reducing the need for judicial intervention. Further it is contrary to the interests of justice and the precious resources of the employment institutions to provide a mechanism by which an employer can test their own documentation. It is incumbent on an employer, and their good faith obligation to do this prior to entering into a working relationship.

***To promote the effective enforcement of employment standards***

33. When a purported employer attempts to circumvent the proper response to Labour Inspectorate investigations by issuing proceedings against purported employees, or as in this case against the Labour Inspector, to oust the jurisdiction of the Act undermines the objective in section 3(ab) to promote the effective enforcement of employment standards, by conferring enforcement powers on the Labour Inspectors, the Authority, and the Employment Court.
34. Section 6 provides a worker with employment rights that would otherwise be unavailable as a contractor (or other worker), and has a protective purpose of providing rights under the Minimum Wage Act 1983, Holidays Act 2003, Wages Protection Act 1983 and the Parental Leave and Employment Protection Act 1987. Those rights are protective, fundamental, and advantageous to workers who might otherwise face exploitation. It follows that there should be an avenue to access and assert those rights which are of primary importance to a worker but not an avenue for the purported employer to issue proceedings seeking to deny those rights.
35. The respondent's concerns are these:
  - (a) If employers are permitted to file pre-emptive proceedings for declarations that their workers are contractors, they would need to name those workers as parties. This would put the worker or workers to the stress and expense of being a respondent to litigation, to test a contract that the employer will itself have drafted and to be involved

in the scrutiny of a work environment and work structures that the employer will have created and maintained;

- (b) allowing such actions to be brought by an employer is contrary to the objects of the Act including acknowledging the inherent inequality of power and promoting the effective enforcement of employment standards by conferring enforcement powers on Labour Inspectors;<sup>26</sup> and
- (c) The important procedural protections in s 6(6) of the Act, which require employee consent in writing for such declarations in the Employment Court, risk being side-stepped as they were in this case.<sup>27</sup> The Court of Appeal could not accept that Parliament intended to allow this protection to be circumvented in the way the appellant proposes.<sup>28</sup>

The relevant part of s 6 is in the following terms:

- (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.*

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<sup>26</sup> Employment Relations Act 2000, s 3(a)(ii) and s 3(ab).

<sup>27</sup> Employment relations Act 2000, s 6(5) and 6(6).

<sup>28</sup> *MBIE v Hairland Holdings*, CA, n 1 at [59].

## Key submissions

36. The way in which s 6(5) and 6(6) operate is that the Employment Court (not the Authority, but specifically the Court) can make an order declaring the employment status of workers, but only if the worker or workers are the applicant or have consented in writing. This recognises the more restricted appeal rights from the Employment Court, as opposed to the Authority - where there is an automatic right of challenge. As noted above, s 6(6) ensures the principles of natural justice are observed. It assumes the employer is the 'other party' and gives them the opportunity to be heard. If an employer was the applicant, no similar protective provisions exist in respect of the workers. This is clearly outside the legislative scheme and cannot have been Parliament's intent.
37. The 'applicant' that is envisaged under s 6(5) is the worker or workers themselves, or another person such as a Labour Inspector<sup>29</sup> – with their individual written consent. It is not an action designed for an employer to take. It is about whether the persons named in the application are employees<sup>30</sup>.
38. If the Authority had an inherent jurisdiction, or specific jurisdiction under s 161 of the Act to make such declarations itself, s 6(5) and 6(6) would not be needed. In any event, s 161 specifically excludes from the Authority's jurisdiction the ability to determine matters arising under an application made under s 6(5) of the Act:
- (1) The Authority has exclusive jurisdiction to make determinations about employment relations problems generally, including — ...*
- (c) matters about whether a person is an employee (not being matters arising on an application under section 6(5)):*

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<sup>29</sup> *Gill Pizza*, SC n 4 at [15].

<sup>30</sup> Under Section 6(6)(b) the "other person" or party to the proceedings, is the alleged employer – who is entitled to an opportunity to be heard.

39. Therefore, the way the legislation operates is this:
- (a) An application for a pure declaration that a person is an employee must be made to the Employment Court under s 6(5) of the Act, with the workers' consent;
  - (b) If the Labour Inspector has issued an Improvement Notice under s 223D of the Act, the employer can lodge an objection within 28 days under s 223E; and
  - (c) If there are proceedings on foot already, whether filed by the worker or a Labour Inspector, the Authority has jurisdiction from s 161(1)(c) to determine whether the person is an employee *as part of that proceeding*.
40. There is nothing the Act enabling an employer to file proceedings itself, as the appellant has done in this case, to seek a bare declaration that its workers are employees. As cited by the Authority in its determination, the Employment Court has confirmed that:

*“The Authority is a creature of statute and only has the powers conferred under its empowering legislation, either expressly or by necessary implication.”<sup>31</sup>*

41. Moreover, there are important policy factors at play in relation to actions taken by Labour Inspectors. The Supreme Court discussed these in *Gill Pizza*<sup>32</sup>. In particular, it found that the legislation should be interpreted in a way that reflects the express object of the Act to ensure that decisions are made as efficiently and cheaply as possible. This, it was said, helps ensure:

*“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 [employer].”<sup>33</sup>*

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<sup>31</sup> *Hairland Holdings*, ERA n 18 at [25]. Also see [31].

<sup>32</sup> *Gill Pizza*, SC n 4.

<sup>33</sup> *Gill Pizza*, SC n 4 at [64].

42. Most workers do not have the resources to bring or defend proceedings. The types of cases which are brought by Labour Inspectors tend to involve vulnerable workers at risk of exploitation, pizza delivery drivers, taxi drivers, horticulture and agriculture workers, gardening and cleaning staff, hospitality and food industry workers, and occupations such as sales, service, construction, and farm workers.<sup>34</sup> By and large, they would not be in the position to properly defend a claim brought by their own employer that they are *not* employees.
43. The same could be faced by other employees who might seek a mediation with their employer over a wage or holiday claim, or a personal grievance.
44. The respondent notes at this point that the appellant’s submissions assert that its application to the Authority is not a “class action”. It would however have that effect. A finding in relation to two hairdressers in the same work environment and with the same or similar terms and conditions, will effectively decide the point for the company’s other workers too.
45. The respondent submits that the following adverse consequences will arise if employers are able to pre-emptively file a statement of problem in the Authority to seek declarations about the status of their own workers, particularly where there is already Labour Inspector action underway:
- (a) The statutory functions of the respondent would be undermined, as would the powers and functions of Labour Inspectors to monitor and enforce compliance with employment standards. If workers are aware that approaching the Labour Inspectorate might result in them being named as respondents in proceedings brought against them by their own employer, many will be reluctant to raise concerns about their working conditions or employment status.<sup>35</sup>

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<sup>34</sup> *Southern Taxis Ltd and Ors v Labour Inspector; A Labour Inspector v Southern Taxis Ltd and Ors* [2020] NZEmpC 63; *A Labour Inspector v Cheap Deals on Wheels Ltd* [2017] NZERA Auckland 196; *Labour Inspector (Baldwin) v Goldengrove Stud Farm Ltd v Anor* [2015] NZERA Christchurch 170; *Labour Inspector (Kim) v Pro-Build Canterbury Ltd* [2015] NZERA Christchurch 111; *Semmens (Labour Inspector) v SDP Call Centres Ltd* ERA Wellington, WA 145/06, 27 October 2006.

<sup>35</sup> In this context, the Labour Inspector does not act on behalf of a worker and is not a worker’s advocate in proceedings, but fulfils their own statutory functions and powers.

- (b) A Labour Inspectorate investigation or proceeding could be perverted or interfered with, by undermining the enforcement powers (improvement notices; enforceable undertakings) and through delaying or inhibiting proceedings. As in this case, procedural tangles are likely and the process could open up the Labour Inspector to accusations of abuse of process where they are bringing a statutory entitlements claim. It may result also in interference with witnesses.
  - (c) There would be unnecessary cost and stress to workers having to respond to proceedings brought by their employer, exacerbating the inequality of the relationship which is contrary to the scheme of the Act and the one of the objects of the Act in s 3(a)(b)(ii).
  - (d) There would be a fear of retaliation for workers from raising an issue of employment status with either their employer or the Labour Inspector, as this increases the risk they would be named as parties to litigation by their (purported) employer, which would in turn have the effect of employees being deterred from exercising employment rights and receiving their statutory entitlements<sup>36</sup>. The result would undermine the objective of Act to promote the effective enforcement of employment standards under the Act at section 3(ab)).
  - (e) There would be an increased burden on system resources from the Authority needing dealing with these types of applications.
46. The question might be asked: *What if a contractor wants a declaration that they are a contractor?* The Supreme Court in *FMV v TZB* referred to the Authority having jurisdiction to consider problems that arose in the employment relationship and in a work context.<sup>37</sup> In a situation of a contractor seeking a declaration that they are a contractor, there is no ‘employment relationship’ being asserted. In turn, the plaintiff submits the Authority would not have jurisdiction to determine this application.

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<sup>36</sup> *Gill Pizza SC*, n 4 at [50]: “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 employers regarding employment status.”

<sup>37</sup> *FMV v TZB* [2021] 1 NZLR 466; [2021] NZSC 102 at [93] and [176].

## Application of case law

### ***Gill Pizza***<sup>38</sup>

47. In *Gill Pizza* the Supreme Court considered whether a Labour Inspector could commence proceedings in the Authority where there was a dispute about the employment status of pizza delivery drivers (employees or contractors) or whether that issue must first be determined by the Employment Court under s 6(5) of the Act. The s 6(5) process would have required a separate application by the Labour Inspector to the Employment Court and the individual consent of each driver, and a determination of employment status through that mechanism before the Labour Inspector could seek to recover the claimed holiday pay and wage entitlements in the Authority.
48. The Supreme Court held that determining whether the workers are employees is a 'jurisdictional fact' to be proven as part of the action by a Labour Inspector under s 228(1) to recover "any wages or holiday pay or other money payable" and that a dispute over the element of employment status does not deprive the Labour Inspector of the power to commence the action in the first place.<sup>39</sup> The Supreme Court held (in agreeing with the Court of Appeal) that the plain meaning of s 161(1)(c) of the Act permitted the Authority to determine matters relating to status that arose as an ingredient of another action; with that being just another matter to be proved like any other aspect of the claim.<sup>40</sup>
49. The Supreme Court noted too the Court of Appeal's observation that, in practice, status was often put in issue in response to Labour Inspectors' actions under s 228(1) and this type of issue was routinely resolved by the Authority. It held that, once it is established that the action may be brought by a Labour Inspector under s 228(1), s 161 expressly gives the Authority jurisdiction to deal with it.<sup>41</sup> Therefore, the Authority has jurisdiction under

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<sup>38</sup> *Gill Pizza*, SC, n 4.

<sup>39</sup> *Gill Pizza*, SC, n 4 at [42].

<sup>40</sup> *Gill Pizza*, SC, n 4 at [26].

<sup>41</sup> *Gill Pizza*, SC, n 4 at [45].

s 161(1)(c) to determine issues of employment status provided they are not raised in the context of an application under s 6(5).<sup>42</sup>

50. *Gill Pizza* makes it clear that the process under s 6(5) is not required for a Labour Inspector to commence an action against an employer who is disputing the employment status of its workers. When that issue is raised in the s 228(1) context, it simply becomes part of the tests that the Authority has to work through in determining the action commenced by the Labour Inspector.
51. The respondent submits that this is exactly what ought to have happened in the present case: the appellant should have waited and *responded* to the Labour Inspector's recovery action under s 228(1) by asserting that its workers were not employees, or objecting to an improvement notice, thereby raising that as an issue for the Authority to consider and determine.
52. Instead, the appellant has attempted a similar declaratory process to s 6(5), but without filing the application in the Employment Court and without the consent in writing of the hairdressers. In effect, the appellant seeks a s 6(5) declaration<sup>43</sup> through another means which is not provided by the Act.

### ***FMV v TZB***

53. The Employment Court relied on *FMV v TZB*<sup>44</sup> in deciding that the Authority can determine a discrete application brought by a purported employer about the status of its workers because that issue is a controversy arising in a work context. The Court of Appeal accepted the respondent's submission that the Employment Court had misapplied *FMV*<sup>45</sup> because *FMV* referred to the Authority having jurisdiction to consider problems that arose in the employment relationship *and* in a work context<sup>46</sup> (emphasis applied to the word 'and' is the Supreme Court's).

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<sup>42</sup> *Gill Pizza*, SC, n 4 at [49].

<sup>43</sup> COA at 101.0012-101.0013.

<sup>44</sup> *FMV v TZB*, n 37.

<sup>45</sup> *MBIE v Hairland Holdings*, CA n 1 at [38].

<sup>46</sup> *Hairland Holdings*, EC n 14 at [30]-[31] and [35]; as compared with *FMV v TZB* n 37 at [93] and [176].

54. To explain this point: the Employment Court<sup>47</sup> quoted an extract from *FMV* where the Supreme Court said that if the question can be framed in terms of s 161 it *must* be brought in the Authority as an employment relationship problem. If it did not fit within any of the s 161 examples then it will be a question of “whether the problem nevertheless relates to or arises out of an employment relationship in terms of the open-textured introductory language of s 161(1) and the catch-all in paragraph (r)”.<sup>48</sup>
55. However, the test for whether a difficulty or controversy arises out of the employment relationship was discussed by the Supreme Court in the preceding paragraph to those referenced by the Employment Court, at [93]. In that paragraph, the Supreme Court posed this question:
- “If a “problem” encompasses any kind of difficulty or controversy, when does it relate to or arise out of the employment relationship?”*
56. The Supreme Court observed that this was simply a question of fact, holding:
- “If the controversy arises during the course of the employment relationship and in a work context, then it will be an employment relationship problem.”*<sup>49</sup>
57. The respondent submits that this is a two-limbed test, requiring that there first be an “employment relationship”. This is a threshold for jurisdiction, for an employer. (For an employee, an application for a declaration can be made under s 6(5) of the Act or determined where that issue is raised by the employer in defence of proceedings filed in the Authority.) Where the purported employer is claiming that there is no employment relationship, and seeking a declaration that its workers are not employees, the first limb of this test is not met. An employee, or Labour Inspector however, is relying already on the existence of an employment relationship so does not face this same bar to proceeding.

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<sup>47</sup> *Hairland Holdings*, EC n 14 at [27].

<sup>48</sup> *FMV v TZB* n 37 at [93].

<sup>49</sup> *FMV v TZB* n 37 at [93] and [176]. The emphasis of ‘and’ in this sentence is the Supreme Court’s.

## Court of Appeal decision

58. The Court of Appeal held that the jurisdiction to determine worker status arises only where there are existing proceedings in which this issue arises. The Act provides no mechanism for an employer to itself seek a declaration of status; the employer can do so only at the point of raising the issue of employment status *in defence* of proceedings, because (in summary):

- (a) A matter under s 161(1)(c) of the Act must still involve an employment relationship problem, which is necessarily founded on an employment relationship.<sup>50</sup> Thus, this section does not give the Authority jurisdiction to determine a stand-alone application for a declaration made by an employer;
- (b) The focus of the Act is very strongly on resolving issues that have their genesis in an employment relationship. The role of the Authority is “resolving employment relationship problems” (s 5) which necessarily imports the definition of employment relationship;<sup>51</sup>
- (c) The case law illustrates the correct operation of s 161(c) in practice;<sup>52</sup>
- (d) The scheme of the Act does not contemplate an employer accessing the Authority to seek a bare declaration as to employment status, independent of any allegation of a substantive employment relationship problem;<sup>53</sup>
- (e) Allowing status to be determined by the Authority in the absence of any other problem would undermine s 6(5), which confers on the Employment Court exclusive jurisdiction<sup>54</sup> to make declarations as to status.<sup>55</sup> This can occur only if the worker or workers are the

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<sup>50</sup> *MBIE v Hairland Holdings*, CA, n 1.

<sup>51</sup> *MBIE v Hairland Holdings*, CA, n 1 at [55].

<sup>52</sup> *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721, cited in *MBIE v Hairland Holdings*, CA n 1 at [57].

<sup>53</sup> *MBIE v Hairland Holdings*, CA, n 1 at [58].

<sup>54</sup> Employment Relations Act, s 187((1)(f)).

<sup>55</sup> *MBIE v Hairland Holdings*, CA, n 1 at [59].

applicant(s) or have consented in writing (s 6(6)). These important procedural safeguards would be circumvented by an employer making an application to the Authority instead, where a worker could be exposed to litigation over status without their consent;<sup>56</sup>

- (f) If Parliament had intended parties who are asserted to be employers to be in the category of persons who can seek a declaration of status under s 6(5) it would have been very straightforward to include them within that section. Parliament chose not to include them;<sup>57</sup> and
- (g) The objects of the Act include the need to acknowledge and address the inherent inequality of power in employment relationships, which is reflected in s 6(5) – 6(6) and directed at protecting workers rather than shielding employers from potential liability.<sup>58</sup> Fairness for employers is achieved by providing a mechanism under s 161(1)(c) to challenge employment status where other proceedings are on foot.<sup>59</sup>

- 59. In summary, the Court of Appeal found that the Act does not allow an employer to itself seek a declaration that its own workers are not employees. The tests and mechanisms for deciding whether a worker or workers are employees, are only applicable in response to those workers seeking to themselves establish this status (directly or via a Labour Inspector or union) in order to access the suite of minimum statutory entitlements or bring other employment claims.
- 60. The respondent submits that there is no error of law in the Court of Appeal's analysis and that this appeal must therefore fail.

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<sup>56</sup> *MBIE v Hairland Holdings, CA*, n 1 at [59] and [61].

<sup>57</sup> *MBIE v Hairland Holdings, CA*, n 1 at [61].

<sup>58</sup> *MBIE v Hairland Holdings, CA*, n 1 at [62].

<sup>59</sup> *MBIE v Hairland Holdings, CA*, n 1 at [63].

## What is an employment relationship problem?

61. To address this specific point in more detail, the respondent submits that the Court of Appeal’s decision, and the rationale set out in the judgment (as summarised above), is plainly correct in finding that the Authority could not determine the appellant’s application for a declaration that its workers were not employees, because that is not an employment relationship problem.
62. The respondent acknowledges the minority decision of Cooke J, which focused on the position that a disagreement over whether a worker is an employee is itself an “employment relationship problem”.<sup>60</sup> However, as the majority found, the respondent submits that an “employment relationship” problem cannot be said to arise where the employer party claims that its workers are not employees: *“If there is no employment relationship, there can be no employment relationship problem.”*<sup>61</sup>
63. As the majority also found, the meaning given to “employment relationship problem” in s 161 is expressly constrained by the words “relating to or arising out of an employment relationship”. While words may have wide import, they nevertheless require some connection between the problem and an employment relationship, as defined in s 2 of the Act.<sup>62</sup>
64. The respondent submits that the majority was correct in finding that the Employment Court erred in relying *FMV v TZB* to decide that the Authority had jurisdiction to consider all problems that arise in the work context, as set out above.<sup>63</sup> Here, the appellant sought a declaration that there is *no* employment relationship, so the problem cannot be said to arise *out of an employment relationship*. As the majority of the Court of Appeal noted, on the appellant’s stated position no employment relationship exists in this case and therefore no employment relationship problem exists.<sup>64</sup>

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<sup>60</sup> *MBIE v Hairland Holdings, CA*, n 1 at [80].

<sup>61</sup> *MBIE v Hairland Holdings, CA*, n 1 at [38].

<sup>62</sup> *MBIE v Hairland Holdings, CA*, n 1 at [50].

<sup>63</sup> *FMV v TZB* n 37 at [93] and [176].

<sup>64</sup> *MBIE v Hairland Holdings, CA*, n 1 at [50].

65. The majority acknowledged the apparent tension between s 5 (definition of employment relationship problem) and s 161(1)(c) of the Act (jurisdiction of the Authority) to determine whether a person is an employee, but held this to be “readily reconciled” through a purposive and contextual interpretation of the relevant provisions: that the threshold for bringing a claim before the Authority is that one of the parties asserts that there is an employment relationship problem.
66. Hence, the threshold requirement is that one party asserts there is an employment relationship. If the other party denies that, it is a challenge to the Authority’s jurisdiction that the claimant is then required (with reference to *Gill Pizza*) to prove in the proceedings. Section 161(1)(c) empowers the Authority to determine whether it has jurisdiction.<sup>65</sup>
67. The appellant refers to s 161 not being an exhaustive list, but rather containing broad wording of a chapeau.<sup>66</sup> The respondent submits that the opening phrase of s 161 still needs to be considered, which requires an employment relationship problem to begin with, and thus being premised on an employment relationship. The respondent submits that a “broad interpretation”<sup>67</sup> of s 161 cannot be so broad as to disregard its opening words.
68. The other examples referenced by the appellant at paragraph 25 of its submissions do not have the link to s 6(5) or the protections of s 6(6) to consider.
69. The appellant submits at paragraph 26 that s 161(1)(r) implies there can be employment relationship problems unconnected to an employment relationship. This submission does not accord with the wording of s 161(1)(r), which merely confirms jurisdiction for any other action arising from the employment relationship or related to the interpretation of the Act. The latter is premised on there being an employment relationship to start with, as it is only an employment relationship to which the Act applies.

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<sup>65</sup> *MBIE v Hairland Holdings, CA*, n 1 at [56].

<sup>66</sup> Appellant’s submissions, para 16.

<sup>67</sup> Appellant’s submissions, para 19.

Aside from the current issue (employment status) in all other cases where the Act might need to be interpreted, there will need to first be an employment relationship.

### **Proceedings issues**

70. The minority judgment also suggested that any proceedings being used oppressively is a case management issue. As the respondent has outlined above, most workers do not have the resources to bring or defend proceedings. Case management is unlikely to assist. The types of cases which are brought by Labour Inspectors tend to involve vulnerable workers at risk of exploitation. By and large, they would not be in the position to properly defend a claim brought by their own employer seeking a declaration that they are *not* employees. The same can generally be said for most other workers.

71. The important policy factors at play in relation to actions taken by Labour Inspectors were discussed by the Supreme Court in *Gill Pizza*.<sup>68</sup> In particular, the Court found that the legislation should be interpreted in a way that reflects the express object of the Act to ensure that decisions are made as efficiently and cheaply as possible. This, it was said, helps ensure:

*“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 [employer].”*<sup>69</sup>

72. It is incorrect to say that the appellant is left “without a remedy”<sup>70</sup> or “extraordinarily deprived”<sup>71</sup> where the Labour Inspector has found some of its workers are employees and seeks redress. The purported employer party, can raise that issue for determination by the Employment Relations Authority as a defence to the Labour Inspector’s proceeding. This is the

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<sup>68</sup> *Gill Pizza*, SC n 4.

<sup>69</sup> *Gill Pizza*, SC n 4 at [64].

<sup>70</sup> Appellant’s submissions, para 10.

<sup>71</sup> Appellant’s submissions, para 35.

point at which an employer's position that its workers are not employees is tested; not before. As the Court of Appeal found:

*"Fairness for employers is achieved, however, by providing a mechanism under s 161(1)(c) that enables them to challenge employment status when it is material to a live employment dispute. This ensures those who deny the allegation that they are employers can defend themselves fully against any claims that may be made against them."*<sup>72</sup>

73. Rather:<sup>73</sup>

*"Parliament chose not to include parties who are merely asserted to be employers in the category of persons who can seek a declaration of status from the Employment Court under s 6(5). If Parliament had intended that such parties have the right to seek a bare declaration of employment status it would have been very straightforward to include them within s6(5). In our view, it would be contrary to parliamentary intent to interpret s 161(1)(c) as conferring such a right on those parties. This is especially so given that the critical procedural safeguards contained in s6(6) are absent from s161(1)(c)."*

## **Conclusion**

74. The respondent submits that the majority of the Court of Appeal was correct to find that the structure of the Act only enables an employer to raise the issue of worker status in proceedings *in response* to a claim or matter that has already been filed. There is no mechanism in the Act enabling an employer to itself file proceedings to test that point. Permitting that procedure would be detrimental to workers and to the Labour Inspectorate, and would be contrary to the purposes and objects of the Act.

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<sup>72</sup> *MBIE v Hairland Holdings, CA, n 1 at [63].*

<sup>73</sup> *MBIE v Hairland Holdings, CA, n 1 at [61].*

## Relief sought

75. The approved question for which leave to appeal was granted is:

*Whether the Court of Appeal was correct to allow the appeal on the basis that the Employment Relations Authority does not 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?*

76. The relief sought by the respondent is a finding that the Court of Appeal was correct.

77. The respondent seeks costs.



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**K F Radich**  
**Counsel for the respondent**  
**29 January 2026**

**Certification**

78. Counsel for the respondent certifies that this submission does not contain any suppressed information and to the best of her knowledge is suitable for publication.

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**K F Radich**  
**Counsel for the respondent**  
**29 January 2026**

## **Appendix – List of authorities and statutory references**

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### **Prior cases in the current proceeding** (contained in the Case on Appeal)

*Chief Executive of Ministry of Business, Innovation and Employment v Hairland Holdings Limited* [2025] NZCA 219, [2025] 3 NZLR 162 (**MBIE v Hairland Holdings, CA**)

*Hairland Holdings Limited v Chief Executive of the Ministry of Business, Innovation and Employment and Hairland Holdings Limited v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2022] NZEmpC 169 (**Hairland Holdings, EC**)

*Hairland Holdings Ltd v The Chief Executive of the Ministry of Business, Innovation and Employment* (**Hairland Holdings, ERA**) [2018] NZERA Christchurch 196

### **Primary cases** (respondent's bundle of authorities)

*FMV v TZB* [2021] 1 NZLR 466; [2021] NZSC 102

*Gill Pizza Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2022] 1 NZLR 1; [2021] NZSC 184

### **Other primary cases cited** (not included in authorities bundle)

*Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721

*E tū Incorp and Ors v Rasier Operations BV and Uber Portier BV and Ors* [2022] NZEmpC 192

*Rasier Operations BV and ors v E tū Incorp and ors* [2025] NZSC 162

### **Employment Relations Act 2000** (respondent's bundle of authorities)

Section 3

Sections 5-6

Section 161

Section 179

Section 214

Sections 223 – 223A

Section 223E

Sections 224-228

### **Other** (respondent's bundle of authorities)

Select Committee report on the Employment Relations Bill 2000, page 32.