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

SC 62/2025
[2026] NZSC Trans 9

BETWEEN

HAIRLAND HOLDINGS LIMITED

Appellant

AND

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

Respondent

Hearing: 05 May 2026

Court: Winkelmann CJ
Ellen France J
Williams J
Kós J
Miller J

Counsel: T P Cleary and P H Fisher for the Appellant
K F Radich and G R La Hood for the Respondent

CIVIL APPEAL

MR CLEARY:

May it please your Honours. Cleary and Mr Fisher for the appellant.

WINKELMANN CJ:

Tēnā korua.

5 **MS RADICH:**

E ngā Kaiwhakawā o Te Kōti. Tēnā koutou. Ko Ms Radich ahau. Kei konei māua ko Mr La Hood, mō te kaiwhakahē. Ms Radich and Mr La Hood for the respondent, and with me is Ms Marriott who is operating the ClickShare.

WINKELMANN CJ:

10 Tēnā koutou. Mr Cleary?

MR CLEARY:

Tēnā koutou your Honours. I propose starting reading to written submissions if your Honours please commencing at page 3. There are three, we say, broad issues arising from the Court of Appeal's decisions, namely must an
15 employment relationship arise from an employment relationship as defined. Second, does Hairland have an employment relationship problem. Third, if so, is it precluded by the effect of section 6(5) of the Employment Relations Act 2000, which is the declaration process through the Employment Court.

20 Your Honours, when the majority of the Court of Appeal, their Honours Katz and Courteney declared: "If there is no employment relationship, there can be no employment relationship problem." That proved fatal to Hairland's claim that it should have jurisdiction before the Authority. With respect we say that represents a material error which this Court is asked to remedy.

25

The majority in their decision traversed the facts and they turned to the purpose and the scheme of the Act, and then to this Court's decision in *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, focusing on his Honour Justice Williams' rephrasing of the introductory words to s 161. For convenience s 161 is set out,

subparagraph (c) is set out at page 2 of the written submissions. The majority went on to comment about Judge Smith in the Employment Court comment about “work context” which was taken from *FMV*. They then set out the excerpts from *FMV* concluding that there was a prerequisite for triggering jurisdiction of having existing employment relationship.

Your Honours, on this issue we say that that approach is, with respect, too narrow in the scheme of the Act, and in terms of the words used in section 161(1)(c). As his Honour Justice Cooke said in the dissenting opinion, it is a circular argument. It doesn’t allow for the very implied controversy that arises from a section 161(1)(c) matter, which is a dispute over status. We say the correct reading, your Honours, is that although usual it is not necessary for there to be an existing employment relationship before the Authority’s jurisdiction is triggered.

15

Notably, your Honours, in *FMV* the issue was the collateral proceedings, negligence in the High Court, or an employment problem in the Authority, and emphatically this Court has found that section 161 is to be read broadly, and that if there is a controversy that can be framed in terms of the subparagraphs under section 161, then that must be heard by the Authority and no other jurisdiction.

20

Now in the majority opinion, your Honours, the *FMV* passages relied on did imply that there should be an employment relationship, but of course the context of that case is important. Employment relations were not at issue. It was common ground that there was an employment relationship. In *Hairland’s* case from the very beginning employment status is at issue.

25

In *FMV* this Court looked at the definition of “employment relationship problem” and then at the chapeau, as his Honour Justice William Young expressed it to the introduction of section 161. Both of those defined inclusively, that is the definition of “employment relationship problem” includes personal grievances and disputes but it may have other things and then the general chapeau is to be read inclusively as well.

30

The second *FMV* finding about section 161 is that it is itself to be interpreted broadly and in the context of “empowerment, pragmatism and accessibility”. There’s a mention there in Part 10 of the Act on the Authority institution being:

5 “... practical, specialised [and] speedy. [It’s an] informal dispute resolution that is accessible to all parties.” And of course, in this case it’s the respondent’s view that all status declarations alone must go first and foremost to the Employment Court.

10 The third finding for *FMV* at section 161 is that the subparagraphs set out in that section are not themselves “legal categories, they are factual phenomena ... without fine or technical distinctions.” The examples set out are varied and subject matter informed. His Honour Justice Williams said section 161(1)(c) itself is not strictly a problem but more in the nature of a

15 response to a solution to a problem.

The fourth aspect of *FMV*, your Honours, is that the legislative history of the Employment Relations Bill supported a broad interpretation of section 161, which leads us to the fundamental submission on this issue which is that the

20 appellant submits that the majority view doesn’t accord with the ratio of *FMV* which says “if a controversy *can* be framed in terms of one or more of the examples in section 161(1)(a)-(qd), it *must* be brought in the Authority”.

As Justice Cooke found plainly, section 161(1)(c) which says the Authority has

25 exclusive jurisdiction to make determinations about matters whether a person is an employee, not being matters raised under section 6(5), we say those clear wordings indicate that that subsection allows a party in the position of Hairland to go to the Authority at a low level and ask for a decision on status.

30 If I could, at this juncture, contrast section 161(1)(c) with the carve-out section, section 6(5), which also was at issue in a case to be discussed, *Gill Pizza v A Labour Inspector (Ministry of Business Innovation and Employment)* [2022] 1 NZLR 1, you will note that under section 6(5), Parliament has discriminated so that it’s only applications that may be made for employee status and the

applicant either has to be involved as the party or give consent for that to happen. Under section 6(6) there's a reference to the party alleged to be the employer as being given an opportunity to be a party or present submissions. So, it indicates, quite clearly, that section 6(5) it was intended by Parliament to be an employee-only application. We say that contrasts with section 161(1)(c) which is very open-textured in its nature and simply refers to there needing to be a matter arising whether a person is an employee.

Now, apart from those interpretive differences emanating from *FMV* we also say that the interpretation doesn't take into account that several of the other subsections in section 161 can only operate if there is no existing employment relationship, and I've set those out there at the foot of page 5.

1020

If we take the first sentence as an example "matters about whether the rules ... incorporated society that wishes to register as a union, comply with the provisions of this Act". There is no employment relationship extant at that stage. The Authority is called on to make or to declare whether the rules are consistent with what the Act requires a union to have. There are others, such as "whether an incorporated society is entitled to [be registered]" and "whether a person is entitled to be a member of a union". Notably, your Honours, those are all, like section 161(1)(c), declaratory matters.

WILLIAMS J:

Do you know how these sorts of issues, those non-employer/employee issues, arise in fact?

MR CLEARY:

Well, what was presented at the Court of Appeal was this is the first time, I think, and probably as long as –

WILLIAMS J:

No, no, I mean when there is a disagreement over the rules of a union, for example, how does that end up in court? What's the general factual matrix that gives rise to what appears to be an esoteric kind of question?

5 **MR CLEARY:**

Well, one would suppose that there may be instances where rules of unions are framed in such a way as some parties may have an issue with one or other of them as meeting the, what the Act requires.

WILLIAMS J:

10 You might need to bring that microphone around to your mouth. It's not a very good microphone.

MR CLEARY:

Is that better?

WILLIAMS J:

15 That's perfect.

MR CLEARY:

We concede that some of the examples in section 161(1)(c) may be rare. They have been included there as examples by Parliament where they wished the Authority to intervene if requested, if there is a problem, even though there isn't an extant relationship that is employment in nature.

20

WINKELMANN CJ:

Can you – have you finished answering Justice Williams? What I'm struggling with is why there is a gap. On your analysis, you say there's a gap if there's, if section 161 is not construed expansively and section 187 exclusive jurisdiction of the Employment Court is not construed restrictively, there is a justice gap.

25 There was not a justice gap in this case, was there? Because the issue was going to be traversed in one form or another, because it was going to be traversed through the actions of the Labour Inspectorate or through – if the

issue was an issue for you, it would be because someone was saying that it was an employment relationship and you had failed to provide the necessary conditions to meet that relationship.

MR CLEARY:

- 5 Yes, well, there may well be other cases where the parties can simply say, we don't have an issue with who is the applicant and who is the respondent, but that isn't the case here. Hairland –

WINKELMANN CJ:

- 10 But what I'm asking you really, I mean here, the issue, if it was going to be an issue for your client, was going to come through, come before the Court with a problem, which was whether or not – well, which was the proceedings that were actually in fact brought against you. But in what scenario would there be an actual gap? Because I'm putting to you there wasn't an actual gap in your case, because the issue came before the Court in the other proceedings.

15 **MR CLEARY:**

- Well, Hairland alleged that that is itself an abuse, but that aside, there may well be examples where one could think of a scenario where there's a contract for services and that the principal, the purchaser of services finds out that there is discontent, that there's a feeling that the contractors may be of the view that
20 they are employees, but that they are simply not wanting to take that any further other than to have that issue raised, so that the section 161(1)(c) import is that it doesn't matter who has the problem, but there is a right for it to be brought to the Authority.

WINKELMANN CJ:

- 25 So you're saying it's when there's kind of a burbling discontent but no one's bringing it to a head, and then the employer just carries on carrying a risk that at some point it will be brought to a head?

MR CLEARY:

Yes and in this case your Honour, Hairland was advised by the Crown through the Labour Inspector that the Labour Inspector considered that the model was one of employment and I refer to that later on in submissions but...

5 **WINKELMANN CJ:**

But you knew then that it wasn't going to burble away without an issue. It was going to come before courts in one way or the other, no?

MR CLEARY:

10 No, not – with respect your Honour no, because the Labour Inspector's report posits that might be one outcome, but it's not definitive. It's – I concede –

WINKELMANN CJ:

I mean well if it's not definitive it'd be that you either accept their ruling and therefore address it or you dispute it and they accept it or else it comes before the Court. Isn't that the three alternatives?

15 **MR CLEARY:**

Well it was open, we suggest, for the Labour Inspector to accept the problem in the first place, some time ago now. That didn't happen. There was instead collateral, well subsequent proceedings filed. So it's simply about whether the law allows a party who's put in a position of having a problem for that party to
20 decide, and I concede your Honour, many parties may decide to see how things run but following the plain wording of section 161 we say it should be open, it is open to a party to ask the Authority at the very lowest level, a speedy and formal contest and to have matter clarified very early.

MILLER J:

25 So why did you bring proceedings against the Chief Executive and not the employees?

MR CLEARY:

Well that's been –

MILLER J:

The putative employees should I say.

MR CLEARY:

That's been found to be in error your Honour and –

5 **MILLER J:**

And you accept that now?

MR CLEARY:

Yes, that's – well the error was the Chief Executive instead of the Labour Inspector, that's what Judge Smith found. That is accepted, but as
10 Justice Cooke said, that can be fixed in future.

MILLER J:

So do you say then that you could bring a proceeding against an inspector without naming the employees, putative employees?

MR CLEARY:

15 Well depending on the circumstances. In this case the Inspector has made a determination and –

MILLER J:

I'm asking you what are your rights?

MR CLEARY:

20 Yes, your rights are that the Inspector – the Inspector's view and your view have created a problem.

MILLER J:

No, to be clear what I'm positing here is you see there's a problem, someone has complained. There may or may not be an inspector involved at that point.
25 They may – we don't know what the Inspector's view is. I'm asking whether you accept that you must name the employees, the putative employees as respondents and you are saying well you could name the Inspector, but

presumably not in the abstract. There would have to be an inspector already at least involved in that.

MR CLEARY:

Yes, no we agree with that, and we agree with Judge Smith's direction that the
5 named complainants must also be invited. And to answer your question which
is yes, that the – Hairland would not have a declaratory, a non-named
declaratory process available to it.

MILLER J:

Right. So it would have to have a respondent that on the face of it is the putative
10 employees, but you say that in circumstances where an inspector is already
involved, that inspector can be the respondent instead of?

MR CLEARY:

Well as a primary respondent, Judge Smith made it clear that the named
complainants ought be given a right of audience. So Hairland can't have –

15 **KÓS J:**

In what capacity Mr Cleary, as –

MR CLEARY:

Well his concern was that the complainants should have an opportunity much
as in the same way section 6(6) gives the opportunity to an imputed employer
20 that these complainants should have an opportunity, if they wish, to appear, so
not as a party as I understand it.

1030

KÓS J:

If they're going to be declared under your proceeding not to be employees, don't
25 they have to be parties? Respondents?

MR CLEARY:

Well, at the low level of the Authority the problem is raised and the Authority has flexible, and can deal with the matter as they see fit, subject to equity and good conscience and that would involve, we accept giving the complainants an opportunity to be heard, but you'll hear from my friend about bringing people in who are vulnerable and we accept that those concerns are valid but only after the proceeding commences. Justice Cooke dealt with that by saying it's simply a case management matter, which is where the Authority, using their speciality, would allow the complainants to be heard if they wished.

10 **WINKELMANN CJ:**

Because on one account of this there's no gap and you've just brought pre-emptive proceedings before proceedings could be brought against you. I'm not quite clear why and it's caused the mess that, you know, that the Employment Relations Authority was then faced with.

15

I'm not criticising you for bringing it, I'm just saying that's because the proceedings, you were either going to accept the Labour Inspectorate's finding. They were either going to be persuaded by you that they were wrong or else these proceedings were going to be brought by the Chief Executive or whoever brings the proceedings.

20

MR CLEARY:

Well, possibly your Honour. We say that because the determination says that the complainants were employees, we're thinking about these things, there might be a claim in the Authority, there might be an improvement notice or whatever else is available to the Labour Inspector, and a contractor faced with that can simply wait, if they wish, or they're entitled under section 161(1)(c) because they do then have a matter about employment status. They're entitled to go to the Authority straight away and say to the Authority, we've had complainants say that they're employees, we wish to clarify that, we wish to have it heard in a speedy, informal way.

30

WINKELMANN CJ:

Can I ask you a point about statutory interpretation then. When you read section, where is it, section 187(f), it gives the exclusive jurisdiction to the Employment Court to decide issues under section 6(5), so that's, where is
5 section 6(5), that's an application is brought by a: "union, Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are employees, and the other persons are" tend to be employee, I think in the interpretation.

10 Why, as a matter of statutory interpretation, would this exclusive jurisdiction be conferred upon the Employment Court on the application by the employee, union or Labour Inspectorate, but not where the application is by the employer, which is your interpretation?

MR CLEARY:

15 Well, precisely, your Honour, because section 6(5) process excludes –

WINKELMANN CJ:

I know that. I know that's your interpretative argument but why, as a matter of policy, would this exclusive jurisdiction be conferred on the Employment Court on the application of some parties and leaving other parties to apply and it's
20 dealt with by the Employment Relations Authority?

MR CLEARY:

Well, because under the Authority claims are personal, whereas under the section 6(5) process it was originally called a class action, and as Justice Cooke said, it's a process where some named persons are not going to be parties to
25 the proceeding. So, it's a different class of proceeding.

WINKELMANN CJ:

So, on your interpretation then could it be that this exclusive jurisdiction could be stepped around by employees also if they brought a claim under section 161?

MR CLEARY:

Yes, absolutely.

WINKELMANN CJ:

And the distinguishing factor is?

5 **MR CLEARY:**

Well they're different types of processes. So the employee would be raising it as a problem under section 161(1)(c).

WINKELMANN CJ:

10 They could just come and ask the Court for a declaration or an order as to whether or not they're an employee, which is kind of looking like exactly replication a section 6(5) proceeding.

MR CLEARY:

Well it's overlapping, and the *Gill Pizza* decision by this Court found that. Found that there's co-existing jurisdiction to decide status.

15 **WINKELMANN CJ:**

That was in the context of a problem, wasn't it, so it's a – where there's a problem, where there's a problem wrapped around that issue.

MR CLEARY:

20 Well that's – our point, your Honour, is that Hairland has a problem. It wished to resolve it quickly.

WINKELMANN CJ:

And who had given it the problem?

MR CLEARY:

25 Well problems are often the coincidence of two perspectives, but it had arisen because of its knowledge that former employees of that had asserted and taken, made a complaint to the Labour Inspector, who agreed that they were employees. So if I can draw that out a little your Honour, problems we say are

crystallised when there is a coincidence of opposition. His Honour Justice Williams used the term “controversy” in *FMV* and we say it’s pretty straightforward that when Hairland found out that two of its former employees were alleging, despite having signed contracts for services that they were employees, they had a problem.

WINKELMANN CJ:

So it’s kind of an anticipatory problem. No one’s actually lodged a demand with you for anything, or a dispute that you anticipate and the possibility of a problem.

10 **MR CLEARY:**

Well it was a matter about employment, whether someone was an employee, which is what the words say.

WILLIAMS J:

Your statement of problems says, kind of sharply into the point, the problem is the status of contractors engaged by the applicant, yes?

MR CLEARY:

Yes.

WILLIAMS J:

FMV says that problem is a factual category. Isn’t, it’s not really a question, isn’t what you said out there a question of law, not a fact?

MR CLEARY:

Well the factual problem was that at least two former employees had gone to the – through a complaint to a solicitor.

KÓS J:

25 Well, I don’t think you’re accepting they’re employees?

MR CLEARY:

Sorry. Purported employees your Honour.

WILLIAMS J:

Strike the transcript.

MR CLEARY:

That it was manifestly evident that there was an issue, a controversy between
5 Hairland, and at least those complainants about their former status.

WILLIAMS J:

But the factual issue, the status is of course a legal question. The factual issue
is whether Hairland's was responsible to pay holiday pay, minimum wage,
et cetera. That was the practical problem. Were they in the gun for the money
10 the Inspector and conditions the Inspector said in her statement of the problem,
which is much longer, whether that was correct or not. So her statement of fact
was, the respondent had failed to pay. The respondent had failed to comply.
That gave rise to the question of status, but status is itself not a problem,
because it's not a question of fact.

15 MR CLEARY:

Yes. I understand that your Honour. I think in *FMV* your Honour referred to
this particular subsection as a solution to a problem, and what Hairland had was
exactly what the wording of section 161(1)(c) said.

WILLIAMS J:

20 No, but doesn't the effect of section 161 chapeau, isn't the effect of section 161
chapeau that you have to be able to say, I am in disagreement with (b) over my
obligation to pay. So that it's not just a question at large because that's the sort
of abstract disagreement that section 161 is not aimed at because it's a factual
speedy informal process, not a place for abstract disputation.

25 1040

MR CLEARY:

Yes, except that that's not what we say the words say, that they are quite clear.
If you want to have an abstract argument about status, you may do so.

WILLIAMS J:

So, what counts against you there is that *FMV* says “problem” is a factual category.

MR CLEARY:

5 Yes.

WILLIAMS J:

Not a legal one – well, implicitly not a legal one. Don’t come to me in the abstract, come to me with an actual problem.

MR CLEARY:

10 Yes, well.

WINKELMANN CJ:

And the statute provides for an abstract process.

MR CLEARY:

In which way, your Honour?

15 **WILLIAMS J:**

Section 6(5).

WINKELMANN CJ:

Section 6(5).

MR CLEARY:

20 Yes, but given the overlapping jurisdiction, we still assert, your Honours, that there is an ability for a simple declaration under section 161(1)(c).

KÓS J:

25 Could we pick up the Chief Justice’s justice gap point again? In this case, you had your pre-emptive strike that is quickly followed by the Labour Inspector bringing proceedings also in the Authority under section 228. You protested jurisdiction to that initiative by the Inspector, but equally, you could have, as a

defence, asserted that the subject of the Inspector's proceedings, the employee – the workers were not employees.

MR CLEARY:

Of course, yes, that was an option, except that we say the law allowed it another
5 option.

KÓS J:

Yes.

MR CLEARY:

That it took.

10 **KÓS J:**

But in fact, you didn't really have a gap here. If it was, it was of short duration because the Inspector brought the proceeding, and you could have defended it on the basis that they were not employees.

MR CLEARY:

15 With respect, your Honour, the Inspector's proceeding was lodged after Hairland's.

KÓS J:

Yes.

MR CLEARY:

20 At the time of the Inspector's report, as I suggest, there was no definite or – there was a likely outcome, I acknowledge that.

KÓS J:

Right.

MR CLEARY:

25 But at that stage, Hairland was left in abeyance, if you like, and yes, of course it was an option just to wait and see.

KÓS J:

But at that point you could equally have struck your camp on your one, your proceeding, and simply defended the Inspector's proceeding on the basis that the subjects were not employees.

5 **MR CLEARY:**

Yes, we accept that except that –

KÓS J:

Well, I'm not sure, I'm not quite sure what the reality of the problem you're suggesting here is. At least in this case, there wasn't one, and in some cases,
10 I agree, it must be possible that either workers or the department raise difficulties for you, for your business model, and unless they do something about it, you might be hamstrung on Ms Radich's and the Court of Appeal majority's approach, but you weren't hamstrung here.

MR CLEARY:

15 Well as it turned out, your Honour, that is correct.

KÓS J:

Yes.

MR CLEARY:

But we maintain, and we go back to the open-textured wording of
20 section 161(1)(c). We say that it's irrelevant. We dispute, in any event, the notion of pre-emption and say it's an irrelevancy that the Act – because the Act anticipates something in the notion of a matter about status being raised on its own.

MILLER J:

25 Let's suppose an Inspector never got involved. The facts are that a solicitor came to Hairland on behalf of two people that said, we're employees. Do you say that you could then have brought a proceeding against those

two employees to say, we are not obliged to pay them holiday pay, or whatever it was, because they are not employees at all?

MR CLEARY:

Yes, your Honour, because they have a matter –

5 **MILLER J:**

Yes.

MR CLEARY:

– not a strict problem, they have a matter as to whether someone is an employee. It's their right to have that dealt with by the Authority.

10 **MILLER J:**

That would not, as a matter of res judicata, bind the other 110 or however many it is hairdressers, but it would effectively determine their status.

MR CLEARY:

15 And that was Hairland's concern, your Honour. There were also other options available to the Inspector, such as the removal to the Court, and Justice Cooke talks about that. There is the other option of a section 6(5) declaration such as this Court dealt with in *E Tū Inc v Raiser Operations BV* [2022] NZEmpC 192 recently. From the commencement the Labour Inspector didn't need to issue a determination, it could simply have asked the Court to decide the matter.

20 **KÓS J:**

But you say you can't.

MR CLEARY:

But we say Hairland can't approach the Court.

KÓS J:

25 Well are you absolutely right about that? I mean section 6(5) is no magnificent piece of parliamentary drafting. Are you absolutely certain it excludes an application by an employer and is there any authority to that effect?

MR CLEARY:

There's no authority as far as I know but section 6(6) talks about a "person who is alleged to be the employer" being given the opportunity of being heard.

KÓS J:

5 Well they will get that right if they are the initiator of the proceeding.

MR CLEARY:

Well we read that, your Honour, as it being an employee or a worker-centric provision and the history of the class action declaration we would say bears that out.

10 **WINKELMANN CJ:**

So if we go –

WILLIAMS J:

Because that's what it says in *Gill Pizza* doesn't it?

MR CLEARY:

15 Well *Gill Pizza* said that the –

WILLIAMS J:

Says that it's not available to employers.

MR CLEARY:

Well and it – yes and it's an overlap in jurisdiction.

20 **WINKELMANN CJ:**

On Justice Miller's fact situation, you couldn't – if a solicitor came along and said, my client instructs me that they're employees, I'd like to talk to you about whether that's so, you couldn't then immediately file proceedings could you, because they're not saying this is a demand, they're saying, let's talk. So I
25 would suggest to you that section 161 wouldn't enable you to bring such a claim until you actually had a problem, until you actually had individuals demanding terms and conditions as employees. I don't think it conceptualises hypothetical

problems coming to the Employment Relations Authority, it's actual problems. Not signal problems but actual problems.

MR CLEARY:

Well here the actual problem, your Honour, was Hairland's assumed business
5 model was being put to the test and it wished to clarify it, that's all.

WILLIAMS J:

Well it wasn't being put to the test, that's the point. You were trying to pre-empt
it being put to the test by putting it to the test yourself.

MR CLEARY:

10 I'll rephrase that your Honour, that Hairland's status as a contractor was being
disputed. Now once a dispute is raised we say that creates fertile ground, if
chosen, and I accept his Honour Justice Kós' positing that it's not necessary,
it's – you could just wait and raise your defence but if that controversy through
a dispute is extant in fact then that creates the ground needed under
15 section 161.

WINKELMANN CJ:

Was it actually a dispute or was it not a preliminary indication to you of a view
and you were given an opportunity to comment and there were possible
pathways of action mapped out? So isn't it more akin to what I was saying
20 when someone comes to you and says, I think I'm an employee, let's talk about
this?

MR CLEARY:

Well we suggest your Honour it was something a little more but there is also
the option of mediation early on which the Act promotes, and which was
25 available. We accept it's not available for minimum entitlements which is often
the argument in these types of cases that the workers are not being paid
minimum entitlements. But we would suggest your Honour it wasn't simply
reaching out and sensing the temperature so to speak, but it was complaining

to a solicitor, the solicitor going to the Labour Inspector, the Labour Inspector carrying out an investigation and these matters all are contrary to Hairland's –

WINKELMANN CJ:

And then what happened? What happens when the Labour Inspector then says
5 to you what?

MR CLEARY:

Well the Labour Inspector can –

WINKELMANN CJ:

No in this case, in this case.
10 1050

MR CLEARY:

Well following the report the Labour Inspector made it clear that the determination was that these complainants were employees and that, we say, crystallises the matter that is referred to in section 161(1)(c). Hairland, we say,
15 didn't even need that. It would've been a complaint to a solicitor that raises the matter because at that stage there is an extant dispute about status.

ELLEN FRANCE J:

One of the points that the majority in the Court of Appeal were concerned about was the impact on expense, inconvenience and stress and so on, to the workers
20 in your, sort of, pre-emptive strike situation. How do you envisage case management assisting in relation to those sorts of concerns? Because the expense, et cetera, how does that meet those concerns?

MR CLEARY:

Well, because the Authority, your Honour, is intended to be this low-level,
25 informal jurisdiction. There's no compulsion on the workers themselves concerned to be involved but –

ELLEN FRANCE J:

No, but they're at risk if they're not.

MR CLEARY:

Yes, and there are safeguards though for the Authority to run the process as
5 they see fit. This is, of course, Justice Cooke's argument –

MILLER J:

Well, take my example where the employer chooses to single out an employee
and make them the respondent. This exposes this problem of the inequality of
resources. So, how would the Authority handle that?

10 **MR CLEARY:**

Well, in the same way, your Honour, I suspect as with, say, a breach of contract
claim against one individual where there could be perceived imbalance of
power. The imbalance issue, we say, arises – it's irrelevant to jurisdiction.
Either Hairland has a problem or it doesn't. If it does have a problem the
15 inequity or otherwise associated with processing that problem can, we say, be
dealt with through the very empowering, fluid nature at the Authority as opposed
to the more rigid, formal strictures at the Employment Court. I've also
mentioned mediation as being available.

WILLIAMS J:

20 This is not a mediation issue though is it? You didn't avail yourselves of
mediation in this case because it was too important in principle for you?

MR CLEARY:

I'm not instructed on mediation, your Honour, but I am –

WILLIAMS J:

25 Well, it's just that this was your business model at risk so you couldn't mediate
your way out of that.

MR CLEARY:

Well, I can't speak to that scenario but what I can say is that mediation is encouraged under the Act and that the imbalance issue is certainly a live one and it was alive to his Honour Justice Cooke, but the very institution of the Authority who by then, once it's in the door, has the whole raft of objects available to it under the Act, such as having an eye on inequality and bargaining power, although we do say that in *Uber* this Court has ruled that that issue doesn't come into play in terms of section 6 arguments.

WILLIAMS J:

10 So, the report said, reply by whenever it was. Did you reply?

MR CLEARY:

I think proceedings were filed, your Honour, before there is a reply –

WILLIAMS J:

That the reply was to try and get the initiative?

MR CLEARY:

15 Well, the proceedings were the reply.

WINKELMANN CJ:

Yes, so, it also says – it doesn't say it's a concluded view. It makes clear that they're asking your response and if they find it's an employment relationship, this is the likely course of action, but they're asking you for your comment by 20 5 pm Wednesday 23 August. So, it's not actually a problem, is it? They have not concluded. They're asking you to engage with this process.

MR CLEARY:

Well, I think determination is mentioned earlier, your Honour. But even so, even 25 if it was preliminary, there's still a problem that Hairland has about employment status. It's still being created.

WINKELMANN CJ:

Well the actual words of the determination at 101.0008 is: "The Inspector has identified that the real nature of the relationship between the hairstylists and the company is likely to be an employment relationship, in which case the company
5 has breached minimum employment standards. Subject to comments on this report from the employer, the preliminary view of the Inspector is that an Improvement Notice would be appropriate to rectify the breaches identified."

Because I suppose I've asked you what the gap is and it doesn't seem to me
10 that you've really identified a gap, because you either have – we've got the three courses of action which is, accept their view and work out an answer, provide comment, change their view or else they take the actions that they're identifying, so there's no real gap on that analysis. But there is something troubling on the other scenario, which is that you've taken a pre-emptive kind of a move which
15 on the Employment Court's, I think view, should have been against the employees. It raises concerns about the imbalance of power.

MR CLEARY:

I understand that but the words of the subsection don't talk about the justice gap. It's simply whether there is an extant matter. If I could take your Honour
20 back –

WINKELMANN CJ:

But my point is on that, there's not because there's no concluded view. No one's saying, these people are employees they're trying to talk to you about it.

MR CLEARY:

Well it was clear that the workers themselves considered that they were employees, and that was sufficient, as I say, to create a problem.

WILLIAMS J:

But you didn't name them.

MR CLEARY:

I think it did name –

WINKELMANN CJ:

Well didn't they go to the –

5 **WILLIAMS J:**

You didn't name them as parties. You didn't bring a claim against –

MR CLEARY:

No, no, and we accept that that must happen.

WINKELMANN CJ:

10 Well they haven't said, "we're employees", they've availed themselves of rights they have to go to the Labour Inspectorate and say, look we think we're employees can you help us with this, can you look at this? So they haven't come to you and said, "pay us these minimum entitlements".

MR CLEARY:

15 I accept that this case is drawing at the margins in terms of there needing to be a gap, but we still say that that's not what section 161(1)(c) is about, that it's an in or out provision and we say it creates overlapping jurisdiction. In another case, and this is where Justice Cooke took issue, he didn't think someone should be able to utilise section 161(1)(c) only if they had another issue such
20 as a personal grievance tacked on.

WINKELMANN CJ:

But isn't your answer honestly that there is a gap. This wasn't actually at the point where it was a problem because it hadn't been formally said to you, we're employees please pay these entitlements it's a process going on. But the gap
25 you're identifying is that employers cannot avail themselves of section 6(5) and therefore when they've got uncertainty about their business model they can't get reassurance from the courts that it's not an employment relationship,

whereas the other parties can under section 6(5) get reassurance as to whether or not it's an employment relationship.

MR CLEARY:

Well quite so your Honour. That's where Judge Smith asked the question,
5 where is Hairland to go? We say it would be extraordinary for Parliament to
have ousted Hairland's remedies because they can't go to the court, *Gill Pizza*,
but we do submit about Declaratory Judgments Act 1908, possibilities but we
can see that that is highly formal and expensive compared to the authority route.
So when your Honour asked about a problem, Hairland has a matter which we
10 say is a subset of an employment relationship problem because it suddenly is
aware that its model is being challenged. We accept that there is no demand
as such at that stage, but we say there doesn't have to be because Hairland
should have a chance to argue status at a low level.

WINKELMANN CJ:

15 And if it doesn't come within section 6(5) and section 161 that wouldn't preclude
you from seeking declaratory judgment?
1100

MR CLEARY:

We submit that would be the alternative. If this Court decides Hairland doesn't
20 have a justiciable argument in the Authority and it can't go to the Court, and it
still wants a declaration, it can go to the High Court, but we see that as totally
contrary to the whole thrust of *FMV*, which was an expansive approach to
section 161, capacious, we would say, as to the Authority's authority for
jurisdiction, was that in that case, a High Court action, the collateral proceedings
25 were causing issues and this Court decided, Justice Williams, if it can be
framed, it must be under section 161(1)(c).

WINKELMANN CJ:

Right, well, I mean, yours is not an optimal test case for this issue though, is it?
Because you actually already had a process that was going to wend its way
30 through the Court, which was when the proceedings were commenced.

KÓS J:

Through the Authority.

WINKELMANN CJ:

Through the – sorry, through the Authority.

5 **MR CLEARY:**

Yes, but we say that should have no bearing on statutory interpretation. That is because the words are clear.

WINKELMANN CJ:

10 So, it's either allow anticipatory problems to come under section 161 or us – jam it into section 6(5) or us leave it to the High Court's declaratory jurisdiction.

MR CLEARY:

Well, except that we would suggest that you're not allowing anticipatory claims. You're allowing a live problem. It happens to be a matter, it happens to be able to be argued relatively simply and soon.

15 **KÓS J:**

Would the Authority have the capacity to receive your problem but say to you, as a matter of case management, that it wouldn't act on it until the Labour Inspector got off the pot and did something about it?

MR CLEARY:

20 I believe that's open to the Authority, if they believed that was in the best interests of dealing with the matters, so yes, this case is really about whether section 161(1)(c) allows Hairland to have its say. What happens thereafter –

KÓS J:

Well, to file, anyway.

25 **MR CLEARY:**

To file.

WINKELMANN CJ:

So I'm interested in whether, if the Employment Court or anybody has ever considered a case where parties are in discussion about whether there has been a wrong and there's a process going on and someone just brings a sort of a pre-emptive proceeding, so the employer brings a pre-emptive proceeding, 5 so they're in discussion with the employee as to whether there's an issue and then the employer just issues a proceeding saying, oh, there's a problem, because that's effectively what you've done. No one has said to you, this is definitely the case, and we demand these back payments, et cetera, or 10 compensation. Someone said to you, this is possible, can we have your views? And you've brought the claim and said, oh, it's a problem.

MR CLEARY:

Well, it's open for those who are involved on the other side of the problem to say that there isn't, but –

15 **WINKELMANN CJ:**

But do you see the possibility of that being quite an unpleasant scenario, where employers can just say when they're in discussion, or their employees can say, oh, I've had enough of this, I'm just going to file a proceeding. This is a problem. I want it sorted out.

20 **MR CLEARY:**

Well, there is abuse of process for – there's a vexatious proceedings regime under the Act. There are these safeguards against use of the process against justice, but here, we simply go back to this notion that it wasn't necessarily pre-emptive, it was simply Hairland suddenly wanted a matter it had, so a live 25 dispute, at the very least there was a dispute over status.

WINKELMANN CJ:

I mean, I appreciate this is high stakes for a business to know whether or not, what the implications of its business model are, but then, businesses have to carry that burden in all sorts of areas, don't they? They just do their best to 30 bring themselves legally within their regulatory obligations.

MR CLEARY:

Yes, and sometimes businesses have an opportunity, we say, where if there is – and we would agree, an employer can't simply make up an issue and have that dealt with, but where there is a factual foundation for a controversy, that
5 crystallises the jurisdiction. The Authority does have these safeguards in place for matters which it sees as an abuse or vexatious.

MILLER J:

Can you just point me to the provision that says an employer can even bring a claim in the Authority? Section 158 says that you commence them by the
10 lodging of an application in the prescribed form, but there's nothing equivalent to section 6, it seems, that says who can bring an application. And most of the things listed in section 161 are, in their nature, claims by a union or an employee.

MR CLEARY:

As far as I know, your Honour, there's no further provision relating to who the party may be in a section 161 matter, but it is obvious, usually from those provisions, as to the range of applicants that the – for instance, personal grievance, it's obvious an employer may not bring one of those because there's a definition in the Act that only employees have them.
15

20 WINKELMANN CJ:

But employees, I mean, there's litigation isn't there about breach of confidence and breach of directors duties and all of that has come within the section 161 where the employer –

WILLIAMS J:

25 Well there's a breach of contract express.

MR CLEARY:

Absolutely and that's what Justice Cooke referred to, is his reading of section 161(1)(c) didn't lead him to believe that there was somehow, a narrowing down of the scope of that provision compared to, say, lodging a

personal grievance, where it's obvious employers are out, just stands to reason. Or, for instance, where there's a breach of contract claim which obviously can go both ways.

WINKELMANN CJ:

5 Breach of confidence?

MR CLEARY:

Breach of confidence.

WINKELMANN CJ:

Intellectual property, blah, blah, blah.

10 **MR CLEARY:**

Yes, but some, for instance a breach of restraint of trade, that can only go one way because it's someone who has restrained themselves by working. So, to answer your Honour's question generally, it's obvious from the wording of the provision we would say section 161(1)(c) is agnostic. It doesn't limit who may
15 bring a claim. You know, it's simply anyone who has a matter and that, as I indicated earlier in submissions, it sits in contrast to the very strictures of section 6(5).

KÓS J:

Well, perhaps.

20 **MR CLEARY:**

Arguably, your Honour.

MILLER J:

So section 161(1)(c) begins with the word, "matters", which means essentially a dispute and if we adopt the premise that either party to that matter can come
25 to the Authority to raise, this is the literal interpretation isn't it that Justice Cooke pointed to, and of course this wouldn't be a matter arising on an application in

this section 6(5) because an employer can't bring an application under section 6(5).

MR CLEARY:

And nor has the Labour Inspector brought one. Although, we say it was
5 always –

WINKELMANN CJ:

Not at that point.

MR CLEARY:

Not at that point and we say, not now, because Hairland wants its problem
10 heard.

WILLIAMS J:

Do you say that Hairland could come to the Employment Relations Authority and ask it, if I did A, B, C would I be in breach of the employment agreement? Sorry, if contractor. Let's assume employee for present purposes. If employee
15 does A, B, C, would that be in breach of employment agreement, can it?

MR CLEARY:

Well, I think they can ask, your Honour, but I don't think they'd get a determination out of it on the basis –

WILLIAMS J:

20 No. Isn't that what you're doing?

MR CLEARY:

No, because there's no if. There is an extant dispute.

WILLIAMS J:

Well, that's, in end, what the question is.

MR CLEARY:

Yes, and it's not in the abstract because Hairland's model is, we say, being challenged and it's open to it, not in a pre-emptive way but simply in a way which accesses an institution at a low-level to get an answer.

5 WINKELMANN CJ:

So, what's being said against you, I think, is that there is no problem because in fact it was just a process running through and you anticipated there being a problem and that this legislative scheme doesn't allow you to seek declaratory relief or advisory – as an employer to seek declaratory relief or an advisory
10 opinion and that's it I think in a nutshell. And I think we've traversed all those issues. Is there anything else you wanted to cover in your submissions?

1110

MR CLEARY:

Well, just on that last matter we haven't, well we discussed the objects of the
15 Act but – and *Uber* where the inequality of bargaining power was said to not be part of the mix when you're dealing with section 6. The issue does come down to whether this Court is of the view that Hairland's situation, if we can put it like that, raises a matter of employment status. It's open to a party, we concede, to jump the gun and form a view that it's got a problem when none exists, and to
20 answer your Honour's question about what the Authority would do for an abstract that would be the answer, and sometimes the Authority does that, for instance, quia timet injunctions, wait for something to happen before we effect jurisdiction.

MILLER J:

25 And you would say that might perhaps be an employment relationship problem, a term which we've defined very expansively, but it wouldn't be a matter, and as such the Authority might say, we're not going to decide it?

MR CLEARY:

Yes.

MILLER J:

All right.

MR CLEARY:

5 Yes, it's – Hairland seeks the Authority's jurisdiction and recognises that, well
as opposed to the other counterfactual which was waiting and seeing, it
determined that the best approach was to utilise the avenue in the Act which
allows anyone if there is a matter about whether there's an employee to go to
the Authority and have that sorted. This is not like getting a tax ruling for an
extant set of affairs, but it's about effecting the opportunity under that provision
10 in contrast to section 6(5), low-level speedy versus restricted and also formal.
Just checking that we have covered – and my friend may also talk about
section 6(5) as the majority did as having protections and we say, as this Court
did in *Gill Pizza*, have a look at the legislative background and section 6(5)
protections were actually put in place because of contractor concerns that a
15 person might take an action, a class action against their wishes that they wish
to remain contractors.

WILLIAMS J:

I see your opposition says you're wrong about that. What do you point to?

MR CLEARY:

20 About?

WILLIAMS J:

The respondent says that's factually incorrect in their submissions.

MR CLEARY:

Well –

25 **WILLIAMS J:**

Can you just point to what you're relying on so I can record it?

MR CLEARY:

So in the select committee report, that's in the case bundle your Honour, you'll see that the committee was responding to these concerns that were raised. The committee said the majority of submitters who opposed clause 6 did so
5 because of the impact that it had on existing relationships, as well clause 154 as being omitted. So the select committee's concern wasn't necessarily protection of employees but it was to make –

WILLIAMS J:

Well do you draw your conclusion from the phrase “existing relationships”?

10 **MR CLEARY:**

No from the fact that the initial heading to the clause was a class action and that the reading from the select committee appeared to be as a result of the concerns that had been raised by contractors rather than employees.

MILLER J:

15 What paragraph is that?

MR CLEARY:

It's at pages 5 to 6 of the select committee report, which is in the casebook, page 89.

WINKELMANN CJ:

20 Are we going to pop that up on the screen?

WINKELMANN CJ:

What page, then, of the select committee –

MR CLEARY:

At the foot of page 5, your Honour, page 90 of the casebook.

25 **WINKELMANN CJ:**

Oh, we don't seem to have it.

ELLEN FRANCE J:

No.

KÓS J:

I can't access it anyway.

5 **WINKELMANN CJ:**

I think we've only got page 32 of it, no...

MR CLEARY:

I see.

WINKELMANN CJ:

10 That may be the difficulty that your assistant is having.

WILLIAMS J:

Oh yes: "A number of submitters expressed concern that clause 154 could be used to change the status of individual contractors" –

WINKELMANN CJ:

15 Did you find that in the materials?

WILLIAMS J:

"Who do not wish to change their status."

ELLEN FRANCE J:

Oh, that's page 32, isn't it?

20 **WILLIAMS J:**

Yes, 32.

WINKELMANN CJ:

Okay.

ELLEN FRANCE J:

Not pages 5 to 6?

MR CLEARY:

Well, clearly a different version has been used in the casebook, but the point is,
5 your Honours, that the section 6(5) protections that the majority referred to were
done for those reasons, to protect contractors who wanted to stay contractors.

WINKELMANN CJ:

Well, you see, that's – isn't that kind of protecting against class actions? So say
in the *Uber* scenario where proceedings are brought by some people who say,
10 well, we're employees, and the others who want to be independent contractors
are not bound by the process, isn't that what it's generally dealing with? That –

MR CLEARY:

Well that's one aspect and the other was getting the approval – so the applicant
in a section 6(5) process can be a Labour Inspector or a union or a person
15 who's personally affected, but if it's not the person who's the applicant, the
person who is named in the application as an employee, purported, must give
consent.

WINKELMANN CJ:

And what do you say flows from that?

20 **MR CLEARY:**

Well it's not that aspect, it was more about the majority's view that section 6(5)
afforded protections for employees, and we disagree with that. We say
section 6(5) was originally intended as a class action that's been modified
somewhat, but the main point is that it sits in contrast to section 161(1)(c).

25 **KÓS J:**

I'm still struggling with why section 6(5) can't apply in the case of an application
by an employer. I take the point about section 6(6). I don't see *Gill Pizza* as
necessarily deciding the point, but it does – it would require, as you say, it would

require, for a declaration to be made as to an employee's status, the employee to consent. Well, that's just what section 6(5) provides, but that doesn't actually mean that an employer couldn't, or a party that said it was not an employer but had workers as contractors couldn't make an application under section 6(5), but
5 I'm sure my colleagues will explain to me at the morning break why I'm completely wrong.

MR CLEARY:

It's just, your Honour, that the import of that provision –

BACKGROUND NOISE (11:19:12)

10 **WINKELMANN CJ:**

Sorry about the percussive accompaniment, just carry on.

MR CLEARY:

The provision is aimed at applicants being declared employees and it doesn't seem consistent that an employer would make an application that an employee
15 is an employee. It's there for, like in the case of *Uber*, except that – well, and in that case, this Court dealt with it as a declaration.

KÓS J:

Well, the wording in section 5 is wider than you suggest, may by order declare whether the persons named are employees. That seems to go both ways, not
20 that they are, but whether they are.

1120

MR CLEARY:

Well, except the applicant for that process, in our view, must be asking the Court for a declaration of employment and –

25 **KÓS J:**

Well, I appreciate a union or a Labour Inspector's probably going to be doing so, but what about one or more other persons? Why can't that be Hairland?

MR CLEARY:

Because there's a very real indication, your Honour, that that provision that refers to the person who has engaged workers is to be afforded opportunities of natural justice, there's a clear implication that that provision, the applicants
5 are not going to be that person. It's a thrust of the section.

KÓS J:

All right, well, I'll wait to be educated.

WINKELMANN CJ:

And I suppose you could read it that way so long as the employee was
10 effectively joining in the application. It requires at least the employee's joining in the application.

KÓS J:

Well, they'd have to consent.

MR CLEARY:

15 Or consenting to it.

KÓS J:

They'd have to consent.

MR CLEARY:

Justice Cooke did make a comment about this which we disagreed with
20 because it implies that Hairland could've made the application, but even there he sees that as unfair because it would need the consent of the complainants.

WINKELMANN CJ:

I mean, that's definitely a possible reading of section 6(5), I think, if they have the consent of the people who aren't complaining because it's the – of the
25 individuals.

MR CLEARY:

And he saw that as creating another problem for Hairland and it comes down to this, your Honours, if Parliament had intended section 161(1)(c) to be as restrictive as my friend is going to encourage upon you, we say that it would've
5 had something more in the nature of a qualifier. As it stands it's unqualified.

WINKELMANN CJ:

There is, however, a sense in section 6(5) of a notion that people aren't brought before the courts, employees aren't to be brought before the courts on abstract matters except by their consent. And you can see that as underpinning the
10 requirement of section 161, or except by the extent or instigation I suppose, so ordinary people going about their ordinary work should not suddenly find themselves before the Employment Relations Authority because an employer wishes to clarify their legal status.

MR CLEARY:

15 Well, if that is correct it's something we would say doesn't gel well with the wording used in section 161(1)(c).

WINKELMANN CJ:

Okay. It's definitely not a model of statutory precision.

MR CLEARY:

20 Well, it's been described by this Court as clumsy and awkward but funnily enough, your Honours, we would say that section 161(1)(c) is one of the clearer provisions because all you need to have a problem is to have a live controversy about status.

WINKELMANN CJ:

25 Well, I've previously vented about section 161 but I was actually talking about section 6 on this occasion.

MR CLEARY:

I see.

WINKELMANN CJ:

So, is there anything else?

MR CLEARY:

No, those are our submissions, unless your Honours have any further
5 questions.

WINKELMANN CJ:

Thank you Mr Cleary. Ms Radich.

MS RADICH:

May it please the Court. The question of employment status is the gate through
10 which a worker must pass to access the minimum statutory entitlements, such
as minimum wage, rest breaks, meal breaks and holidays and an employee can
also pursue a personal grievance.

Now, the respondent's primary submission is that there are two pathways
15 through that gate for employment status to be determined, and it is the
employee or the worker who takes the steps towards those pathways.

Now, the employer isn't excluded from this path. They can come in, I'm going
to continue this analogy, forgive me, to place in that pathway an objection, a
20 rock as it were, in the pathway for the institution to determine one way or the
other.

So, one pathway is the Employment Court. We've been talking about
section 6(5) and 6(6), and Ms Marriott's put those up for our reference there.
25 So, a worker can seek a declaration, and I will come to the interesting
discussion we've been having about the breadth of this shortly, but in our
submission the – this is for a person asserting to be an employee primarily to
seek a declaration, and that can only be made with their specific written
consent.

30

Now the respondent's submission is that it's clear from this wording that this isn't a pathway available to the purported employer. I'll just park the technical discussion about that for a bit later, because I just want to talk about these two pathways to start with. So this is the pathway to the Employment Court.

5 Now for the employer under section 6(6)(b) the other person has an opportunity to be heard. So this is where the person that is being asserted to be the employer has that opportunity to be heard.

The other pathway is in the Employment Relations Authority, and this is where
10 the Employment Relations Authority can determine under section 161(1)(c) of the Act whether a person is an employee, and this was confirmed in *Gill Pizza*. Now for the employer they have an opportunity to be heard at this point. The Employment Relations Authority is required to comply with principles of natural justice, as with any Tribunal, it's specific in the Employment Relations
15 Act in section 157(2)(a). So again at that point the purported employer can oppose this question of whether a worker is an employee, and this is often as a preliminary matter in an employment proceeding.

So the respondent says it's the worker, or in this case the Labour Inspector,
20 which brings the proceeding and the employer can oppose –

WINKELMANN CJ:

Under section 6?

MS RADICH:

I'm still talking about section 161 your Honour.

25 **WINKELMANN CJ:**

Okay.

MS RADICH:

That in this it's the work of the Labour Inspector which would bring a proceeding and if an opposition comes up as to whether those workers are employees or
30 not, then the Authority has that jurisdiction to consider that question under

section 161(1)(c). Now the respondent submits there isn't a third pathway, there isn't a pathway for an employer to simply file a proceeding seeking a declaration, and I'm talking about a bare declaration simply on its own, my workers are independent contractors. There's simply nothing, in my
5 submission, in the Employment Relations Authority which allows for that pathway. But the employer isn't excluded. They have that opportunity as part of a response to either an application under section 6, or a matter that is brought to the Employment Relations Authority.

10 Now I want to touch on that word "matter" for a minute because it is –

KÓS J:

Could we just clarify one point first, and that is do you accept though that there are some matters under – sorry. Some applications that could be made under section 161 by an employer, or is that an employee provision only?

15 **MS RADICH:**

No, there would be matters being able to be brought by an employer your Honour, particularly in the restraint of trade area.

KÓS J:

Right.

20 **WILLIAMS J:**

And breach of agreement.

MS RADICH:

Breach of agreement. Just bringing it up.

WINKELMANN CJ:

25 Breach of confidence. All of those things. That's what *FMV* has said, hasn't it.

WILLIAMS J:

IP.

WINKELMANN CJ:

IP.

MS RADICH:

5 Primarily employers bring actions in relation to breaches of duty by an employee, restrains of trade, theft, something that has caused the employer loss. That would usually be where an employer would initiate proceedings. The other time is in the bargaining sphere. An employer might seek facilitation in a collective bargaining situation.

KÓS J:

10 Right, now back to your argument. Thank you.

MS RADICH:

15 Thank you. I just wanted to point out that in section 161(1)(c) the word “matters” is used, but the key point is section 161(1), which is where we say the test comes in. So there’s exclusive jurisdiction to make determinations about employment relationship problems. So we say that is the, as the Court of Appeal found, this is the context to that provision. So it’s jurisdiction about employment relationship problems.

20 Now this Court described that in the *FMV v TZB* case at paragraph 72 as a perimeter, and I'll just show you the quote which we’ve brought up online there, and it’s just towards the end of paragraph 72, where Parliament is intending “the perimeter of the Authority’s exclusive jurisdiction” and they’re talking about that being co-extensive with that of the employment relationship. I just wanted to point that out because I think this idea of a perimeter is a really clear
25 explanation of what we’re talking about here, that there is a perimeter of an employment relationship, and in that perimeter the employment institutions, and by that that’s the short form for Employment Relations Authority and Employment Court, the employment institutions have jurisdiction within that perimeter to determine those matters that come up –

WINKELMANN CJ:

But your point is, I think that you're going to build on that, the perimeter is defined by the existence of a problem.

MS RADICH:

5 An employment relationship problem.

WINKELMANN CJ:

Yes, obviously.

MS RADICH:

10 So that's the point which is where I differ to my learned friend. He's saying the problem is that the workers are contractors, and I'm saying that does not fit within that perimeter, because that is not an employment relationship problem.

WINKELMANN CJ:

Right, so we'll take the morning adjournment.

COURT ADJOURNS: 11.30 AM

15 **COURT RESUMES: 11.49 AM**

WINKELMANN CJ:

Ms Radich.

MS RADICH:

20 Thank you your Honours. I was just starting to talk about the introductory part of section 161(1), and the nub of the disagreement between the respondent and appellant over this is the respondent considers those introductory words to be important whereas the appellant is effectively trying to have subsection (c) stand-alone. So if we look at what those words mean, there's a couple of
25 phrases in there that are actually defined in the Employment Relations Authority. I'm at paragraph 17 of my submissions. The employment relationship problem, that's defined in section 5, and that's a personal

grievance, dispute, any other problem relating to or arising out of an employment relationship. There's an exclusion that it doesn't include fixing terms and conditions. But if you look at that definition of "employment relationship problem" in section 5, this particular application – or
5 the application that the appellant made to the Employment Relations Authority is not one of those. So we say for there to be an employment relationship problem we first – sorry. As another point we say that to have an employment relationship problem we need to have an employment relationship.

10 **WINKELMANN CJ:**

So your point is that whether there is an employment relationship does not fall within that, because it has to be – the issue is whether there is an issue arising out of an employment relationship, so that's a superadded part. And, so it's a jurisdictional factor as to whether, there might be a jurisdictional factor as to
15 whether there's an employment relationship, but that only legitimately comes before the relationship authority in that way when it has this superadded problem wrapped around it.

MS RADICH:

Correct, and there are two part, two phrases in this subsection (1) which are
20 defined. One is "employment relationship" which is the shorter part, and that's defined in section 4(2). That's not actually in the documents but it is in paragraph 12 of the Court of Appeal decision in this case, and that section 4(2) sets out what are employment relationships, and they are relationships between employer and employee, union and employer, union and a member of a union,
25 union and another union. But in that list of what is an employment relationship you don't have principal and contractor, and you don't have purported contractor and purported employer or anything like that.

WINKELMANN CJ:

That doesn't really help, though, does it?

MS RADICH:

Just pointing out, your Honour, that in that phrase, in that opening part of section 161(1) there are aspects of that that are defined terms in this Act.

WINKELMANN CJ:

5 I thought that the majority's reasoning had one aspect which was not particularly persuasive, which was that it couldn't be an employment relationship problem because the employer was contending there was no employment relationship. Well I mean an employer must be free to contend that in the context of something which is a fact-based problem that comes before the
10 relationship – the ERA.

MS RADICH:

Yes, correct, and the respondent's case is that there are the two pathways I talked about. The employer can come along those pathways, but there isn't an ability under this piece of legislation for an employer to apply simply for a bare
15 declaration, as this employer organisation did in the Employment Relations Authority, simply my workers are contractors. That simply isn't –

MILLER J:

Could they go to the Authority and say, I've got someone here who's claiming holiday pay on the basis that they're an employee, and I'm not liable to pay it
20 because they aren't.

MS RADICH:

Your Honour, in the respondent's submission that would need to be secondary step. So that would be the employee or the Labour Inspector taking or bringing that action, and then the employer could come in and oppose it on the basis
25 that they don't have an employment relationship. But simply having a person, and this is a real concern for the respondent in terms of that vulnerability in this relationship. You know somebody raises a sexual harassment complaint. Somebody raises a discrimination complaint. Says that they're not being given bereavement leave. If the employer can oppose that by itself, initiating
30 proceedings when there are none others on foot, that is a significant imbalance

added to the employment relationship. Because at the moment an employer can't do that. They can't have a retaliatory action until the employee is the one that initiates that proceeding, and the way the employment dispute resolution system is set up, is that proceedings are actually quite a far way down the track.

5 There's usually correspondence and discussion first. There's mediation which is virtually compulsory. In terms of the settlement rates they're about 80%. So the numbers of cases that actually get to the Authority by an employee are relatively small.

KÓS J:

10 So, what would an employer do, then, if it's faced with the problem that, to use it in a neutral way, problem that there is an assertion of an employment relationship but no one's actually doing anything about that? That people are standing outside, waving placards, they're talking about the prospect of claims, but no one does anything about it. In the meantime, your share price is falling
15 because there's a question mark about whether your business model is actually subject to a whole lot of extra costs.

MS RADICH:

In the industrial relations arena, your Honour, there are many ways to bring a matter to a head. I would have – off the top of my head, the employer could
20 wind things up to the point where there is something filed, they could be quite aggressive in their response, they could stop people's –

KÓS J:

Hang on, sorry, what?

MS RADICH:

25 Stop people's pay.

KÓS J:

Right.

MS RADICH:

The employer has the power in these relationships. They're the one that pushes the button or however the payroll goes through these days, so they have the ability, if they wanted to bring it to a real head, to almost force
5 proceedings. They could do that.

KÓS J:

Well, that's not a very good faith approach.

MS RADICH:

No.

10 **KÓS J:**

I mean, they're perfectly happy to pay the contractors their contract rates, they just don't want to pay them holiday pay. I mean –

WINKELMANN CJ:

Well, they wouldn't have to be – if they're independent contractors, the good
15 faith obligations don't apply, I suppose, do they?

MS RADICH:

That's right, but in this case, your Honour, the payment made to the hairdressers was lower than the minimum wage, and that's in the Labour Inspector's report. It was \$15 an hour, so – and that was lower than the
20 minimum wage when this first came up, which was much lower than it is now, so –

KÓS J:

Yes, but your – I'm just testing your proposition that the employer could wind things up. I mean, let's say the employer doesn't want to act in sort of general
25 bad faith. I don't mean statutory bad faith.

MS RADICH:

Mhm, well –

KÓS J:

They want to be, you know, a good contractor. How do they bring it on?

MS RADICH:

5 You're talking about the situation of people waving placards, so there's something else happening.

KÓS J:

Yes, there's a threat. There's a threat that something's going to happen but the, you know, the Labour Inspector hasn't done a report yet, or the Labour Inspector has done a report but isn't doing anything about it.

10 **WINKELMANN CJ:**

Or a less acute example, where there's just this grumbling issue about the business model, and so the employer's carrying this risk that their business model will at some point in the future be subject to challenge.

MS RADICH:

15 What you're talking about with the waving placards and the business model coming at risk is action by those individuals. Now, they are the vulnerable people in this. If they're contractors, they can be dismissed at will. They will have a notice period, they won't have the ability to take a personal grievance, and if they did, then the question of employment status would come up, but the
20 idea that people would suddenly come out and do something to damage their principal in this contracting relationship, it doesn't bear in mind the fact that these are fairly vulnerable people themselves.

KÓS J:

25 None of this is an answer to my question, which is what does the employer do to get certainty? I mean, just because they've got power doesn't mean they've got an answer.

MS RADICH:

The way I'm answering your question, your Honour, is to point out that that would be a really unusual situation, so it would be already a very hot, very disputed situation and that would, in my view, would have something that would
5 come up in it that would allow some sort of action or proceeding to be taken.

WILLIAMS J:

Well, if it got to the point of being a strike, then there's a whole slew of rules about what you can and can't do and what the employer can and can't do, but I guess the –

10 **MS RADICH:**

If they were employees.

WILLIAMS J:

I guess the answer is for the employer to agree with the employees that you'll seek a declaration, or you'll all go to the ERA with a problem.

15 **MS RADICH:**

Yes.

WILLIAMS J:

You just can't do it pre-emptively by yourself.

MS RADICH:

20 It's – for the employer, yes. Yes, but I mean, that situation probably wouldn't arise because contractors wouldn't be collectively organised as members of a union to be collectively bargaining.

WINKELMANN CJ:

25 So is your answer that it's a small gap and then this is the real question, this is the second part, if it's a gap at all, does that – is the interpretation you urge upon us, we accept – does that leave the situation where the employer would

be free to go and seek a declaratory judgment, for instance, in the High Court, because it's outside the ERA – the jurisdiction created by section 161?

MS RADICH:

5 Yes, your Honour, there would be, and it's been a very long time since I've been in the High Court, but jurisdiction in the, you know, for the High Court to make a declaration of that nature – the point for the respondent is that this is an action by a Labour Inspector. These actions come up with more vulnerable employees. There's examples in the submissions around the pizza delivery drivers, hospitality workers. The other aspect that the Labour Inspector – the
10 people that seek assistance are migrant workers. They're very vulnerable to exploitation. Often English isn't their first language. They may have a work visa which is tied to that employer. They may have employer-provided accommodation. So this is one of the areas where the respondent is very concerned about what has happened here, where if people in that vulnerable
15 situation are faced with an employer seeking a declaration, and there was some discussion this morning with my learned friend about who would be named in those sorts of applications.

1200

20 There's a quote in one of the cases about the employees putting their head above the parapet and they very much are doing that when they're seeking assistance and seeking advice. It might be through the Community Law Centre, it might be through a union or the Labour Inspectorate. The employer's not going to respond well to that, whoever it comes through, and so allowing this
25 sort of pre-emptive, in my submission your Honour, retaliatory action by the employer to say, we're going to stop this in its tracks, we're not going to wait for the process to unfold.

30 There was discussion earlier about the Labour Inspector report and I'll just ask Ms Marriott to bring up the page before the one we talked about, because there was discussion about this Labour Inspector report being a report that the employer had the opportunity to comment on and in the page before the one we were looking at, so this is 101.0007, if you just read under the conclusion

heading there, you can see there the Labour Inspector saying: "On balance, having considered the legal tests ... the Inspector's view is that these hairstylists were employees ...". So, the Inspector's stating a view and then on the following page, which you were discussing with my learned friend earlier, there's the opportunity for response to that view.

So, all that's happening here is the Labour Inspector has had people come and raise concerns about holiday pay. They've looked into the situation, they've specified a view. This report also mentions the fact that there was a meeting that the employer attended. They had a representative from an organisation called Employsure with them and then the Labour Inspector's expressed this view, but they haven't yet taken that step of issuing proceedings.

So, at this point there's different remedies available here. This doesn't have to go to the Employment Relations Authority. There could be an enforceable undertaking, there could be an agreement to pay the people their holiday pay, there could be a mediation, I've been to a mediation with a Labour Inspector on the other side. There can be ways of resolving well ahead of this needing to go to the Employment Relations Authority. But at that point that it does, and the employer might say in those resolution processes, well, actually we don't think these people are employees, they might assert that and it may be that that needs to go to the Authority, but it's in response to an action that we say the employer can raise that issue.

WILLIAMS J:

So, the problem for the employer is they can be held up potentially for months, bank breathing down their neck, business model at risk. They need clarification now for the sake of the business. What you say doesn't give them much comfort.

MS RADICH:

Well, they can, at this point, so if you've got a Labour Inspector expressing the view then the employer can respond to that. They can have discussions. When the proceedings are filed they can file their statement in reply quickly.

They can seek urgency. The Employment Relations Authority, you've got the ability to seek urgency and have something happen fairly quickly. So, that can happen fairly quickly. It's also not likely to be public, so at this stage the Labour Inspectorate isn't going to be publishing what they're doing in these
5 initial investigations, it's only at the point where there's actually proceedings filed that it may become public.

And it's like any case, your Honour, I think it's almost akin to saying there's a risk of an employee raising a personal grievance which might upset our share price. Well, that's a reality of being an employer and having to act in good faith
10 and treat people reasonably and responsibly.

MILLER J:

It's not at all the same.

MS RADICH:

15 Sorry, your Honour?

MILLER J:

It's not at all the same. We're talking here about contingent liabilities for, say, holiday pay or penal rates or whatever. All those entitlements, and presumably penalties on top of them, so to pick up Justice Williams' point, this is a
20 contingent liability that you've got on your books. It's not at all the same thing as saying we might have a personal grievance if someone behaves badly and we get sued, that's something you can manage. You can understand why you would want the status question resolved quite promptly.

MS RADICH:

25 And there's two responses I'd give to that your Honour. Let's say I've leased a premises over the road and I'm going to set up a hairdressing salon. I might be entering into a tenancy arrangement, I might be sourcing products, there'll be all sorts of things that I'm doing as I set up that business. I'm not going to come to the Court and seek a declaration that my tenancy agreement's okay or my
30 insurance arrangements or whatever else. So there is responsibility on a

company or a business setting up to effectively get its house in order and the Court of Appeal referred to that in terms of “resource management, competition, tenancy” at paragraph 64. So there’s a question here of what is the role of a court or a tribunal and at what point?

5

The other thing at this point if I could bring up, there was an extra document filed last week because section 6 has actually been amended. So hopefully you have – there’s the new section 6 which we’ll just bring up now, because actually this has got easier since the 21st of February 2026, and the reason is in section 6(1) there’s a highlighted part there, section 6(1)(d), the definition of employee now “excludes a specified contractor”.

10

And if you just take us down to subsection (7) what we have now is basically what has to go into a contract. So a “specified contractor [is a person] who has entered into an arrangement with another person” and there’s a written agreement that they’re an independent contractor and not an employee. They’re “not restricted from performing work for any other person” or – I’m just going find where I’ve actually got a better summary of it in my own notes. They’re an independent contractor, they’re not restricted for performing work for others, they’re not required to perform at certain times or they can subcontract, the agreement cannot be terminated early merely because they decline work, and they had a reasonable opportunity to obtain independent advice before signing. So this has put a very clear statutory test in in terms of what would be looked at in the written agreement.

15

20

25

Now the common law tests still apply, so this is effectively the first look at what those documents say. There is still the control, intention, fundamental tests et cetera. So you don’t have to have the written agreement is what I’m saying. An organisation that doesn’t have this and doesn’t tick all these boxes can still argue that its workers are contractors, but it has been made much clearer.

30

KÓS J:

Is this a good time to talk about section 6(5)?

MS RADICH:

Certainly your Honour. So, as I understand your Honour's question, it's whether under section 6(5) the "1 or more other persons" that makes the application might be the purported employer?

5 **KÓS J:**

Yes.

MS RADICH:

10 It wasn't my reading of how this works because I was looking both at subsections (5) and (6) together and I think if you read them together, as my learned friend said, section 6(6)(b) talks about "the other person who is alleged to be the employer". So from an interpretation point of view if we look at those together and how that process works, certainly the respondent's submission is that that doesn't allow, when you look at subsections (5) and (6) together, but certainly purely on the words of subsection (5) you could have a person who
15 goes and gets that written confirmation from the people named in the application, conceivably make that application. I've got to say your Honour, the idea of that concerns me because I have this vision of the employer who has the fruit pickers coming in for three months over summer, getting them all to sign their contract and sign up to consent to a declaration at the same time and
20 I think that could be really misused by an employer.

KÓS J:

Well it's not consent to the declaration, it's consent to the application for declaration.

MS RADICH:

25 Application, that's right.

KÓS J:

It's slightly less intrusive.

MS RADICH:

That's right, but your Honour, a lot of people won't know what that means.
What is a –

WILLIAMS J:

5 A lot of people, almost everybody.

MS RADICH:

What is a declaration? What am I consenting to? It'll be another piece of paper that I'm signing alongside my IRD form and that I've read the health and safety manual and that I consent to deductions for my steel cap boots or whatever.
10 There's a lot of documentation when employment starts and I think it would awfully easy to slip that in and use it later, there's no timeframe for when that consent is given. So that does concern me, that interpretation.

WINKELMANN CJ:

And you would say we don't need to decide it in this case anyway?

15 MS RADICH:

That would be preferable your Honour, from the respondent's perspective.
1210

KÓS J:

It's just that it is a potential route to deal with the uncertainty that Justice Miller
20 and I, and Justice Williams, I think also, are concerned about, or possibly all of us, but if there is indeed a gap.

MS RADICH:

A potential route, your Honour, but in my submission Parliament would have been clearer at this point in saying "either party". It's very simple drafting if
25 you –

KÓS J:

Yes, well, that's a fair point, but otherwise we're only left then with an application for a declaratory judgment in the High Court, which seems to be a sledgehammer to crack a nut.

MS RADICH:

- 5 That's right, and it wouldn't need to be used, your Honour, because the employer can simply wait, like in this case, and reply.

KÓS J:

Well, yes, except we're positing a situation where they can't because it's becoming perilous.

10 **MS RADICH:**

Yes, yes. I can't think, in my almost 32 years as an employment lawyer, of that situation having arisen and that issue having become that pointed to an employer without any other possible way to resolve it. I've never seen that, Sir. I mean, I'm only one person, but I just worry that it might be a consideration
15 that's not likely to arise in practice.

KÓS J:

Well, your other answer to that might be back to your point before, like the rent, the tenancy, and the insurance. At the end of the day, capitalists have to make their judgements. They make their money from taking risks.

20 **MS RADICH:**

That's right, and really the whole point of having contractors rather than employees is it's a lower liability. It's usually paid lower, there's not the minimum entitlements that apply. I mean, sometimes contractors are paid much higher because they might have specialist IT expertise and the like, so I
25 don't want to broad-brush that.

Your Honour, I'd just like to touch on the objects of the Employment Relations Act, so this is from paragraphs 28 to 35 of my submissions, and really looking at how these, from the perspective of the Labour Inspectorate, because these

are a really crucial point for them in the important work that they do, and the first there in paragraph 28 is acknowledging and addressing the inherent inequality of bargaining power, and that's – Ms Marriott's put up section 3, which is where these objects come from. In the respondent's submission, particularly
5 with the cases that it deals with, the worker is the party with less power and there's a real concern about them being named in separate proceedings to what the Labour Inspector is seeking to do in terms of enforcing minimum provisions.

The next one is in paragraph 30 of my submissions, which is section 3(a)(vi),
10 and that's reducing the need for judicial intervention. So, that's an object of this Act, that the idea of an employer being able to take a proceeding itself to seek a declaration doesn't reduce that need. It increases it, and there is a real risk that employers, if this case decides they can seek a declaration, might decide to do that, and there's a concern as to what that might do in terms of the
15 numbers of cases in the Employment Relations Authority presently, or the Employment Court, if it ends up through section 6.

I've talked earlier about the fact, the concern about retaliatory action and what happens if a person does raise this issue, because if the employer does think
20 they're a contractor, they are very much at risk of having that contract terminated and having their remuneration stopped pre-emptively.

The next one, which is in paragraph 33 of my submissions, which is section 3(ab), and that is talking about promoting the effective enforcement of
25 employment standards and the concern for the respondent is that this process that we've seen in this case does not support that object, because the Labour Inspector has not been able to progress this matter. The date of the Labour Inspector report they were talking about, submissions back in August, I'm just trying to find it. It's 2018, and here we are today, and there was a delay
30 while the parties were waiting for the *Gill Pizza* decision, but you know, this is exactly a demonstration of what can happen where an employer does seek to place roadblocks in a process.

This was discussed in *Gill Pizza*, just to briefly point that out. It was paragraph 64 of that case, that “Labour Inspectors could take action to protect vulnerable people”, and they were looking at that being able to be done in that case “without potentially costly procedural impediments or a requirement that

5 such vulnerable people must put their head above the parapet”. So that’s where that “head above parapet” quote comes from. So, that’s just come up on the screen now, at paragraph 64(a)

So, the Labour Inspectorate concern is that the enforcement function, there

10 could be adverse consequences if employers can take the action that the employer did in this case in terms of its own statutory function potentially being undermined, if people who might otherwise approach a Labour Inspector are aware that they might end up being caught up in proceedings by their employer bringing them in direct, and there's the procedural tangles we've seen here.

15

Just touch briefly on the case law. So, we've talked about *Gill Pizza*, and that was exactly the process that the respondent says should've happened here. So, the employer claimed that the workers were contractors in response to the Labour Inspector filing proceedings, and that's an example of exactly how the

20 respondent says this process should flow.

And in terms of the *FMV* case, as the Court of Appeal held which upheld the respondent's submissions in that case, the Employment Court was incorrect and only looking at half of the test in the case at paragraph 93 because an

25 employment relationship problem is one that “arises during the course of the employment relationship *and* in a work context”. And “*and*” was actually highlighted in the decision. So, just pointing that out, that those parts are what the Court of Appeal said the Employment Court had wrong in this case.

30 I was just leading to a conclusion section unless you have any more questions? No? Well, I'll conclude very briefly then. I think we've covered a lot. The respondent submits that the way the legislation operates is that an application for a pure declaration is through section 6, and if there are

proceedings on foot already the Employment Relations Authority can determine the question of status under section 161(1)(c).

5 Within the Labour Inspector environment there's also a process where a Labour Inspector can issue an improvement notice, and this is under section 223D, capital D, which can refer to alleged breaches of minimum entitlements. Now, an employer can file or lodge an objection to that within 28 days, so if a Labour Inspector issues an improvement notice the employer can object to that by filing in the Authority, so again that's another mechanism where
10 an employer can respond and say, we oppose that because we don't think these workers are employees.

KÓS J:

And that in fact was what was signalled by the Inspector here?

MS RADICH:

15 Yes. Yes. So, the respondent submits that there's nothing in the Employment Relations Act allowing an employer to file proceedings itself as the appellant has done in this case, simply for a declaration, absent any other proceeding or issue being already on foot.

WINKELMANN CJ:

20 Thank you Ms Radich.

MS RADICH:

As the Court pleases.

WINKELMANN CJ:

Mr Cleary, do you have any submissions by way of reply?

25 **MR CLEARY:**

Just two brief points, if it pleases the Court. The first is my friend referred to "employment relationship problems" in the chapeau of section 161, and of course we accept that reference. but as this Court found in *FMV* the definition

itself of “employment relationship problem” is inclusive and the chapeau itself is inclusive, so it leads to what Justice William Young called the “universalist approach” of this Court as to the Authority’s jurisdiction, which I reiterate is seemingly capacious and also that would include as to matters of declaration
5 under section 161(1)(c).

And the other point, your Honours, is that certainly a business is to take a risk as to tenancy agreements and insurance policies and the like, but in this case it’s different because we say Parliament has passed a law that says the entity
10 can go to the Authority, a low-level speedy institution and get a quick response. We agree with the summation that going to the High Court for a declaration is a sledge hammer to crack that nut.

Those are the two issues that I wish to address in reply. Unless you had any
15 questions, those are our submissions.

WINKELMANN CJ:

Thank you Mr Cleary. Well, thank you counsel. We will reserve our decision and we will now retire.

COURT ADJOURNS: 12.20 PM