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

SC 67/2021
[2021] NZSC Trans 19
Amended and republished
16 November 2021

BETWEEN **GILL PIZZA LIMITED**
SANDEEP SINGH
JATINDER SINGH
MANDEEP SINGH
MALOTIA LIMITED
Appellants

AND **A LABOUR INSPECTOR (MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT)**
Respondent

RESTAURANT BRANDS LIMITED
Intervener

Hearing: 4 November 2021

Coram: William Young J
Glazebrook J
O'Regan J
Ellen France J
Williams J

Appearances: G G Ballara and S P Radcliffe for the Appellants

J C Catran and H T N Fong (via VMR) for the Respondent
S C Langton and R M Tomkinson for the Intervener (via VMR)

CIVIL APPEAL

MR BALLARA:

May it please the Court, counsel's name is Ballara and I appear for the appellants with my learned friend Mr Radcliffe.

WILLIAM YOUNG J:

Thank you, Mr Ballara.

MS CATRAN:

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Catran ahau, kei kōnei mō Mr Fong, mō te Karauna. Your Honour, Mr Fong is in Auckland and appearing by VMR.

WILLIAM YOUNG J:

Tēnā koe Ms Catran. Mr Langton.

MR LANGTON:

Tēnā koutou o te Kōti. Ko Langton ahau, kei kōnei māua ko Ms Tomkinson, mō te Restaurant Brands.

WILLIAM YOUNG J:

Tēnā korua. Okay, has there been an agreement as to division of time, Mr Ballara?

MR BALLARA:

Not directly, Sir, no. Not to say there is a disagreement.

WILLIAM YOUNG J:

All right, well how long do you anticipate being?

MR BALLARA:

The matter, Sir, is set down for half a day. I would have estimated our or my direct involvement to begin with perhaps half an hour Sir.

WILLIAM YOUNG J:

Half an hour did you say, well that's commendable. Okay, Ms Catran?

MS CATRAN:

Yes Sir. We agree that half a day is sufficient. I suspect my submissions might take a little longer but not more than an hour.

WILLIAM YOUNG J:

Mr Langton, what's your position?

MR LANGTON:

With the leave that was granted to the intervener, Sir, said that the Court would tell us either before or at the hearing if they wished to hear from us so I have put in an oral outline. Unless my friends don't cover something that I might need to I may need to speak at all but I would image far less than my friends.

WILLIAM YOUNG J:

Well let's pencil you in for 15 minutes and we will see how we go, okay?

MR LANGTON:

Thank you, Sir.

WILLIAM YOUNG J:

Mr Ballara.

MR BALLARA:

Your Honours, in terms of my oral outline just starting at paragraph 1, the Employment Relations Act was enacted in 2000 so 21 years ago now. Back then it defined "employee" under section 6 and it established the Employment Relations Authority and the Employment Court as we know that

court today under the Act including establishing each of their respective specialist jurisdictions under the Act. I will return to each of those jurisdictions but noting the Authority under 161 of the Act and the Employment Court under section 187 of the Act.

The Act in 2000 also established the labour inspector's powers and reach for the purposes of the Act including to commence a recovery action for monies under the Minimum Wage Act 1983 or the Holidays Act 2003 as is in question before your Honours today.

So my essential first submission, your Honours, is that none of these provisions and none of these entities are new in the sense of having been recreated or revisited or substantially modified since 2000 and all of them were created based on the consideration of the underlying policy of the Act as at its enactment and I am going to also return to that policy but just as a marker to begin with, that's what I'm making these submissions in connected with.

The short point is that all of this including the provisions at issue today are not some repetition of the Employment Contracts Act but what Parliament specifically thought about in 2000 in enacting them.

Now I'm not going to take your Honours to my general submissions in terms of jurisdiction but they are in the written submissions for the appellants at paragraphs 38 and following suffice to say that it's common ground, your Honours, that each of the labour inspectorate and the Authority being creatures under the Employment Relations Act can only have those powers in jurisdiction as are conferred by the Act. Neither can stray outside of those.

Against that background and turning to point 2 in my oral outline, this appeal is about a threshold issue. Essentially which specialist institution under the Act, the Authority or the Employment Court is able to decision employment status at first instance in a case like this.

The starting point, your Honours, for that is section 6. This provides for the definition of –

WILLIAM YOUNG J:
Just pause there. If it were not the section 6 subsections (5) and (6) there it would be perfectly clear that the labour inspector could bring these proceedings, I take it?

MR BALLARA:
Clear in that no impediment, Sir, is that the question?

WILLIAM YOUNG J:
Yes.

MR BALLARA:
Well the issue under s 228 in my submission, Sir, is about money owing to an existing employee or an existing employer so to answer your Honour's question you would have to then look without those section 6(5) and (6) points at whether the Authority could answer that question.

WILLIAM YOUNG J:
It would be a jurisdictional fact which conventional practice treats as being within the competence of a Tribunal to determine itself. So if someone makes a claim to say a Tenancy Tribunal it's presumably, I haven't looked up the legislation, a jurisdictional fact that has to be established that there's an tenancy agreement and whether there is a tenancy agreement is something I would expect a Tenancy Tribunal to be able to determine, at least for the purposes of hearing before it not necessarily conclusive. Do you agree with that?

MR BALLARA:
A number of points in there, Sir, but essentially I don't disagree with it.

WILLIAM YOUNG J:

Well that's a start. Let's work on that, onwards from that.

MR BALLARA:

I may have to come back to that point, Sir, if that's okay. It's a difficult one to answer on the hoof, so to speak, because all of this is predicated on what's in the Act rather than what isn't and so in the absence of (5) and (6).

WILLIAM YOUNG J:

Well subsection (6), subsections (5) and (6) can be read as creating a standalone jurisdiction to apply for a declaration irrespective of any other issue.

MR BALLARA:

I would agree with that, Sir, to the extent that they can be read that way if there's no requirement to do so. So whether there's a requirement to make that application then comes back to 228.

WILLIAM YOUNG J:

I agree you have to read the sections together but it does seem to me the case really comes down to whether subsections (5) and (6) exclude what would otherwise be the right of the labour inspector to bring these proceedings.

MR BALLARA:

Sir, and as I will come to in terms of the legislative context that point in my submission Sir was squarely addressed by Parliament in enacting those.

WILLIAM YOUNG J:

Okay.

MR BALLARA:

Now in terms of section 6 and I'm now at 3.1 of the oral outline, deciding status is in my submission a critical preliminary issue. Section 6 is in part 2 of

the Act under preliminary provisions right next door to, for example, the statutory duty of good faith and it's called the meaning of employee.

It's critical in my submission, your Honours, because it's the means of determining the presence or the absence of the foundational rights under the Act for employees and section 6 likewise sets the pathway that I've referred to in the written submissions to decide that critical preliminary issue status depending on who the person it is who is asking that question.

In terms of that legislative history and policy underlying the Act, and this is my point 4 in the oral outline, but if your Honours could please turn to the summary, or the appendix of that, that's on page 3, this is an attempt your Honours to set out the parliamentary debate around what became section 6(5) and section 6(6) of the Act. So, just working through that, 16 March 2000 and there's a cross-reference to my written submissions and I'm talking to paragraph 78 of those if that's of assistance. The first reading of the Bill, in terms of clause 6 that's not yet and remembering clause 6 becomes section 6 later, clause 6 is not yet referring to any protections. It's just about, and there's a reference to what it's about in the materials at tab 5, but it doesn't contain any statutory protective mechanism.

Clause 154, next door in the table, talks about the power of the Court to make a declaration that a group or class of persons are employees under the Act and I've reproduced that at paragraph 79 of my written submissions. Again it says the Court can do this and the person who can apply for that includes a Labour Inspector and then a declaration made by the Court is binding about that.

At the same time, clause 172, or 172(1) which it became (c) of the Bill, talks about the jurisdiction of the Authority and says that relates to matters about whether a person is an employee. So that's the starting point of the Bill as it was introduced to the House.

Now, in a number of sessions involving questions for oral answer, concern was expressed about this. The first reference in my table one row down Tuesday 9 May, the Honourable Margaret Wilson responds to that questioning and says: “No one is forced to change his or her employment status. It is irresponsible to suggest that. A quite incorrect interpretation is creating a lot of unnecessary anxiety in the community.” So there’s a debate and there’s a series of interchanges about that debate and what, in my submission, the member is referring to is that no, this is not about some kind of a process to change without peoples’ permission.

Dropping down to Wednesday 10 May 2000, the Honourable Richard Prebble queries that persons could be declared employees under clause 154 on the application including of a Labour Inspector and the response from the minister: “Yes, Labour Inspectors frequently have to enforce the law which is not clear on the exact status of an employee or an independent contractor for the purposes of the Holidays Act, et cetera. The provision is intended to ensure that those people with few resources are not denied an opportunity to have their employment status determined. The intention is that they seek the assistance of the Labour Inspector, a union or an authorised representative to have a declaration as to their employment status.” So talking about the very people that on the Labour Inspector’s case need to be able to go to the Authority under 228, Parliament directing those people under 154 to the Employment Court for a declaration.

11 May the Honourable Max Bradford asks if there will be support for changes to clause 6 in 154. The response from the minister is to refer the questioner back to the answers given the day before. Sorry, two days before on the 9th. We’ve dealt with it essentially.

A few more questions. Again, the Minister says: “Clause 155 provides opportunity for people. The case can be taken on behalf of must identify, notify the people.”

Dropping down to 16 May, again questions for oral answer. A series of questions from the Honourable Max Bradford, Honourable Richard Prebble and the Right Honourable Simon Upton, the Minister replies: “The Bill provides for employees or groups to seek a declaration of status if they want to. An independent contractor can remain as such. No one can declare them to be anything else. The intent of the clause is that the Court looks to see whether that group is in fact not in label an employee or a contractor. No one forces anyone into any position.”

Now, the select committee then looks at all of this and what do they come back with? They come back with a number of important changes based on that discussion, based on those concerns as expressed in the House. From paragraph 80 of my written submission, I am talking about those, but essentially there’s two or two or three if we can put it that way.

Paragraph 81 of my submission: “Two important changes were then made. First, and as referred to in the commentary to the Bill, clause 154 is simply omitted so that only persons who consented to action being taken would be affected by any Court decision. Clause 6 (what would become section 6) was amended with a new subclause or ‘protective provision’ requiring consent of the person where the application is not made by them personally but rather by a union or a relevant to this case, by a Labour Inspector.”

We then also have the second primary change to clause 172 which then adds in the carve-out and I will come back to that carve-out your Honours, but a carve-out: “Not being matters arising on an application under section 6(5).”

In my submission, Sir, those changes are Parliament clearly intending to prescribe situations where a third party can have their status changed so that –

WILLIAM YOUNG J:
It’s not a status changed, it’s status determined.

MR BALLARA:

Determined, yes Sir, and that this cannot occur except by application to the Court.

WILLIAM YOUNG J:

That's not the language of the section. You can apply for a declaration.

MR BALLARA:

Section 6, your Honour?

WILLIAM YOUNG J:

Yes.

MR BALLARA:

So section 6 refers to applying for an application.

WILLIAM YOUNG J:

Applying for a declaration.

MR BALLARA:

Sorry, for a declaration, but in my submission, Sir, one has to look at how one is required to get to that point. So, from the parliamentary materials my submission would be that Parliament was clearly addressing the concern. The concern was Labour Inspectors going to the Employment Court and changing, and asking to declare/change somebody's status into something else.

WILLIAM YOUNG J:

Well, plainly it is directed to a Labour Inspector making – it plainly at least encompasses a Labour Inspector making a freestanding application for declaration, so that's common ground. The question is does it preclude the status of a person as an employee or contractor being determined in proceedings to which that person is not a party or not necessarily a party

where it's relevant to the determination of those proceedings and that's the point you have to argue, isn't it?

MR BALLARA:
Sir.

ELLEN FRANCE J:
Sorry, just in terms of that history, might it not be consistent with the idea that this is a standalone jurisdiction because that will be why you would need the protection.

MR BALLARA:
Standalone in terms of the Employment Court only, Ma'am, or, I'm not sure I follow the question?

ELLEN FRANCE J:
Well, with section 6 providing for a standalone ability to go to the court and get a declaration having broader effect in contrast to what occurs under section 228 and that might be why under section 6 you need that additional protection or that additional protection was seen as being necessary. In other words, I'm questioning how helpful the legislative history is to your case.

MR BALLARA:
That's a good question your Honour. My response to that is that the legislative history is very important because it directly, in my submission, addresses how we come to have a section 6(5) process in the first place, and coupled with that the changes that were made to the Authority's jurisdiction to carve-out that process from its jurisdiction says to me, your Honours, that the two reading the two together, what we're talking about is the same thing. We're talking about a Labour Inspector's ability to seek a determination, however so that may arise, and what the legislation, in my submission, is telling the Labour Inspector they need to do, where status is at issue, is go to the Employment Court, not be able to include that element within a 228 application as an ingredient which is, as I understand my learned friend for the

respondent's, argument to be. It's about the same thing, your Honours, would be my answer to your Honour's question.

WILLIAMS J:

Maybe your point is that there's a deeper policy point, or a deeper truth in the debate over 6(5) and (6) and that is that none of the politicians wanted to allow an official to act in a way that affects the rights of others without the others agreeing to it, and that you shouldn't be able to get around that by using section 228.

MR BALLARA:

That is an elegant to way to refer to it.

WILLIAMS J:

I wouldn't have called it elegant, but that's your point, isn't it, that there's a deeper right or interest involved here, and you have to look past the procedural canals to understand that, and make sense of it. So that if an unrelated official could jump in and act without the consent of the people whose rights she is affecting in this case, then that would be inconsistent with a strongly felt policy preference in the legislative debates.

MR BALLARA:

Yes Sir, I would agree with that. This is –

WILLIAM YOUNG J:

What do you say then about the material that's relied on by the respondent that suggests that this issue was identified by Mr Franks, and his proposals to deal with it explicitly were not picked up?

MR BALLARA:

Yes, your Honour, that's my very next part, and that's the bottom three rows of the table on page 3 of my oral outline. So just turning to that, you have the proceeding events, discussion, changes in select committee and so on leading down to those. The Honourable Mr Franks picks this up on the 9th of

August and I am looking at that, your Honours, in the respondent's bundle, in terms of the electronic reference it appears at entry 28 of the index, and it's on the 18th page of that. If your Honours are referring to the paper copies, tab 28, 18 pages in.

WILLIAMS J:
Have you got a page number?

MR BALLARA:
There is a number on the Hansard materials on the top right-hand corner, which is 4117. So where this starts, your Honours, is right at the bottom of page 4117, and there's a reference to Mr Franks there, and he says: "I want to speak to my amendment, which is to remove the reference to subsection (5) in clause 6(6) and replace it so that subclause (6) covers the whole of clause 6." Then he goes on to talk about what he describes as "false assurance from the proponents of this legislation" and then there's an interlude about something that was totally unparliamentary. But down the bottom of page 4118 he then continues, and in the very last paragraph says: Subclause (6) limits applications to subsection (5). That is all it does. There is nothing in this legislation that stops people being declared to be employees when they thought they were contractors, in the course of any other kind of proceeding. For example…"

Then over the page, so onto 4119, he describes what the government has done, what the Minister has talked about as addressing that issue. So that's, in my submission Sir, Mr Franks referring to what the government has said it's done about –

WILLIAM YOUNG J:
But look at the bottom of page 4118, last two paragraphs. I think the union plotting refers to, probably has been thwarted by subsections (5) and (6) but the Labour Inspector plot probably hasn't been, and that's the point he's making explicitly at the bottom of the page.

MR BALLARA:

Sir, my submission is that the plot, to put it that way, that Mr Franks is referring to is the Authority's ability to change people's status per se, rather than the ability of the Authority not to do that on a section 6(5) application.

WILLIAM YOUNG J:

Isn't he – I mean I don't know exactly what section 234 that he refers to corresponds to the Act, but on the face of it he is directing his remarks to the very situation that arises in this case.

MR BALLARA:

Sir, section 234, which has been repealed, but it's in relation to circumstances in which officers, directors or agents of a company can be liable for minimum wages or holiday pay.

WILLIAM YOUNG J:

Yes, but this is, in substance, this case.

MR BALLARA:

Sir. So the –

WILLIAM YOUNG J:

And he's saying on the Bill as it stands the Labour Inspector will be able to bring proceedings on behalf of those who are categorised by agreements they enter into as contractors, and that's what the Bill provides for, let's change it, and there's a deafening silence, isn't there?

MR BALLARA:

Sir, I wouldn't agree with your Honour that there was a deafening silence about that.

WILLIAM YOUNG J:

Well the point is not picked up, is it?

MR BALLARA:

His point is picked up in that when you look at what his point is, what he's doing is he's quoting what the Minister has said before and he's saying: "I don't agree with that. I think there's a hole in this." If we move to the – there's three different references to this which, when one reads them together, makes this a little bit more clear. So the 9th of August next one, which is at tab 29 on page 4487, or it's the sixth page in, he's talking about your Honour's point, as I understand it, in the second paragraph down: "I draw members' attention to clause 172(1), which states: "The Authority has exclusive jurisdiction to …" et cetera, et cetera, and then he's referring to the carve-out. "The only subsection in section 6 that was cured in accordance with the reassurance given to contractors, is subsection (5)." So what he's saying there, in my submission, is that Parliament has fixed that bit but he goes to say: "The matter remains at large for the authority to deal with in any other kind of application at any time…" and that really highlights a nub of this case for the appellants. We are not saying that the Authority is unable to determine status. What we are saying is that if one is a Labour Inspector one must proceed under section 6(5) if status is in issue, because there's a difference –

WILLIAM YOUNG J:

Well look at the third paragraph down on 4487. The end of that: " Yet I see—obviously not by mistake, and obviously something that the committee has thought about—that we have a new subclause in clause 172," which is now section 161 I guess, "… that expressly states that the authority can make those determinations outside the context of an application by anyone under section 6(5)."

MR BALLARA:

Yes, your Honour.

WILLIAM YOUNG J:

So that's really the respondent's argument, isn't it?

MR BALLARA:

If one were to accept that that's what those words meant.

WILLIAM YOUNG J:

What else can they mean?

MR BALLARA:

Outside the context of an application by anyone under section 6(5)?

WILLIAM YOUNG J:

Well, if section 6(5), section 6(5) and 6 have the meaning that you attribute to them, then Mr Franks was completely wrong.

MR BALLARA:

He says he's not an employment lawyer, Sir. He says: "I sought advice and that's what I was told," and what he's also told is that the legislature has looked at the point and decided to maintain the distinction between applications by a Labour Inspector on behalf of a third party and applications by an individual on their own behalf which are able to be within the authority's jurisdiction. Status, your Honours, is a fundamental issue. If one's an employee or not is fundamental to the rights which flow under the Act and there is, in my submissions, there is strong policy distinction between being able to determine someone else's status and being able to have a go, if you like, about your own because it's not going to affect someone else.

O'REGAN J:

But are you saying that the only way of determining status is under section 6?

MR BALLARA:

If one is a Labour Inspector, then yes, your Honour.

O'REGAN J:

But if you're not a Labour Inspector, it can be determined by the Authority?

MR BALLARA:

Yes, Sir, if it's a claim about yourself.

O'REGAN J:

Where does the Act say that the only way status can be determined is in section 6?

MR BALLARA:

So that, in my submission, Sir, comes from a close reading of section 6, section 187 which provides the Court's jurisdiction to look at that issue where one is a Labour Inspector.

O'REGAN J:

It says: "The Court has the jurisdiction," but it doesn't say "and that's the only way it can be done". It just says if someone does apply under section 6, that's who deals with it.

MR BALLARA:

It does say that latter part of it, your Honour, but why does the person have to apply for the section 6 declaration? That is the critical part. My submission is that if one is the Labour Inspector, one has to apply. One can't choose to apply or not apply because what's the point? What's the point of having a system which allows for Labour Inspectors to go and get a status determination if they don't have to? My learned friend has some interesting reasoning around why you might choose one way or the other, but my response to that is it's distinction without a difference.

O'REGAN J;

But the important point is there's nothing in the Act that says you can't choose one or the other.

MR BALLARA:

Again, Sir, if one looks at section 6, section 187, the carve-out in section 161(1)(c) and then at what section 6 talks about, it clearly in my

submission, directs the reader to Parliament's intent which was to differentiate between who can decide what based on who the applicant is and that's for the protection, the reasons of policy protection which were included in section 6 to prevent this very thing. So, if a Labour Inspector –

O'REGAN J:
Yes, but Parliament was told that it didn't prevent this very thing and said: "We don't care".

MR BALLARA:
I would disagree with your Honour about the "we don't care" part of that. My submission would be that Parliament had addressed it. Mr Franks' comments about that were Parliament didn't address it, but really when one looks at that, the way that he is explaining this is that Parliament, or the minister, or the people who decided all of this are being duplicitous, or pulling a stunt, or something like that which is, well, all sorts of things get said in a house, but in terms of your Honour's job, our job in interpreting this legislation, there's no evidence of a stunt. There's no evidence of –

WILLIAM YOUNG J:
No, but that's his language. You can leave aside the hyperbole. He is averting to the, what he saw as a reality that section 6(5) and (6) were of limited application confined to applications to seek a standalone declaration, that questions of status could be determined as a subset of the issues involved in other proceedings properly before the Authority or the Court.

MR BALLARA:
Sir, in response to that point my submission is that if one reads all of this closely we hadn't quite got to the last of the entries on the 15th of August which jumps into tab 30, page 4846.

Mr Franks is talking again in that and I'm referring in the second and third paragraph begins: "So what do we find…" At the end of that he's speaking to the government who enacted this having trumpeted the protection from

unilateral change that we're talking about. As I understand your Honour's point it's a reference to the respondent's submission perhaps about meaningful silence by the –

WILLIAM YOUNG J:

No, I mean there obviously are issues about how material parliamentary history is but in this particular case what you say is a necessity to read two sections together to create a coherent scheme which say is consistent with the parliamentary purpose isn't really consistent with what Parliament knew at the time and that is that section 6(5) and (6) are narrow in their application and they do not cover this sort of situation where employment status is a subset of other issues and despite Mr Franks' best efforts that the legislature of the whole wasn't prepared to amend the statute. So it's not really inadvertence or anything else, it looks as though the narrowness of subsections (5) and (6) or section 6 was well appreciated.

MR BALLARA:

Or your Honour was it chosen not to make any change to that because they thought it did the job all right.

WILLIAMS J:

Again isn't that your best argument, who cares what an opposition member says about clause 5 and 6(6) when the Minister has in May given an assurance that the intention is that individuals can seek the assistance of the inspectorate, union or an authorised representative to make a declaration and there's no intention to override their wishes.

MR BALLARA:

Yes Sir.

WILLIAMS J:

Franks is a distraction.

MR BALLARA:

Franks is a distraction but one I've endeavoured to focus on given it's been raised but I agree with your Honour.

WILLIAM YOUNG J:

One other entirely unrelated issue. Any driver who wishes to contest the Labour Inspector's position is of course able to be joined as a party.

MR BALLARA:

Are we referring to the Authority?

WILLIAM YOUNG J:

Yes.

MR BALLARA:

Well there is a process of joinder available in the Authority.

WILLIAM YOUNG J:

Yes, section 221.

MR BALLARA:

Yes Sir.

WILLIAM YOUNG J:

And one imagines that if the – if Gill Pizza Limited or Restaurant Brands Limited thought it appropriate to do so because presumably they are in contact with their drivers those drivers could be joined as parties to maintain the position that they are contractors not employees?

MR BALLARA:

Sir, that points the appellants in the position of driving the Inspector's case for them, doesn't it?

WILLIAM YOUNG J:

No, one of the points that is raised in your submissions is that this means – the corollary of the Labour Inspector's argument is that people can have their status, you keep on saying changed I would prefer to say determined, without being able to be heard but I don't think that's correct, is it?

MR BALLARA:

Well they would have to want, Sir, to be heard.

WILLIAM YOUNG J:

Yes, exactly. If they don't want to be heard, I mean it's quite likely that they would want to keep their heads down.

MR BALLARA:

Or Sir it's a possibility that they simply no longer are engaged by the completely, they've disappeared.

WILLIAM YOUNG J:

Yes maybe, maybe.

MR BALLARA:

They've moved on, anything can have happened factually.

WILLIAM YOUNG J:

But it is perfectly possible for any who wish to participate to be given an opportunity to do so if necessary by public notice.

MR BALLARA:

Well Sir, the Inspector hasn't done that.

WILLIAM YOUNG J:

No, but there's no need for the Inspector to do that at the moment. The question is we're looking at it in a broader sense. If there is a concern that anyone has that their rights are being determined without them being involved, section 221 provides a mechanism for that concern to be allayed.

MR BALLARA:

It does provide a mechanism for joinder. Joinder has a number of its own difficulties, but as I understand the respondent's argument, what the respondent is saying we don't even need to ask these people, we can just do it.

WILLIAM YOUNG J:

That's a different issue. I mean, they're probably right, they don't need to because it's not something that's required under the Act, but anyone who wishes to participate can and perhaps a procedure should be put in place to ensure that those who are affected are given an opportunity to be heard should they wish to be heard.

MR BALLARA:

Well, Sir, in terms of the existing statutory scheme this may be one of those issues which as the Employment Court referred to, if there's a need for change to this, that's a job for the House.

WILLIAM YOUNG J:

Okay.

GLAZEBROOK J:

What policy reason is there though because I can understand the policy reason to say that you don't want to force people to have their status determined as an employee if they think their status is a contractor, but if they do, then they can be joined and make that argument? If they don't, or they don't really care what their status is, but policy reason is there in requiring them to be involved?

MR BALLARA:

Well, in answer to your Honour's question, what would be the reason of running the case at all. I mean this is a state –

GLAZEBROOK J:

Well, because these people aren't being paid the minimum wage and if they're employees they should be paid the minimum wage. So the policy reason is that the Labour Inspector thinks they're employees, thinks they should be paid a certain amount. They're not being paid a certain amount so the policy reason is that that's why you have a Labour Inspector because that Labour Inspector can look after people who otherwise wouldn't be able to look after themselves, isn't it, so that's the whole point about having this process? What's the policy reason in saying that these people actually have to put their heads I think as Justice Young suggested about the parapet in order to challenge a decision not to pay them the minimum wage?

MR BALLARA:

Well, at the risk of being thought of as avoiding the question which I'm not trying to do.

O'REGAN J:

Don't start your answer, that's a bad start to your answer.

WILLIAMS J:

Never start, yes, never start an avoidance with admitting it.

MR BALLARA:

There are two issues here. One is how you get to a determination and the other is the policy underlying all of the minimum protections in the Act and I'm not going to submit to your Honours that any of the minimum code is not important and useful and has fantastic reasons of policy behind it. Of course it does. What we are talking about as the appellants is how you get there. So, I somewhat –

WILLIAM YOUNG J:

But you would say they never can get there unless they can sign up employees to consent.

MR BALLARA:

And I say that, your Honour, because the policy behind the provisions which talk about declarations or determining status is that and that is a different policy to the policy protections which apply to employees –

GLAZEBROOK J:

I just want to know what the policy protection is in circumstances where you're actually requiring a positive engagement from people who either think they are employees but are too scared to say so or don't care whether they're employees or contractors. That was the point of my question because I can understand a policy reason that says you don't require people to have their status determined with no appeal unless they personally have said they're going to. But in situations where you can participate and where you can appeal presumably, or be party to that appeal, what is the policy reason of saying you can't do it?

MR BALLARA:

Well, the policy reason, your Honour, is that one's status can't be changed by a third party without one's involvement.

WILLIAMS J:

It's being – you keep on saying being changed.

MR BALLARA:

One status cannot be determined –

WILLIAMS J:

Yes.

MR BALLARA:

– without that person being involved and so when one looks at for example –

GLAZEBROOK J:

But why would that be the case if it isn't a question of changing status as you put it against somebody's will? That was the point of my question and I think the point of what Mr Franks was saying as well. He was actually saying these people who might want to be independent contractors shouldn't be forced into a situation of being declared employees with no appeal without their consent.

MR BALLARA:

And I think the consent part of that is the policy reason.

GLAZEBROOK J:

No, the policy reason was when people don't want to be contractors – employees when they supposedly have a choice rather than a choice that is forced upon them by an employer who is pretending, and I'm not suggesting that is the case here because we're looking at a preliminary question, but an employer who was forcing people who were actually employees to sign something up to be contractors because they are not in any position to gainsay that if they want to have the employment.

MR BALLARA:

So –

GLAZEBROOK J:

And I'm not making any comments about this particular case.

MR BALLARA:

I understand, your Honour.

GLAZEBROOK J:

It's in a more generic sense so let's have a look at cleaners or something of that nature.

MR BALLARA:

Certainly. So in that wider policy sense my submission is that what Parliament did in enacting section 6(5) and particularly section 6(6) is to say that when one is a labour inspector as in an arm of the state wanting to become involved in something as a third party, the people in question need to be involved in that. So whether or not they mind, don't mind, are happy, are unhappy they have to be involved and they have to consent.

WILLIAM YOUNG J:

So they have to consent, they have to line up with the Labour Inspector.

MR BALLARA:

Correct, your Honour.

GLAZEBROOK J:

And so if you do have a situation where an employer is actually forcing these people who don't have a choice because they want to work to say that they are independent contractors rather than employees. They have to stick their head above the parapet and presumably then find themselves blacklisted and that's a policy reason to say that you don't have that protective mechanism that's actually in the Act of somebody being able to inspect on your behalf.

MR BALLARA:

Well if one looks at what a labour inspector does practically there are hundreds and hundreds of labour inspector cases before the Authority and lots and lots before the Court. They are always, so to speak, sticking somebody's head above the parapet that's their job but what Parliament has done is it's provided a vehicle, a required vehicle where status is in issue to proceed under section (5) and (6). So in terms of the parapet argument, if we're talking about hypothetical unhelpful employers they're going to know either way. If we're talking about a blacklist they're going to know that the Labour Inspector is proceeding about somebody about status they're going to know who that person is.

WILLIAMS J:

Why?

MR BALLARA:

Because they'll be referred to. So, for example, in this case there's a list of people who the Labour Inspector says are employees, they're listed in the documents before your Honours. So it's not done in secret. It's not done in a way which the employer won't know, and I'm using the word "employer" in quotation marks. This is not some sort of a way around the employer becoming aware of who the Labour Inspector is referring to.

GLAZEBROOK J:

But the point is it's the Labour Inspector taking it not the particular people themselves. So you're requiring a policy that says the particular people themselves have to do that even if you have a rogue employer.

MR BALLARA:

Well all the people have to do is consent. They don't have to run the case. They don't have to pay for the case. Because it's in the Labour Inspector's name there's not going –

WILLIAM YOUNG J:

Okay, they have to pick up the position – overtly and explicitly take up a position contrary to that of their and I'll use the word employer.

GLAZEBROOK J:

Well you can in an independent contract –

MR BALLARA:

Yes, your Honour, that's right but what's going to happen in a case? Let's say they're in the Authority or in the Employment Court talking about whether someone is an employee or not. The Labour Inspector is going to have to have evidence, it's going to have to have those people, they're going to have to talk about their individual circumstances.

WILLIAM YOUNG J:

Of course they have, they're going to have to call evidence as to what they do. Now whether they have to call everyone to do that is another matter or whether there may be just an agreed statement of facts as to the role of drivers but how it plays out if it goes to hearing is I suppose would be – is hard to determine now but there are a range of possibilities.

MR BALLARA:

There are, Sir, a range of possibilities. All I would say is that in response to the earlier question proceeding as a Labour Inspector doesn't involve avoiding that issue. The people will be involved either way.

O'REGAN J:

But it does throw a spoke in the wheel because it requires a bifurcated process where you have to go to the Employment Court first, then you can't proceed further, so you've got to go back to them. Why would legislation which is about having simple process require that? It just doesn't make any sense at all.

MR BALLARA:

Well, your Honour, that was addressed by the Employment Court in this case when it talked about the policy drivers in terms of the reasons for section 6(5) and (6) and so on and said: "Well, look, yes it does create that extra step but it's one that the legislature thought was needed." So, yes we might have, if we started with a blank sheet of paper suggested a more streamlined way to do things, but my submission is that in the context of a status of employment being a fundamental or a foundational thing, what Parliament did, what section 6(5) and 6(6) do is when one is the third party Labour Inspector, they require that step.

GLAZEBROOK J:

Well, if it's so foundational, why didn't they require it in all cases? Why would they say the Authority can do it in any other case except where you're actually

probably looking at the more vulnerable people than the ones who can look after themselves in another case?

MR BALLARA:

Well, that's the policy distinction, your Honour, between a case taken by one's self and a case taken in relation to a third party. If I'm running my own case in the Authority and I'm claiming I'm an employee, then Parliament says: "Great, you can do that."

GLAZEBROOK J:

But well you say that. I just can't see why if it's so foundational the Authority can be trusted to it in every other case except in this type of case. That's what I can't understand, so perhaps you can explain why that would be the case.

MR BALLARA:

Well, in terms of that distinction, foundational rights of employment attach when one is an employee. What, and I'm at risk of traversing what I had already submitted, your Honour, but where it's a third party who wants to –

GLAZEBROOK J:

No, why is it so foundational? Is it not determined in this way? Why is it, if it's so foundational, is it not determined by the Employment Court in all instances?

MR BALLARA:

Where one is an individual applicant, it's a different proposition. The only person who can be affected is you.

O'REGAN J:

Well, that's not right though, is it? Once the Court makes a precedent, all your colleagues will be as well if they've got identical contracts.

MR BALLARA:

I'm not sure if that's correct, your Honour. An example would be a recent case about, heard by the Employment Court in relation to courier drivers. We're looking at the real nature of the relationship. The chief judge at the Employment Court makes it very clear that she's talking about the particular driver in the case before her and says: "Look, this judgment does not apply to all the other ones."

GLAZEBROOK J:

It sure will if you've got identical contracts and identical facts.

MR BALLARA:

That will be the factual question, your Honour. I would submit that even if you –

O'REGAN J:

Well, in this case they are all identical because we've got an agreed statement of facts that applies to them all.

MR BALLARA:

In this case, your Honour, you have a statement of facts which says that they're employed on the same contracts, but there is still going to be difference across specific individuals. Section 6 always –

O'REGAN J:

Honestly, you're not seriously suggesting that one courier, one pizza deliverer will be an employee and the one who comes in five minutes later won't be. I mean honestly, let's get real here.

MR BALLARA:

Well, Sir, I would suggest that's a possibility because the real nature of the employment test under section –

O'REGAN J:

And, do you suggest that would be a good thing? I mean surely it would be much better for the Labour Inspector to get it decided once and for all for everybody.

MR BALLARA:

The decision under section 6 is not going to be of that nature, Sir, in terms of how the section operates.

O'REGAN J:

Which suggests, then, that it would be better to let it be dealt with under section 228.

MR BALLARA:

But for, Sir, Parliament in my submission clearly directing the Inspector to proceed that way.

WILLIAM YOUNG J:

Well we're sort of starting to cover the same ground. Is there anything else you want to say?

MR BALLARA:

Yes Sir there was. If I could just return to the written outline. Paragraph 5, I have covered some of this and I will proceed through it rapidly rather than revisit what has been addressed already but, in my submission, Sir, section 6(5) is reinforced by 187(1)(5). The Employment Court has exclusive jurisdiction to hear and determine under section 6(5) any question whether any person is to be declared to be an employee within the meaning of the Act or a worker or employee within the meaning of any of the Acts referred to in section 223 and this brings me to what 223 covers which is including the Minimum Wage Act and the Holidays Act which are the very provisions section 228 refers to. So when we're talking about 228 we are talking about the two Acts under which the Employment Court is given the jurisdiction to determine status about on the application of a labour inspector.

Contrasting those with, and this is my point 6 your Honours, 228 and 161(1)(q). The exclusive jurisdiction provided to the Authority is to determine actions of the type referred to in 228. What is that again your Honours, that is an application for the recovery of monies payable under the Holidays Act or the Minimum Wage Act to an employee by the employee's employer.

So when one looks at the matter, and this is just moving to my point number 7 in the oral outline, the Employment Court's *GSTech Limited v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 84, [2018] ERNZ 277 judgment which is at tab 10 of the appellant's bundle. This was the specialist Employment Court looking at those two provisions and saying there's a narrow range of claims which a labour inspector is entitled to look at under 228 and it's a case that's raised to make the submission that 228 is about a narrow thing. It does not include the issue of status because it's already talking about the two Acts which are in connection with paying employee's money by their employer. It's about the factual circumstances of is the money owing rather than of the parties.

Now in terms of the –

WILLIAM YOUNG J:
Unless it is the – all right, we're going back over old ground.

MR BALLARA:
And that is the issue which will vex your Honours but, yes. In terms of my point 8 of the oral outline the carve-out in my submission reinforces that this is for the Employment Court. Parliament is taking away the whole issue of what section 6(5) and (6) talk about. It's saying it's not for the Authority it's for the Court.

It's also not about a choice in my submission, your Honours. The words in the brackets are really about where a status decision is required and that in my submission flows from 228 not being about status.

I've spoken your Honour to my point 9, your Honours, apologies, to my point 9 in the oral outline about the residual purpose. The Court of Appeal was concerned that there may not be one. Again, it's about claims by individuals rather than there being no residual purpose.

Now one point that I did want to refer to in relation to the respondent's submissions is their comment about res judicata and the in rem/in personam issues. Now on the respondent's case the Labour Inspector can proceed under 228. The respondent says the employee is not bound by that 228 determination because it's in personam –

WILLIAM YOUNG J:
I would say they are. An employee is privy of, in those circumstances is a privy of the Labour Inspector.

MR BALLARA:
Yes your Honour. Which is where I was about to go. In my submission that can't be correct. There is only one category of employment under the Act. An employee is an employee is an employee. There are no subcategories, and this is the very same subject matter.

WILLIAM YOUNG J:
And indeed if the employee has been given an opportunity to be heard it would be a straight res judicata anyway?

MR BALLARA:
Correct. Correct. So –

WILLIAM YOUNG J:
I suppose I don't see that as a big issue if employees are given an opportunity to be heard.

MR BALLARA:

Well, Sir, if they don't agree with a determination that's made –

WILLIAM YOUNG J:

No, I know, we've been over this ground.

MR BALLARA:

We have Sir. So in terms of where the appellant lands on this, my submission is that the appellants' case does reflect the Act, and the intent of Parliament behind the Act, and it also doesn't prevent the Labour Inspector from doing her job. Instead what is required is that she followed a pathway which Parliament directed her to follow to do that job. We're not submitting, we're not suggesting that it can't happen. All we're suggesting is that the Labour Inspector needs to follow the pathway under the Act for the policy reasons Parliament thought important in enacting that pathway, and I've referred to that, your Honours, as not being able to put the enforcement cart before the jurisdictional horse. But that's a rather trite summary of that.

Now unless I can assist your Honour's any further, those are the submissions for the appellants.

WILLIAM YOUNG J:

Thank you Mr Ballara. Mr Langton?

MR LANGTON:

Sir, I wondered if it wouldn't be more helpful for your Honours if I went last. A, I would have had the benefit of hearing from the respondent, and it just might be more efficient. I'm happy to do it now if that suits.

WILLIAM YOUNG J:

The preference is now actually. The usual course is now.

MR LANGTON:

Okay. You should have received yesterday from me an oral outline which I'm going to be able to cut through quite quickly because I don't, unless it's helpful, particularly want to duplicate my learned friend Mr Ballara's submissions, but there's two issues that acutely affect the intervener here, and they are the two that your Honours have spent most of the time talking about. The first is that a determination of a class of its or its franchisees drivers could be declared to be employees, notwithstanding what their written contracts say, where those drivers haven't consented to the Labour Inspector bringing that claim on their behalf in the Authority. That's the first issue.

The second issue is that the driver would be unable to challenge or end up being stuck with that declaration and that will have, or could have some wide-ranging effects from KiwiSaver to child support payments to PAYE issues than they may otherwise have organised their affairs as independent contractors. So they are the two issues for the intervener's sake that are important.

I say, as Mr Ballara said at the starting point of section 6(5) is crystal clear that it grants to the Inspector a power and the court, a jurisdiction, unlike the section 228 approach, which is a bit more strained, if you look at section 6(5) I've, in the oral outline, simply bolded the bits that I thought are the important bits. So the Court has the jurisdiction. It's on an application of the Labour Inspector, and it is in respect of persons named. The language is subtle but it is different, the language, in 228. Section 228 is all about a singular employee, and the point here is that 6(5) seems already into, quite explicitly towards the class style or representative style actions, more than section 228 is directed at this single employee situation. That's not to say that a Labour Inspector couldn't bring a number of 228 actions and have them consolidated, but my focus is on section 6(5). It is a tailormade provision for the class and it might answer, to some extent, your Honour Justice Glazebrook's question about the policy.

The reason why the Court and not the Authority seems to have been given the jurisdiction under section 6(5) to determine status is because it's status in the context of the class, and the policy considerations that are likely to be different, who they would be when it[s just in relation to a single person, and there was some discussion. In practical terms I can see it playing out this way, for instance, some of the class may not even work for the alleged employer in the future. Apparently at the time that the action was brought they may have left the country, they may be unavailable.

Secondly, members of that class, and I think this was your Honour Justice Young's point, is if you ask the member of the class to be joined to an Authority proceeding, you are essentially asking them to engage in litigation. To incur the costs of doing so. To pit them against the Labour Inspector. It seemed to be the opposite policy to what 228 is about. So that's why I think section 6(5) is quite unique in terms of its policy. I see it as directed, although it does permit singular employees to do so, but I see it as directed at a class situation, and that is why consent is required.

Paragraph 3 of the oral outline, and I'm not going to go over this again, my friend has taken you through the parliamentary debates, suffice to say one point, and that is to the extent those debates are of assistance, and I accept they're not always that helpful, were the submission to be made that they actually showed Parliament intended to defeat Member Franks' point, I would have expected to see in the debates a bit more of a hook or a basis for that intention to be inferred. I tend to read them, as Mr Ballara tended to read them, in that the amendment in the select committee, coming out of the select committee stage, was sufficient to cover off this issue. I don't think you need to go on and do more, it's fine. So that's my only point on them.

Paragraph 4 of the oral submissions, and again I'm just being careful not to repeat it, repeat my friend's submissions, but we agree (**audio glitch** 11:09:05) of a section 228 action being part of Part 11 of the Act.

AVL FEED OF MR LANGTON LOST – 11:09:25

MR LANGTON:
I think we're back.

GLAZEBROOK J:
And perhaps if you start, you said you didn't need to go and be more explicit and I think you were just starting your next point. In terms of Parliament not needing to be more explicit and you were really just starting your next point when you disappeared.

MR LANGTON:
Point 4, thank you, I've got it. So, I agree that the purpose of section 228 is an enforcement purpose, no quarrel with that. There's part of Part 11 that is plainly directed at the enforcement provisions that are made available to the Labour Inspector, but I read 228 as being in two parts. The second part is the enforcement part. That's the actual action to recover the minimum entitlements. But the first part is a power question and the question is whether the Inspector has the power to commence that action at all and that in my submission is more about substantive jurisdictional question than it is an enforcement question and it is more properly dealt with under the definitions part of the Act than it is under the enforcement part of the Act. It is illustrated in the Court of Appeal's judgment if I deal with –

GLAZEBROOK J:
But only, we are told, where it's brought by the Labour Inspector, is that?

MR LANGTON:
That's right.

GLAZEBROOK J:
So that if the person themselves is party to this, it's not so important that it would have to be dealt with the Employment Court?

MR LANGTON:

And that comes back to my earlier point, your Honour, that because it's been dealt with in a representative context and in our case in a class context where status is explicitly an issue – the Court of Appeal's judgment in the cases at tab 3. The paragraph is 36 of the judgment. At the bottom of paragraph 36 the Court says: "If the Authority were to find," this is in a 228 action context where the Authority is allowed to determine the employment status question, but the first part of what I've said, 228, what I submit 228 is about says, "if the Authority to were to find that the workers were not employees, then neither it nor the Labour Inspector would have any further jurisdiction." Well, in my submission, that tends to highlight the problem with that interpretation because the finding would actually be that the Labour Inspector never had any power to commence with and the Authority never had any jurisdiction to deal with the action only to determine whether it had jurisdiction itself.

WILLIAM YOUNG J:

Well, it's entitled. I mean, this happens all the time in relation to tribunals where there are, their jurisdiction is subject to a jurisdictional fact being established. They obviously, in almost all circumstances, have power to determine whether the jurisdictional fact exists. Do you agree with that?

MR LANGTON:

That was the question put to my friend as well. I don't agree with that in the context of this section.

WILLIAM YOUNG J:

Why not?

MR LANGTON:

Because it's the power to commence that action. It's not the jurisdictional fact in relation – sorry, it's not the fact or the ingredient of the action itself. But 228 is, it's even headed in relation to actions. My submission is that the jurisdictional point, the power, the Labour Inspector's power to commence the action has to be found somewhere in the Act. They only operate by virtue of

statute and to use the language in this Court's judgment in *FMV v TZB* [2021] NZSC 102, if the controversary in a section 228 action where status arises between the parties can be framed as a problem under s 6(5) then section 6(5) is the unequivocal, unambiguous clear and direct provision in the Act that the Labour Inspector has to go to.

WILLIAM YOUNG J:
But it can also be framed as a problem under section 228(1) and whatever the subclause is in section 161 which gives the Employment Relations Authority power to determine employment status.

GLAZEBROOK J:
And it will be in any event in under your theory because if it's an individual 228 it will determine employment status so it will determine and if the Authority were to find that the worker was not an employee I find in the employer's favour in that individual case then the Authority would have no further jurisdiction.

MR LANGTON:
But did the Labour Inspector have the power to commence the action in the first place is –

WILLIAM YOUNG J:
But did the employee have the power to commence the action in the first place?

MR LANGTON:
Well that – he or she does, Sir, because there will be an Authority – the employee has the ability to commence their let's call it a personal grievance claim, the alleged employee. The Authority has jurisdiction under s 161(e), explicit jurisdiction to deal with personal grievances. Once that jurisdiction is established then 161(1)(c) is engaged which is the Authority's jurisdiction to determine the matter about whether the person –

WILLIAM YOUNG J:
But isn't it only an employee who can commence a personal grievance?

MR LANGTON:

WILLIAM YOUNG J:
I mean the argument just sort of goes around in circles.

MR LANGTON:
In which case I just – in my submission 6(5) is the –

WILLIAM YOUNG J:
You say section 6(5) is exclusive unless the claim is made by the person who claims to be an employee?

MR LANGTON:
Yes.

WILLIAMS J:
So I can think of lots of situations where in theory Tribunals have this jurisdictional fact issue, for example, the Waitangi Tribunal to use a situation I'm somewhat familiar with, a claimant has to be Māori and it would be standard if there were an issue about that for the Waitangi Tribunal to resolve that question rather than for it to be hived off somewhere else and I guess you can ask, well there's no equivalent – you could say there's no equivalent of 6(5) does that make the difference. Does that make that rather sensible approach thing to things no longer available? I mean I think there's no question this is a jurisdictional fact, the question is the effect of 6(5) and (6) on the ability of the inferior tribunal to resolve whether it's allowed to hear the thing at all.

So the Youth Court, is this person under 17 or 17 and under? If not, sorry, go to the District Court and so on and on it goes through all of the tribunals and

inferior courts we have. Does 6(5) make a difference? That's really the only relevant question.

MR LANGTON:
I agree with your Honour, that is the key question.

WILLIAMS J:
Right, so now you said that the drivers in this case may not even know that an application has been made by the Labour Inspector. I don't think Mr Ballara agreed with you. Can you just explain why you say that?

MR LANGTON:
Sir, I don't say in this case they may not even know, I say it in terms of what the Intervener's interests in this is that there may – envisage a situation where the Labour Inspector picked all of the Intervener's drivers, all of its franchisee's drivers and it bought a single class or representative action to have their status determined to be employees under s 228. That's the scenario that I was suggest may arise and in that scenario there is likely to be a situation where the drivers – they don't have to know, the provision doesn't say that.

WILLIAMS J:
So how would that play out practically? Would there be one driver and one franchisee picked from each of the restaurants or how does this work practically, do you have any idea?

MR LANGTON:
Practically it would be entirely up the Employment Relations Authority to run its investigation into that issue as it decided. It's not a court of record.

WILLIAMS J:
So, let's just run with the possibility that in fact 228 and 161(1)(q) could be used to affect the interests of people who have no idea this is going on and to do so explicitly because they're inside the class even if they haven't been

named, the contract is not in evidence et cetera, et cetera, let's just run with that. Tell me how section 27(1) of the Bill of Rights Act might apply to help you out?

MR LANGTON:
Let me get that in front of me, Sir.

WILLIAM YOUNG J:
Natural justice.

WILLIAMS J:
Yes, and the right to natural justice when a tribunal is making a determination about your rights and interests.

MR LANGTON:
Well, it would depend who engaged that argument around the rights. The Authority could engage it itself and decline to make the determination.

WILLIAM YOUNG J:
Well, wouldn't it simply say: "We'll put everyone on notice, they can join if they want to"?

MR LANGTON:
The point, Sir, is it might, but equally it might not.

WILLIAM YOUNG J:
But why would we assume it wouldn't? Why wouldn't we assume that it would conform with the rules of natural justice?

MR LANGTON:
You might have assumed that, Sir. I can't argue against the assumption being made. Just in practice –

WILLIAMS J:

Well, isn't that an argument? I'm throwing you a fish here, isn't that an argument in favour of your interpretation of 6(5) because it requires consent?

MR LANGTON:

That is my point. All those protections are hardwired or built into section 6(5). It requires them to be named and it requires them to consent.

WILLIAM YOUNG J:

All right. Okay, is there anything else, Mr Langton?

MR LANGTON:

My friend has covered the res judicata point and I felt Justice Young you're over that *Shiels v Blakeley* judgment that I forwarded with the synopsis yesterday so I don't need to take it any further.

One further point is because this Court, this case will have quite wide-ranging effects for other organisations that engage classes of independent contractors and I accept the point that vulnerability is a policy consideration in how these provisions are interpreted, but not all minimum entitlement claims concern vulnerable employees. The Court earlier this year heard a case about commission payments and holiday pay in relation to them. That is a minimum entitlement. There is less of an issue in many of those cases about vulnerable employees. So the Labour Inspector could just as well choose all of the courier operators in New Zealand, name a class of drivers and proceed under section 228(1) to have them all declared employees and then if they wished to push back on that, the drivers that is –

GLAZEBROOK J:

Could you do that under 228, name a class?

WILLIAM YOUNG J:

It has to be on behalf of particular employees, doesn't it?

GLAZEBROOK J:

Yes.

MR LANGTON:

Sorry, I don't mean class as in class action. They could name, they could bring a representative action on behalf of a named group of courier drivers, let's say them all.

WILLIAM YOUNG J:

It wouldn't have to identify – it couldn't bring a claim on behalf of all courier drivers in New Zealand.

MR LANGTON:

Sorry, would have to name them, I agree with that, but let's say it did that, it then puts the requirement on the courier driver who doesn't want to be caught or end up being declared an employee to engage in that litigation.

WILLIAM YOUNG J:

Well, one way or another that's probably right that a courier driver who didn't want to be declared an employee would have to have a right to challenge the Labour Inspector's claim.

MR LANGTON:

My point, Sir, is that why –

WILLIAM YOUNG J:

The claim would likely be for things like holiday pay or breach of minimum pay requirements, wouldn't it?

MR LANGTON:

Holiday pay the obvious one, Sir, but my point is why should it be a requirement that the courier drivers then step into that litigation in 228(1)?

WILLIAM YOUNG J:

It's a natural justice requirement. I mean why should people have to participate in a procedure that if it goes through may adversely affect their interests. Well it's just a requirement that people be given a right to participate. There's no requirement that they do participate.

MR LANGTON:

But that's the policy of s 6(5), Sir.

WILLIAM YOUNG J:

I understand in relation to s 6(5) that is – sections 6(5) and (6) that is the policy. The issue for the case is whether that applies, also the section 228(1).

MR LANGTON:

So that group of drivers will not have to get involved in the litigation if a section 6(5) approach is taken whereas they will do if section 228(1) is –

WILLIAM YOUNG J:

Yes they have to get involved because they have to consent, they have to line up with the Labour Inspector. They have to take a position and unless they take a position a claim can't be brought on their behalf on your approach to the statute.

MR LANGTON:

That's my point, Sir, is those who don't wish to be declared employees under s 6(5) they just refuse to consent and they are –

GLAZEBROOK J:

Yes, they might refuse to consent but the ruling will still apply to them with absolutely no right of appeal whereas under the 228 procedure if they want to get involved they do have a right of appeal, don't they?

MR LANGTON:

Well they have a right of appeal to the very place that, well to the Employment Court. Well, sorry, they won't have a right of appeal unless they are joined as a party.

GLAZEBROOK J:

Well exactly, but all I'm saying is that you might have one person who decides that they want to be an employee consents to the declaration process then effectively binds everybody else in respect of that including the other employers for people who have identical working relationships without a right of appeal so aren't they worse off?

MR LANGTON:

I don't know if they are worse off because a significant consideration in determining whether they are or aren't an employee is what they intend their relationship –

GLAZEBROOK J:

In the individual case but, well I mean all you have to do really is to look at the film workers in *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721 in terms of having a roll on effect to all of the others so-called contractors that turned out not to be.

MR LANGTON:

Well we don't know in those cases, Ma'am, and we don't know in the courier case that the Employment Court heard is whether it's a fair assumption to make that everybody else with similar contracts doing similar things would be happy to be declared an employee against their wishes. Many of them actually prefer, courier drivers are a good example, fitness instructors are another one, prefer to be independent contractors, and they would not wish, and Hansard bears this out, they would not wish to be declared an employee contrary to the –

GLAZEBROOK J:

All I'm saying is they could be declared an employee not because the decision is binding on them under s 6 but because their terms of employment, and I'm using that in the wider sense of employment, are effectively the same as the test case.

MR LANGTON:

If they chose to take the benefit of the test case, yes, they would still have the –

GLAZEBROOK J:

Well, no, but they choose not to but somebody else does and that somebody else will then determine what happens to everybody else.

MR LANGTON:

I don't accept that will determine what happens to everybody else because the parties can still agree otherwise.

GLAZEBROOK J:

Well no they can't because the Employment Court has said they can't but agreement does not override the employment status, it's looked at not in terms of agreement. You don't have a free choice as to whether you want to be a contractor or an employee, it's looked at not in terms of your free choice but in terms of the actual arrangements.

MR LANGTON:

I think that's assisting why a section 6(5) approach should be the one that's taken and I think it will be an exceptional situation a judgment from the Employment Court declared people to be employees even though they never intended that and they choose still not to intend that, that would be –

GLAZEBROOK J:

But does it –

O'REGAN J:

We don't have to decide –

WILLIAMS J:

Your scenario, the disaster scenario is pretty unrealistic isn't it, the busy and underfunded MBIE are not going to be interested in running cases on behalf of people that don't want them run for them?

MR LANGTON:

It's the possibility that that might occur. I think you called it the intrusive labour inspector, the paternalistic labour inspector might choose a class –

WILLIAMS J:

Maternalistic in this case.

MR LANGTON:

Maternal, yes, maternalistic – so might choose a class in my client's case of pizza delivery drivers that had them all declared to be employees.

WILLIAMS J:

Sure, anything's possible in theory but the real question is should we tweak the interpretation of the Act on behalf of a scenario that I'm suggesting he was pretty unrealistic.

MR LANGTON:

Well in my submission it's not a tweak Sir, it's that s 6(5) is the – it contains all the protections, it makes the power clear and unambiguous.

WILLIAM YOUNG J:

All right Mr Langton it's 11.30, is there anything else you want to say?

MR LANGTON:

No, those are my submissions.

WILLIAM YOUNG J:
Thanks Mr Langton, we'll take the adjournment and resume in 15 minutes.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.47 AM

WILLIAM YOUNG J:
Ms Catran, you've heard the argument and you'll have, I think, a reasonable grasp of the drift of the thinking of some of our number, perhaps all of our number, so if you could just tailor your submissions to what's happened, we would be grateful, thank you.

MS CATRAN:
Certainly Sir. We did intend to split the argument so that I would address issues 1 to 3 on our outline, that is the prerequisite or ingredient question, the meaning of the carve-out, and the consent and declaration versus determination, and then Mr Fong will address the policy considerations. But I think that perhaps we don't need to say too much about the question of prerequisite or ingredient. I will address the carve-out and the key question of consent, which is what vexed the Employment Court and is, I submit, the main platform of my friend's submissions, and I will say a little bit about a declaration versus a determination and the issue estoppel question.

The jurisdiction of the Authority is set out primarily in section 161(1) and is a general and fulsome jurisdiction to deal with employment relationship problems generally. This court is very familiar with section 161(1) having recently decided the *FMV v TZB* case, and I submit that a similar approach, as was taken in that case, is relevant here. The factor which was not present in *FMV* is the involvement of the Labour Inspector, and at points 2 and 3 of my outline I address how the Labour Inspector fits into the employment institutions generally. So we say there is a pyramid approach to enforcement, which starts with the Labour Inspector, and then moves up into the Authority and then, where appropriate, into the Employment Court.

The Labour Inspector has a toolkit which they can use to enforce the minimum standards, and some of those tools are set out in the table at page 3 of my outline. They include quite a range of tools such as an enforceable undertaking, which is basically an agreement, an improvement notice or demand notice, then an action in the Authority under section 228, which is what we're talking about today, then an infringement notice, which is actionable in the District Court, and then for serious matters the declaration of breach and pecuniary penalties under Part 9A, which are within the exclusive jurisdiction of the Employment Court.

That is reflected in the purpose section of the Act, section 3, which is at paragraph 7 of my submissions, and in particular 3(ab) says: "To promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court." And we can see in the following paragraphs of our submissions that there is a trend over the last 21 years to increase the tools available to the Labour Inspector where Parliament has not been satisfied that the minimum entitlements are being met or being thoroughly enforced. So section 3(ab) was added in 2016, along with Part 9A. Part 9A contains the most serious sanctions which an Labour Inspector can seek against an employer including pecuniary penalties and banning orders.

From paragraph 10 of my submissions we talk about the day-to-day tools available under Part 11, and then the serious tools available under Part 9A. What you can see from looking at those sections, and also from the table attached to the outline, is that all of those tools require there to be an employment relationship. So, or at least require the Labour Inspector to believe on reasonable grounds that there is an employment relationship. So the argument which the appellants are raising here, with respect to section 228, could equally apply to other tools in the Labour Inspector's toolkit.

In *FMV* this court discussed the general jurisdiction of the Authority with the majority saying it's under the chapeau in 161(1) to deal with employment relationship problems generally.

WILLIAM YOUNG J:
Whereas in truth it's really in the list of subsections you're going to go on to…

MS CATRAN:
I understand your Honour. In my submission it doesn't make any difference here today because we have both.

WILLIAMS J:
I think that's what he said there too.

MS CATRAN:
Exactly. We have both. We have the subsection (1) chapeau, we have paragraph (c) and we have paragraph (q), so I submit that it makes no difference here today either.

We can see the term "employee" used throughout 161(1). It is a, what your Honours have called a jurisdictional fact in every single one of those paragraphs, even in the paragraphs where it doesn't appear, it's an element or what I'm calling an ingredient of the action. For example, for a personal grievance, it's contained in section 103 rather than 161(1)(e), but it remains a jurisdictional fact for each of those things.

In this case the ingredients of a section 228 action, or what *FMV* called the factual problem, there are three. Firstly, that there are wages owed under the Minimum Wage Act or the Holidays Act. Secondly, by that employer. Thirdly, to that employee. So the identity of the "employer", and their relationship with the "employee", using those words in quotation marks, are elements that must be determined in any case, and of course it's trite that the parties can't contract out of that jurisdiction, and can't confer that jurisdiction by agreement.

What then does the carve-out in 161(1)(c) mean and again I submit that the approach in *FMV* is instructive. In that case the Court was considering the carve-out for tort claims under paragraph (r) but the majority held that the

chapeau was a general jurisdiction with the carve-out being read narrowly and that if a claim or a matter, a problem could be brought within the Authority's jurisdiction under 161(1) then it must.

Of course here it can because of 161(1)(q) and section 228. That is because the problem that we are seeking to solve here is not the problem of employment status, it is the problem of minimum wages and holiday pay owed. The question of employment status is an ingredient of that problem but it is not the problem and in that regard this case can be distinguished from *GSTech* which my friends have referred to and which troubled the Employment Relations Authority in the first instance decision. That case was about a claim under s 228 which then morphed into a claim under s 131. So it morphed from a minimum wage claim into an arrears claim and that happened during the course of the investigation but the Labour Inspector remained the plaintiff and the Employment Court held that the Labour Inspector had no jurisdiction to continue with that claim once it became a s 131 claim.

So I submit that that is two different factual problems, a problem of minimum wages and the problem of wage arrears above the minimum wage. That's what happened in *GSTech*. In this case we have only one problem which is minimum wages and holiday pay and employment status is an ingredient of that problem.

WILLIAMS J:
Well can you give me an example of where a status declaration under 6(5) isn't connected in some way to the jurisdiction on this in 161?

MS CATRAN:
There will be other employment problems which are within the exclusive jurisdiction of the Employment Court, for example.

WILLIAMS J:
All right, thank you.

WILLIAM YOUNG J:

Are there cases where declarations have been made under s 6?

MS CATRAN:

Yes, many.

WILLIAM YOUNG J:

Have we got them?

MS CATRAN:

Well I think the *Leota v Parcel Express Limited* [2020] NZEmpC 13, 92020) 17 NZELR 231 is one. Actually the *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69, [2021] ERNZ 183 is a very recent one. That's at tab 8 of the respondent's bundle. That case related to a labour hire arrangement between the Inland Revenue and a recruitment company called Madison Recruitment and eight workers brought a section 6 claim to have them declared employees of the Inland Revenue rather than of Madison and that case I've actually given us an example of how a s 6 claim operates in practice, that case took 21 months to resolve. There were two interlocutory judgments. The applicants requested that it be brought as a class action, a representative action under Rule 4.24 of the High Court Rules and that was declined because the Employment Court held that there was not enough common interest because of the factual nature of the section 6 application. I think there were other interlocutories about discovery, joinder of Madison as a defendant and so on. There were 12 hearing days, 16 volumes of evidence and all together four interlocutory judgments. In the end the Employment Court held that the eight employees were employees of Madison not of the Commissioner of Inland Revenue, and the Court of Appeal refused leave to appeal because it was a factual question not a question of law. Those employees have now sought special leave from this Court to appeal, so, in my submission, that is one example of how a section 6 claim operates in practice.

GLAZEBROOK J:

You're not suggesting that you couldn't do a section 6 claim, you're just saying that in practice, if it's just a question of a minimum wage claim, you would do a 228?

MS CATRAN:

Yes.

GLAZEBROOK J:

But if the Inspector wanted to, or any employee wanted to, they could just go for a declaration?

MS CATRAN:

Yes.

GLAZEBROOK J:

But it would normally be done in a case where they wanted a wider?

MS CATRAN:

Yes, your Honour.

GLAZEBROOK J:

They have a wider interest in being declared, their status declared and that would be the actual issue rather than the specific issues under the other sections, is that fair?

MS CATRAN:

Yes, your Honour. So they're seeking a declaration of their status from which then flow many other things such as the ability to collectively negotiate and so on and there may be reasons why the Labour Inspector might seek a declaration under section 6. The Labour Inspector is currently intervening in a section 6 application with regard to a Gloriavale member, or a former member, and there may be other section 6 claims in the offing where the Labour Inspector might seek to intervene. However, where the problem that

you're trying to resolve is a minimum wage problem, section 228 is the appropriate tool.

WILLIAMS J:
So, Leota is a courier driver, right, I haven't read the decision?

MS CATRAN:
Yes, yes.

WILLIAMS J:
But what was the problem there?

MS CATRAN:
I think Mr Leota sought a section 6 declaration.

WILLIAMS J:
He did, that's right.

MS CATRAN:
And it is an example of one of the cases where the contract said that he was a contractor. I think Mr Leota was quite a vulnerable employee. English was his second language and he had, for example, he had purchased the van and expended a fair amount of money in obtaining that contract or that job and the chief judge went through the test in section 6(1) and in the end she found that he was an employee.

WILLIAMS J:
But what was the underlying problem? You're relating your submissions to identifying the problem. What was it in Leota?

MS CATRAN:
It was the question of his employment status. He sought a declaration of his employment status.

WILLIAMS J:

That was all he sought?

MS CATRAN:

I believe so, your Honour, yes.

WILLIAMS J:

Okay, thank you.

GLAZEBROOK J:

Although, of course as you say, a consequence would flow from that?

MS CATRAN:

Yes. Turning back to section 161(c) and what the words of the carve-out actually mean, the Court of Appeal held that the carve-out applied where a 6(5) application had actually been made. The Employment Court held that the carve-out could not be read narrowly but they did not say exactly what they thought it meant. I submit that you would need much clearer words than in that carve-out in order to remove all issues of employment status from the Authority to the Court and similarly, you would need clear words to distinguish between an employee bringing that claim in the Authority and a Labour Inspector who must go to the Court as my learned friends have submitted. The section does not say that at all. It says: "Except matters arising on an application under section 6(5)." I submit that you can read that in a very straightforward manner as the Court of Appeal did which is where there is an application under section 6(5) the Employment Court has exclusive jurisdiction to hear it.

Turning to the question of consent. This is what really concerned the Employment Court and this is why the Employment Court held that a disputed issue of status must go to the Court under section 6(5) and (6) before it's determined in the Authority. The Employment Court did not distinguish between a declaration and a determination, they treated them as the same thing, however, I submit that they serve different purposes and therefore the

need for a consent and the protections under section 6(6) do not arise under section 228, they are very unlikely to arise under section 228.

On the contrary, the policy underlying section 228 is that of protecting vulnerable employees, those who are earning the minimum wage or who are not being paid the minimum wage. We have included one example in the bundle which is the *A Labour Inspector of the Ministry of Business, Innovation and Employment v Freemind Enterprize Limited* [2016] NZERA Auckland 165 and we've sent up another example last night, the *Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Limited* EmpC 19/2018; [2019] NZEmpC 181 case. I will take your Honours to those cases to give an example of what s 228 is aimed at and why consent is not required.

Firstly *Freemind* is at tab 5 of the respondent's bundle. So this was a case in the Authority brought by the Labour Inspector on behalf of 121 employees. They were kiwifruit pickers. Freemind was a contractor company or a labour hire company which hired out casual kiwifruit pickers to kiwifruit orchards and they largely employed migrant workers and all on casual contracts as the fruit picking industry does.

During the investigation the employer told the Labour Inspector that effectively they didn't pay holiday pay or what they really said was: "We pay holiday pay as you go," but that was clearly not supported by any of the evidence and they said that was the practice for all of their employees.

Freemind raised a jurisdictional issue which you can see at paragraph 14 which was very similar to the jurisdictional issue raised today that the Labour Inspector had no standing to bring a claim under s 228 on behalf of employees who had not consented or who didn't know about the claim and there being 121 of them and them being casual workers and mainly migrant workers many of them had left New Zealand or couldn't be found so they didn't know about the claim. So you can see the jurisdictional point at paragraphs 15, 16 and 17. The employer argued that the Labour Inspector

can only commence an action in the name of an employee and on that employee's behalf, that is, as a representative of the employees.

Turning over to paragraph 26. The Authority was not concerned with that problem at all. They said that public policy in relation to the minimum code is to discourage any form of exploitation of employees and employers not meeting their minimum obligations under the law cannot be allowed to profit from their wrong therefore it cannot be correct that the Authority can order payment of minimum code entitlements against one employer because all of its employees are locatable and allow an employer to retain as profits the underpayments due to its employees not being locatable.

Then at 27 they raise the issue which your Honours have discussed about vulnerable employees putting their heads above the parapet to take action against their employer.

Therefore, at 28 these provisions, that is section 228, cannot be read as prescribing that the consent of an employee has to be given before the Labour Inspector can bring in action regarding that employee. However, the Authority did ask the Labour Inspector about the attempts she had made to contact those 121 employees.

Secondly, the *NZ Fusion* case, this is Labour Inspector and New Zealand Fusion International Limited. Your Honours, this case is getting up towards the worst case scenario and I submit that it is this type of case which the part, the Labour Inspector's powers and the Authority's powers –

O'REGAN J:
It was handed up yesterday.

MS CATRAN:
Sorry, this one was handed up, filed last night. You should have hard copies.

WILLIAMS J:

Yes.

MS CATRAN:

In this case the director of the employer advertised in China for workers. She was the owner of a campsite. She advertised in China for workers. When they applied, she flew to China, met with them, obtained a $45,000 bond from each of them and asked them to sign an employment agreement over there. They then travelled to New Zealand. They applied for a work visa but had not obtained one so they travelled to New Zealand on a visitor's visa and started working unlawfully on the visitor's visas and you can see at paragraph 6 each of the employees worked seven days a week and received no pay whatsoever. Several months later they began to make enquiries about being paid. The employer was not receptive to these requests nor was she receptive to subsequent requests to repay the bond money they had paid to her. Each of them was in dire financial straits and left New Zealand. Later on a journalist made a complaint to the Labour Inspector who began to investigate. When they visited the campsite, the Labour Inspector saw another lady working in the office. At paragraph 9 at the top of page 532 the Labour Inspector asked this lady Ms Wang what her role was. Ms Wang advised that she was scanning documents for a student visa and the employer described her as a family friend. So there you clearly have a contest about employment status.

Then at paragraph 10, the employer was adamant that neither of the previous employees had been employees either and she says later in that paragraph that: "She was well aware neither of them was allowed to work in New Zealand because they were only on visitor's visas and therefore, they did not work." The Employment Court was not persuaded by that argument.

WILLIAM YOUNG J:

This case came before the Employment Court on transfer from the Employment Relation Authority?

MS CATRAN:

No, your Honour, this was an application under Part 9A by the Labour Inspector. So this was an application for a declaration of breach and pecuniary penalties and a banning order. That's that most serious category.

WILLIAM YOUNG J:

Okay, but on the other hand, on the theory of the Employment Court, there should have been a declaration sought first?

MS CATRAN:

Yes, your Honour, and that is in fact not what the Employment Court did in this case.

WILLIAM YOUNG J:

Did it deal with the topic?

MS CATRAN:

Yes. So, if you see at paragraph 13.

WILLIAM YOUNG J:

Sorry, 13?

MS CATRAN:

13, 1-3, it's the chief judge, your Honour. She talks about a threshold issue of employment status and then at paragraph 16 she goes through the evidence about employment status and she says: "I have no difficulty in concluding that each of the three complainants was an employee of the first defendant," and she discusses the evidence at –

WILLIAM YOUNG J:

But she doesn't deal with it under section, doesn't deal with whether section 6…

MS CATRAN:

No, that's correct, your Honour. She deals with it I submit as an ingredient of the declaration of breach and this is –

WILLIAMS J:

She didn't have the consent of the family friend/employees who had gone back to China?

MS CATRAN:

Well, all three of them gave evidence, your Honour.

WILLIAMS J:

Oh, okay.

WILLIAM YOUNG J:

Probably they would've consented.

MS CATRAN:

Yes. It doesn't say specifically whether or not they consented, but they appeared and she was assisted by their evidence, so we can assume they probably would have. But if you turn to 109 and the summary of orders, there's no declaration of employment status under section 6(5), there's merely a declaration of breach and the following pecuniary penalties and they submit that that's correct because a declaration of breach requires there to be a failure to pay minimum wages which requires there to be an employment relationship. The reason I draw these two cases to your Honours' attention is because they highlight the vulnerability of the employees and the difficulty that would arise if consent was required for a preliminary question of employment status.

On the issue of standing which my friends have raised and which also was concerning to the Employment Court. I submit that in practice it's unlikely to be a problem. In issue estoppel, I move towards –

WILLIAM YOUNG J:

I would say that if a claim is brought by the Labour Inspector on behalf of the named employee the employee is going to be bound by a judgment, the results.

MS CATRAN:

That may be, your Honour, they may be a privity. I would say however that there is a public policy exception to privity.

WILLIAM YOUNG J:

Well I would probably also think that they have to be on notice of the proceedings for the right to participate if they want to which I think would exclude any public policy, wouldn't it.

MS CATRAN:

Yes your Honour. I'm addressing what your Honour has called the Labour Inspector plot of seeking a declaration – sorry.

WILLIAM YOUNG J:

Not my language. I did repeat it. It was Mr Franks' expression.

MS CATRAN:

Yes, so if the Labour Inspector perversely brought a section 228 action where –

WILLIAM YOUNG J:

But no one is suggesting that. I mean Mr Franks' speech was marked, it was by some hyperbole but there was an issue that he was addressing and put his finger on and which you rely on.

MS CATRAN:

Yes. So generally I agree privity will apply. If the employee really, really disagreed with the Labour Inspector but didn't know about the case because of some negligence by the Labour Inspector, I use that in a non-technical

term, then perhaps that employee might not be bound by privity. That would be a question for the Court at the particular time. However, in reality that's unlikely to arise.

The Labour Inspector is likely to interview the employees and in this case we can see from the statement of problem that they did interview quite a few of the delivery drivers.

WILLIAMS J:
Can you help me, is that the usual practice here? Is this a book exercise by the Labour Inspector or the Labour Inspector makes contact with these people?

MS CATRAN:
Yes your Honour, the Labour Inspector usually interviews employees and employers.

WILLIAMS J:
Okay.

MS CATRAN:
So they will probably interview them, perhaps not all of them if there are 121 of them and some of them are overseas but certainly some of them.

The Labour Inspector will probably ask some of them to give evidence as they did in *NZ Fusion*. The Labour Inspector carries the burden of proof so they can't just turn up in the Employment Relations Authority without enough evidence. They will probably ask the employees to give evidence.

WILLIAM YOUNG J:
Some of the employees?

MS CATRAN:

Some, yes, your Honour. The Labour Inspector is unlikely to spend their scarce resources on section 228 actions where the employees or purported employee is adamant that they are a contractor. It doesn't make any sense. If the Labour Inspector does do so then the employee could ask to give evidence in the Authority that they don't believe that they are an employee, that they believe they're a contractor in which case the section 228 action will fail.

If that employee isn't present then the employer can ask the Authority to call that employee and of course the Authority is an inquisitorial body, it has the power to call evidence from anyone or information from anyone it wishes. If the employee isn't present and can't be found the Authority can ask the Labour Inspector to make inquiries as they did in the *Freemind* case with the overseas former employees and the Authority can supervise the Labour Inspector's actions to make sure that they're not as your Honour Justice Williams said "breaching the natural justice of those employees," and I would finally say that the Authority is bound by natural justice under section 157(2)(a): "The Authority must observe the principles of natural justice," and one example of that happening is the *Hixon v Campbell* [2014] NZEmpC 213, [2014 ERNZ 535 at 39 – 41 case in my friend's bundle where a jurisdictional issue arose. It was a claim brought by the Labour Inspector under the Wages Protection Act and a jurisdictional issue arose. The Labour Inspector in fact raised it himself and joined an employee as a second plaintiff. So that's one example where the joinder process which your Honour talked about could exist, could help. Or, of course, they could be joined as a defendant. If this all went wrong then the employer could get the employee's consent and bring a section 6(5) claim and the employer of course can also challenge the section 228 determination. So, in my submission, it is actually very unlikely that you are going to have an employee stuck with a section 228 determination which they thoroughly disagree with and didn't have any opportunity to be involved in.

By contrast, it is appropriate that declarations of employment status are made by the Employment Court. It's a different remedy. It has a wider inter omnes effect whereas the determinations in the Authority are much swifter, much more informal. They are usually oral. We handed up sections 174 to 174(E) which I won't take your Honours to, but they prescribe how Authority determinations are to be made and the presumption is that they will be made orally at the end of the hearing or that an oral indication will be given and then they will be recorded in writing in short form within a particular period of time. I think three months unless there are special circumstances. So that is something very different from a declaration inter omnes which is what section 6(5) does.

Unless your Honours have any further questions I will hand over to Mr Fong to briefly address the policy points.

WILLIAM YOUNG J:
Thank you, Ms Catran. Mr Fong?

MR FONG:
May I please the Court, I will be picking up at paragraph 21 of the road map filed by the Labour Inspector and I am conscious of time and not to overlap some of the discussions made this morning. So what I propose to do is simply to amplify one policy consideration which we say should bear on the analysis of the interpretation of the question and that consideration is access to justice. The primary submission we made is that the appellants bifurcative approach would impair access to justice for vulnerable workers and that's for some of the reasons that the Court has canvassed this morning. Mainly section 228 is designed to overcome some of the inhibitions that might prevent vulnerable workers from taking active steps to protect their interests particularly from suing their employers to recover minimum entitlements and as the Authority and the academic literature demonstrate, as discussed in our submissions, these inhibitions could take the form of financial inhibition, in terms of litigation cost, or they could be psychological in character, again fear

of retaliation or reprisals from the employer. We say these obstacles present serious hinderance to these workers' effective access to justice.

In the course of my learned friend's submissions this morning, the suggestion was made that well all that the workers have to do on their theory is simply to consent to an action but the answer we would give is that there is important difference between expressly consenting to an action against one's employer than compares to taking a much more passive role and letting the Labour Inspector to do, to take the limelight, so to speak in any dispute resolution process and in some ways this issue was already dealt with by this Court in the recent judgment of *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 where the Court was alive to the psychological constraints on individuals who might be required to express their consent to opt into a class action and the Court considered that, the desire to promote access to justice would mean that it is not necessary that in all cases a class action would have to proceed on an opt in basis and that an opt out approach which does not require expressed consent individuals would indeed promote access to justice, and we say the same approach should be applied in this case. That section 228 should be given an interpretation that would widen access to justice by shifting the financial cost onto the Labour Inspector and deflecting the attention from the employees and this is an important way in which section 228 would implement the levelling effect of which this Court said was in *FMV* at paragraph 52 as being one of the central themes of the Act. So for these reasons we respectfully endorse what the Court of Appeal said at paragraph 50 of this judgment that it is a distinct advantage for both vulnerable workers and the public interest that the Labour Inspectors can proceed with a section 228 action without obtaining consent.

The other and final issue that I want to address on the access to justice point is the relevance of section 27(1) of the New Zealand Bill of Rights Act. That question was also addressed by this Court in the *Southern Response* case. If I could just take your Honours to that judgment which is at tab 15 of the blue bundle, the respondent's bundle at paragraph 56. There Southern

Response made the argument that natural justice would mean what would support their approach that an opt in approach to class actions should be adopted and the Court turned to that argument at paragraph 56. There the Court said: “As to the natural justice concerns, they are addressed by ensuring there is provision for adequate notice to members of the class with an explanation of their right to opt out. Provision for adequate notice ensures the least impairment of protected rights. We adopt the approach taken by the United States Supreme Court in *Phillips Petroleum Co v Shutts*, in which the Court rejected a similar argument that due process requires class members to affirmatively opt in.”

And we will respectfully adopt that comment to the effect that the right to natural justice doesn't require workers in this case to expressly consent and opt in, so to speak, into a section 228 action and indeed a requirement, an invariable requirement to do so in my learned friend’s theory would, to use again what is language in the *Ross* judgment, it would put an unnecessary hurdle in the path of vulnerable workers depriving them potentially of having that claim determined and the possibility of obtaining relief and we say this desire to promote access to justice being one of the fundamental purpose of section 228 should be promoted rather than impeding. So for these reasons we would submit that on that policy ground the Court shall reject the appellant’s approach and uphold the Court of Appeal’s interpretation.

There are two other considerations that I've referred to in the road map and I've given references to where your Honours can find the relevant submissions in our written submissions. I don’t propose to go over them in detail. So, unless the Court has any other questions on policy matters, those are the submissions for the Labour Inspector.

WILLIAM YOUNG J:

Thank you, Mr Fong. Right, Mr Ballara?

MR BALLARA:

Your Honour, just very briefly to address a couple of points that have been made for the Labour Inspector, just picking up on my learned friend Mr Fong's second to last comment about opt in and opt out and so on, on my understanding of the relevant High Court rule that has been referred to, that was open-ended if you like. It doesn't say you have to have an opt in or it doesn't say you have to have an opt out and the Court was looking at whether you could in that open context. What I would say in response to that is that here, if we're going to consider things on an opt in opt out basis in terms of class actions and so on, section 6(5) in my submission creates an opt in. It requires the buy in because the person has to give their consent under s 6(6) and that, in my submission is a clear parliamentary indication of what it wanted to achieve for that purpose and so to say that section 228 could come along and undercut that, and this is the essential point that the Employment Court was making, cuts right across their statutory protection that Parliament has chosen to put in place. Whether or not we're talking about vulnerable people or not vulnerable people, or minimum entitlements or anything, that protection, Parliament says, is sacrosanct in terms of the Employment Court's analysis of this case 161, section 6, 228, 187 et cetera.

The next comment my learned friend Mr Fong made in terms of Part 9A and section 3(ab) and the comment that was made about 3(ab) earlier for the Labour Inspector, those provisions were enacted in 2016 not in 2000 when the Act came into force including all of the sections that we have been talking about. So, yes, there has been a shift over time towards protecting minimum entitlements and it gives the Employment Court these additional powers in terms of Part 9A, but the basics, your Honours, were there the whole time taking into account the reasoning Parliament had for doing that.

The other points I wish to respond to was in relation to the *Freemind* decision. Apologies, your Honour, your Honours. At tab 5 of the blue bundle, that wasn't a status case. Employment was acknowledged. That was why in my submission the Authority had jurisdiction to look at that, 120 odd people, nobody was saying these people weren't employees. The claim was in terms

of the appellant's theory of the case. The Authority is able to be seized of that issue. The point really is that employment as the fundamental status, we were already in that door when the Authority was looking at that case regardless of the numbers of people involved.

WILLIAM YOUNG J:

Slightly funny thing that jurisdiction only arises once the employer accepts that the employees are employees. So, say these proceedings are issued and the employer says: "I don't accept their employees," then the claim has to stop.

MR BALLARA:

It depends on who's brought it.

WILLIAM YOUNG J:

Yes, so Labour Inspector issues proceedings assuming but not necessarily knowing that the employer accepts the employees are employees. You say there's jurisdiction to hear that if the employer doesn't raise an issue but if the employer does then there was never jurisdiction.

MR BALLARA:

Well your Honour, the way that I would respond to that is there's jurisdiction or there isn't, that's the first point. In this jurisdiction, and I mean the employment jurisdiction, if the parties to a dispute agree that they're employee and employer that's always going to be the start and the finish of that. It's a simpler sort of – an approach if you like, Sir, but in terms of the Labour Inspector, yes.

WILLIAM YOUNG J:

But in this sort of jurisdiction a lot of the employers are not going to be very compliant or co-operative people. So they may just say shtum. They may say: "Well we're not saying, this is all rubbish." So the Labour Inspector wouldn't know whether there's jurisdiction or not until the employer takes a formal position presumably.

MR BALLARA:

They do, Sir, have powers to investigate which are different and if the investigation says to them, well the employer, in quotes, is not really one they shouldn't proceed. It's the due diligence on the part of the Inspector.

WILLIAMS J:

Presumably you accept the concerns around vulnerability such as the *NZ Fusion* case. They are real issues that need to be addressed in a system that works well.

MR BALLARA:

Yes Sir, and that's ironically what I was going to say in terms of the case. I was going to say –

WILLIAMS J:

I wouldn't say that was irony.

MR BALLARA:

As in I was going to bring it to the Court's attention as a response. That's my next and final point here. The *Fusion* case started life in the Employment Court. That's the Court with the exclusive jurisdiction under 6(5) to talk about and determine status. We don't know –

GLAZEBROOK J:

Well it's not though, is it?

MR BALLARA:

I'm sorry, your Honour?

GLAZEBROOK J:

Because you concede that the Authority has an ability to determine status but we're just going over old ground. You do have to be careful of your terminology.

MR BALLARA:

I take your point your Honour. Where I was wanting to go was to say that Court is clearly seized of the ability to look at status under section 6(5) and we don't know from that judgment apart from what's in it obviously, we don't know what sort of exercise was undertaken in relation to that.

WILLIAMS J:

Let's take a scenario which I don't think is unrealistic where two of the three people had gone back home. Consent is impossible. Let's say all three had gone back home, consent is impossible, end of story?

MR BALLARA:

In terms of the facts of *Fusion* your Honour?

WILLIAMS J:

Well something like the facts of *Fusion.*

MR BALLARA:

Well your Honour, if I'm a Labour Inspector and I have three people that I've been looking into their circumstances and I'm not sure about the status or it's in issue, my response to your Honour's question would be that if I can't find two of the three of them, point 1, how would I have done my due diligence in terms of that and so why am I advancing –

GLAZEBROOK J:

Well there's not much due diligence in that fact I was never paid.

WILLIAM YOUNG J:

Perhaps they'd been deported because they didn't have a proper work permit or something or two of them have but the third can speak to what the deal was but you say that that claim is basically stifled as to the two who have been removed from New Zealand which is not a very attractive proposition.

MR BALLARA:

Essentially your Honours, what I would say in response is that I would adopt the approach the Employment Court took. It says in this case that the road parliament has laid in front of the Labour Inspector creates some issues, it could be better but all of that is not the point. The point is it's a clear words approach and a clear requirement to do it that way because that's what they said that's the way they said it should be done. And so the very last bit of the Employment Court's judgment is say, well, yes, it could be different but that's not our job as the Court, that's for parliament to consider and essentially what my submission would be, your Honours, is that you're being invited to interpret provisions in a way which parliament didn't intend to broaden it and that may identify issues in terms of the way it could be done better or differently but those better or different ways are not within the existing provisions in my submission, your Honours.

Unless I can assist further that's all the replies I've made, your Honours.

WILLIAM YOUNG J:

Thank you, Mr Ballara. We'll take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 12.41 PM