IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 196
3038211

	BETWEEN	HAIRLAND HOLDINGS LIMITED Applicant
	AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Member of Authority:	Christine Hickey
Representatives:	Paul Fisher, counsel for the Applicant Catherine Milnes, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	23 November and 5 December 2018 from Applicant 5 December 2018 from Respondent
Determination:	20 December 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

The claims

[1] There are two claims with the Authority that name Hairland Holdings Limited (the company) as a party.

Hairland Holdings Limited's claim

[2] The Labour Inspector conducted an investigation into the company and its employment practices after a complaint by workers at one of its business premises in Christchurch. The company alleges that the Labour Inspector was not entitled to do so

because those workers are not employees but independent contractors. The company says the workers have signed contracts for services with the company.

[3] The company says it had informed the Labour Inspector that the workers were not employees so the Labour Inspector should not have continued to investigate. In addition, she should have provided the company with all documents she held as it requested.[1]

[4] On 16 August 2018, the Labour Inspector issued an investigation report in which she states that she has:

> determined the nature of the relationship was one of employment.

[5] The report also gave the company (called the "employer") until 23 August 2018 to provide further evidence it wished the Labour Inspector to consider before she made a decision on whether she should take enforcement action against the company.

[6] On 3 September 2018 the company lodged its application (3038211) in the Auckland registry of the Authority naming the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) as the respondent.

[7] The company says that the Labour Inspector has wrongly concluded that the company's longstanding commercial arrangement to engage labour "through contracts for service is a sham arrangement." However, the company says the Labour Inspector does not have jurisdiction to demand "employment records forthwith" as she has done under s 229 of the Employment Relations Act 2000 (the Act) because the persons concerned are not employees under s 6 of the Act.

[8] By way of remedy the company seeks a determination from the Authority that those workers who had complained to the Labour Inspector are not employees. It has also applied for costs.

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[1] I understand the company to have made a complaint to the Ombudsman about the Labour Inspector's failure to disclose all the documents she held relevant to her investigation.

MBIE's response

[9] Ms Milnes, who acts for the Labour Inspector, lodged a statement in reply stating that the Authority has no jurisdiction to determine the claim because the Chief Executive of MBIE is not the correct respondent. The Labour Inspector submits that there is no employment relationship between the company and the Chief Executive or the company and the Labour Inspector. Therefore, the Authority has no jurisdiction to investigate and determine the company's claim.

[10] In addition, Ms Milnes says that she does not represent the Chief Executive in the Authority.

The Labour Inspector's application

[11] The Labour Inspector lodged a related application (3039839) on 20 September 2018 in Christchurch naming the company as the respondent.

[12] The Labour Inspector's application asserts that five named workers are employees and seeks, amongst other things, the provision of records an employer is required to keep, payment of minimum wage arrears, annual leave and public holiday entitlements as well as penalties.

The company's response

[13] By way of reply for the company, Mr Fisher submits that since the company asserts the named workers were not employees the correct forum for the Labour Inspector to establish the status of the workers is by way of an application to the Employment Court under s 6(5) of the Act.

[14] The company submits that because of s 6(5) of the Act the Authority does not have jurisdiction to determine whether the workers are employees and therefore the Labour Inspector's application is outside the Authority's jurisdiction.

Procedural background to date

[15] Once the Labour Inspector's application was lodged in Christchurch an Auckland Authority officer transferred the company's application to Christchurch and both were allocated to me so that they could be dealt with together.

[16] On 15 November 2018, I held a case management conference. Mr Fisher lodged a memorandum prior to the case management conference. The company submitted that:

- the matters should go to mediation and the named workers should attend the mediation;
- that the Authority has no jurisdiction to consider the Labour Inspector's application;
- that by lodging her application the Labour Inspector is abusing the Authority's process because she was already aware of the company's application and her application has also resulted in a change of venue contrary to the company's interests; and
- given that there is no jurisdiction to hear the Labour Inspector's claim the company's claim should be transferred back to Auckland to be heard.

[17] After hearing from both parties I issued a Notice of Direction on 21 November 2018. The parties agreed that I should deal with the claim against the Chief Executive of MBIE on the papers.

[18] The arguments put forward by the company in relation to its application also touch on its response to the Labour Inspector's application. I have received submissions in writing from Mr Fisher and Ms Milnes, and in reply from Mr Fisher.

The issues

[19] In brief, the Labour Inspector submits the Authority has no jurisdiction to deal with the company's claim and should strike it out. The Labour Inspector submits that instead I should deal with her claim. She submits that because the company challenges her view that the workers are employees, the Authority should determine the issue of whether the workers are employees under s 6 and s 161(1)(c) of the Act.

[20] The company submits that the Labour Inspector cannot ask the Authority to determine that the workers are employees. It says that if the Labour Inspector wishes to establish whether the workers are employees she must make an application to the Employment Court under s 6(5) of the Act for a declaration to that effect. Therefore, the company submits that the Authority must strike out the Labour Inspector's claims, as the Authority is not the correct forum at this stage of proceedings.

[21] Instead, the company submits that its claim must proceed and should be transferred back to the Auckland registry of the Authority because that is where it was lodged and it is the closest to where the majority of the company's witnesses reside. The Authority should then determine under s 6 and s 161(1)(c) of the Act whether the workers are employees.

[22] In order to resolve the question of the Authority's jurisdiction I must determine the following issues:

(i) Does the Authority have jurisdiction to deal with the company's claim between the Chief Executive of MBIE and the company, or between the company and Labour Inspector?

(ii) Has the Labour Inspector abused the Authority's process by lodging her application which asserts that the workers are employees despite knowing the company disputes that and had lodged its own proceedings?

(iii) Do I have jurisdiction to determine the Labour Inspector's application or, instead, should the Labour Inspector make an application for a declaration from the Court under s 6(5) of the Act?

(iv) What is an employee and how is that determined?

(v) Where should any proceedings be heard?

(vi) Should I direct matters to mediation and direct the workers to attend?

The Authority's jurisdiction to determine the company's application against the Chief Executive of MBIE, or the Labour Inspector

Hairland's submissions

[23] The company submits:

- Although the company has named the Chief Executive of MBIE, it consents to the Labour Inspector being substituted if the Authority considers that appropriate.
- There is a "dispute" between the company and the Labour Inspector. A dispute is defined in s 5 of the Act as "a dispute about the interpretation, application or operation of an employment agreement". In this case, the company says it disputes the interpretation of what the workers and Labour Inspector say are employment agreements.
- There is no good reason to restrict the definition of a dispute to exclude a dispute between a Labour Inspector and a party to an agreement.
- The Authority has exclusive jurisdiction under s 161(c) to make a determination about whether a person is an employee. Therefore, the Authority must do so upon the company's application.
- Doing so would be in line with s 101(d) of the Act which states that the object of Part 9 of the Act includes determining "the rights and obligations of the parties" to employment relationship problems.
- There is nothing in the Act that says the applicant must be the one asserting that an employment relationship exists.
- The absence of an employment relationship is no bar to proceeding in the Authority, because there are many examples in the Act where the Authority is given jurisdiction even when there is no employment relationship between the parties. For example, in matters about unions and incorporated societies (ss 161(h) – (k)) and matters involving Labour Inspectors.
- The definition of an employment relationship problem is non-exhaustive and the company's claim is an employment relationship problem because it arises from or is related to an employment relationship.

[24] The Labour Inspector submits:

- There is no employment relationship between the Chief Executive and the company.

- There is no employment relationship between the Labour Inspector and the company. Instead, the Labour Inspector brings proceedings "on behalf of an employee". A Labour Inspector is not a party to the employment relationship.[2]
- When a declaration of whether the workers are employees or not is all that is required, as in the company's application, and no further remedies are sought then the application should proceed to the Court under s 6(5) of the Act. However, the company does not have the ability to make such an application. Only a worker, a Labour Inspector or a union may do so.
- The Labour Inspector *may* apply for a declaration under s 6(5) but is under no obligation to do so. She has not chosen to do so. Instead, she has made an application to the Authority with the knowledge that the Authority has the jurisdiction to decide the real nature of the relationship between the parties. She is aware that the Authority can establish that as a preliminary issue under ss 6(2) and 161 of the Act.
- As to who can bring proceedings to the Authority, the Act specifies what parties are able to bring specified types of proceedings. The company is not one of those parties in relation to the kind of remedy it seeks. The company and the workers are in an employment relationship, according to the Labour Inspector, but not according to the company.
- The company's claim 3038211 should be struck out for lack of jurisdiction.

What is the extent of the Authority's jurisdiction?

[25] As the company submits, and as confirmed by Chief Judge Inglis in the recent Employment Court case of *GSTech Limited v A Labour Inspector*[3]:

> The Authority is a creature of statute and only has the powers conferred under its empowering legislation, either expressly or by necessary implication.

Does there have to be an employment relationship and/or an employment relationship problem before the Authority has jurisdiction?

[26] The Authority's jurisdiction is conferred by and set out in the Act. Section 3 states the overall object of the Act, which includes "to build productive employment relationships".

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[2] *GSTech Limited v A Labour Inspector of the MBIE* [2018] NZEmpC 84.
[3] Note 2.

Because the object of the Act includes building productive employment relationships, I need to consider what an employment relationship is.

[27] Section 5 of the Act defines an "employment relationship" to mean "any of the employment relationships specified in section 4(2)". Section 4(2) of the Act reads:

> (2)The employment relationships are those between –
>
> (a) an employer and an employee employed by the employer:
> (b) a union and an employer:
> (c) a union and a member of the union:
> (d) a union and another union that are parties bargaining for the same collective agreement:
> (e) a union and a member of another union that are parties to the same collective agreement:
> (f) a union and a member of another union where both unions are bargaining for the same collective agreement:
> (g) a union and a member of another union where both unions are parties to the same collective agreement:
> (h) an employer and another employer where both employers are bargaining for the same collective agreement:

[28] According to ss (4)(2) and 5, the company and the Chief Executive of MBIE are not in an employment relationship. It would not make any difference if I substituted the Labour Inspector for the Chief Executive because, according to ss 4(2) and 5, the company and the Labour Inspector are not in an employment relationship.

Nonetheless, could there be an employment relationship problem between the company and the Chief Executive, or the company and the Labour Inspector?

[29] Section 5 defines an "employment relationship problem" to include:

> a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

[30] I agree with the company's submission that s 5 is not an exclusive definition. However, even taking that into account based on the company's submissions its objection to the Labour Inspector having investigated its relationship with its workers in Christchurch and

having made a decision that they are employees, the company's objection to the Labour Inspector's actions does not arise out of an employment relationship, nor is it related to an employment relationship. The company objects to the Labour Inspector's involvement in its relationship with its workers, who it asserts are not employees. The employment status of the workers is yet to be determined.

Is the absence of an employment relationship between the parties a bar to proceedings in the Authority?

[31] Given that the Authority only has the jurisdiction granted to it by statute it can only deal with the kinds of proceedings set out in the Act. It is correct that some areas of the Authority's jurisdiction include matters that are not employment relationship problems, such as whether a union's rules comply with the Act. However, the Authority cannot extend its own jurisdiction beyond that conferred by Parliament. The Authority has the jurisdiction to deal with matters between parties that are not in an employment relationship only if those matters are specifically set out in the Act, such as those matters set out in s 161(1)(q) under s 228 involving Labour Inspectors.

[32] The absence of an employment relationship does not rule out proceedings in the Authority so long as those proceedings are specifically set out within the Act as matters over which the Authority has jurisdiction.

[33] This line of argument does not make the company's claim against the Chief Executive or the Labour Inspector one that the Authority has jurisdiction to deal with.

Is there a "dispute"?

[34] Section 129 of the Act provides that a person bound by an agreement may pursue a dispute under Part 10 of the Act if there is a dispute about the interpretation of the agreement.

[35] The problem with the company's submission based on ss 5 and 129 is that the term "agreement" refers to an employment agreement, whether an individual or a collective one.

[36] So, for the Authority to have jurisdiction to hear a dispute over the interpretation of the agreements the company would have to agree that the agreements it has entered into with

its workers are employment agreements, when the very purpose of its proceedings is to argue that those documents are not employment agreements.

[37] I do not agree that ss 5 and 129 confer jurisdiction on the Authority to make a determination that the agreements are not employment agreements.

Does section 161 confer jurisdiction on the Authority to determine the company's claim?

[38] Section 161 of the Act sets out the Authority's jurisdiction. It confers exclusive jurisdiction on the Authority in a number of areas:

> (1) The Authority has exclusive jurisdiction to make determinations about **employment relationship problems** generally, including –
>
> (a) disputes about the interpretation, application, or operation of an employment agreement:
>
> (b) matters related to a breach of an employment agreement:
>
> **(c) matters about whether a person is an employee (not being matters arising on an application under section 6(5)):**

(emphasis added)

[39] Since there is not an employment relationship between the company and the Chief Executive or between the company and the Labour Inspector, there cannot be an employment relationship problem. Therefore, s 161 does not confer jurisdiction on the Authority to determine the company's application that its Christchurch-based workers are not employees.

Has the Labour Inspector abused the Authority's process by lodging her application?

The company's submissions

[40] The company argues that the Labour Inspector lodged her proceedings in retaliation for the company having lodged its proceedings.

[41] Under the Act the Labour Inspector had the power to issue an improvement notice under s223D or a demand notice under s 224. The company submits that in not doing so but in deciding to issue proceedings she has committed an abuse of process.

[42] The company submits that the two proceedings cover the same issue: are the workers employees or contractors? Therefore, the Labour Inspector's proceedings were unnecessary. In accepting the proceedings the Authority has wrongly caused the venue for investigation and determination to be changed to Christchurch.

[43] In addition, the company submits the Labour Inspector's claims are based on her assertion of an employment relationship. In substance she is making an application for a declaration that the company's workers are employees. Without the workers having been found to be employees the Authority cannot consider the remedies the Labour Inspector claims.

[44] However, such a declaration can only be decided by the Employment Court under s 6(5) of the Act. In the circumstances of this case, where the company has asserted that the workers are not employees and the Labour Inspector wishes to initiate proceedings under the Act, she needs to make an application to the Court under s 6(5) for a declaration.

[45] Therefore, lodging her application in the Authority was an abuse of process.

[46] The Court would deal with the question of whether or not the workers are employees. Until the Court declares the workers to be employees the Authority cannot deal with the Labour Inspector's claims.

The Labour Inspector's submissions

[47] The Labour Inspector submits that she has not abused the Authority's process. It is correct that she has the power to issue demand notices and improvement notices. However, she is not obliged to do so and, in any event; those notices do not address the need for the real relationship between the parties to be determined.

[48] She submits that she is not obliged to apply to the court for a determination of whether the workers are employees.

[49] The Labour Inspector submits she has properly brought proceedings, which enable the Authority to establish as a preliminary matter the real nature of the relationship between the company and its workers.

What is an employee and how is that question determined?

[50] Section 6 of the Act defines the term "employee":

> (1) In this Act, unless the context otherwise requires, **employee** –
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service:
> …
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or Authority (as the case may be) must determine the real nature of the relationship between them.
>
> (3) For the purpose of subsection (2) the court or the Authority –
> (a) Must consider all relevant matters, including any matters that indicate the intention of the persons: and
> (b) Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.
> …
>
> (5) The court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are –
> (a) employees under this Act; or
> (b) employees or workers within the meaning of any of the Acts specified in section 223(1).
> (6) The court must not make an order under subsection (5) in relation to a person unless- …

[51] So, under s 6(5) the Court has jurisdiction, when a union, a Labour Inspector or one or more people under the Act apply to it to determine whether a person or people are employees under the Act, or employees for the purpose of s 223 of the Act.

[52] Otherwise, s 161(1)(c) of the Act confers *exclusive jurisdiction* on the Authority to deal with matters about whether a person is an employee.

How does the Authority's exclusive jurisdiction work in light of s 6(5) which allows the Court to declare whether people are employees?

[53] The company submits that in interpreting legislation there is a well-known principle that the general gives way to the specific. The company's position appears to be that while

generally the Authority has exclusive jurisdiction to deal with matters about whether a person is an employee, in the specific case of a union or a Labour Inspector wishing to assert a person is an employee the Court has jurisdiction, under s 6(5) and the Authority cannot exercise its otherwise exclusive jurisdiction.

[54] The Labour Inspector's submissions are that s 161(1)(c) does apply. Because she has not applied for a declaration from the Court and is not obliged to do so the only body with the power to determine the real nature of the relationship between the company and the workers is the Authority.

[55] I agree with the Labour Inspector's submissions. She has the right to choose to bring an application for a declaration of the workers' employment status to the Court under s 6(5). However, she is not bound to do so.

[56] Lodging her claims in the Authority is not an abuse of process. The Labour Inspector is entitled to lodge proceedings in the knowledge that the company objects to its workers being classified as employees. The Labour Inspector was aware that the company's statement in reply would include its assertion that the workers are independent contractors, which would give rise to the Authority's need to exercise its exclusive jurisdiction to determine the employment status of the workers. In fact, given that the company has no standing to bring its proceedings to the Authority the Labour Inspector's lodgement is helpful to the company.

Does the Labour Inspector currently have to power to determine whether workers are employees?

[57] The Act establishes some of a Labour Inspector's powers. There is no specific power to determine a worker's employment status. Instead the purpose of the appointment of a Labour Inspector and their functions are set out in s 223 and 223A of the Act.

[58] Section 223(1) of the Act states that Labour Inspectors may be appointed for the purposes of the Act, and:

> (b) the Equal Pay Act 1972: and

(c) the Holidays Act 2003; and
(ca) the Minimum Wages Act 1983; and
(d)the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016; and
(da) the Parental Leave and Employment Protection Act 1987; and
(e) the Volunteers Employment Protection Act 1973; and
(f) the Wages Protection Act 1983.
…

[59] Section 223A of the Act sets out the functions of a Labour Inspector to include:

(a) determining whether the provisions of the relevant Acts have been complied with; and
(b) taking all reasonable steps to ensure that the relevant Acts are complied with; and
(c) monitoring and enforcing compliance with employment standards; and
(d) performing any other functions conferred by or under the relevant Acts.

[60] It is implicit that the Acts listed only apply to employees. Some of the time it will be clear when workers are employees. However, labour inspectors also deal with a number of situations in which they consider workers to be employees although the other contracting party may not consider them to be employees.

[61] The Regulatory Systems (Workforce) Amendment Bill was introduced to Parliament in July 2018, although it was withdrawn on 11 September 2018. I understand there is an intention to reintroduce it to the House.

[62] The Bill proposes to add a new section 229A to the Act to give labour inspectors explicit powers to investigate whether any place is a workplace and whether any person performing work is an employee.

[63] The regulatory impact statement prepared by MBIE says the purpose of the change is to:

> clarify labour inspectors' ability to exercise their investigative powers (which consist of powers to enter premises, interview people, and obtain relevant documents) to ascertain whether or not workers are employees and therefore in scope of the protections of the employment legislation.

[64] It is not clear what change that amendment will make, if any, to the Authority's exclusive jurisdiction to determine workers' employment status. But, currently, the Authority has the exclusive jurisdiction to do so, except when an application has been made to the Court under s 6(5) of the Act.

Conclusion on Hairland Holdings Limited's claim and its allegation of abuse of process

[65] The Authority has no jurisdiction to investigate and determine the company's application because the company has no standing under the Act to bring the proceedings it seeks.

[66] The Labour Inspector's proceedings are not an abuse of process and can proceed in the Authority.

[67] There is no detriment to the company in the Authority dealing with the Labour Inspector's proceedings and as a preliminary matter investigating and determining whether the workers are employees. Indeed, that is precisely what the company asked of the Authority in its application.

[68] If the Authority finds that the workers are not employees, then the Authority has no further jurisdiction, and neither does the Labour Inspector. However, if the Authority establishes that the workers are employees the Authority will continue to investigate and determine the Labour Inspector's claims.

What is the appropriate venue for the Labour Inspector's proceedings?

[69] Clause 13 of the Employment Relations Authority Regulations 2000 provides that every application must be lodged at the office of the Authority:

> … as the person lodging the application considers to be nearest by the most convenient route to the place at which the events that gave rise to the problem occurred.

[70] The Authority interprets that to mean that the appropriate place for lodging the application and for dealing with that application is the office nearest to where the (alleged) employment takes place.

[71] In this case, the workers are engaged to work at the company's premises in Northlands Mall in Christchurch. Therefore, the Christchurch office is the appropriate place for the matter to be dealt with.

Should mediation take place between the company and the Labour Inspector?

[72] I have considered whether mediation will contribute constructively to resolving the matters. However, the preliminary issue of whether the workers are employees is not amenable to a mediated settlement. Therefore, I do not direct the parties to mediation at this stage of proceedings.

[73] If I determine that the workers are employees I will consider the utility of mediation again but must do so in line with s 159AA of the Act, which deems mediation of breaches of employment standards inappropriate except in certain circumstances.

Next steps

[74] Early in the New Year, the Authority officer will contact the parties to arrange a case management conference to set the dates for an investigation meeting in the week beginning 8 April 2019 and a timetable for the provision and exchange of evidence.

[75] Mr Fisher must give serious thought to how many witnesses it will sensibly take for his client to present its best case to the Authority. He needs to advise the Authority and the Labour Inspector of the number of witnesses as soon as possible in line with my earlier

direction. However, in my view the preliminary matter relating to employment status should take no more than one day.

Christine Hickey
Member of the Employment Relations Authority