

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 113  
3027812 and 3029012

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
AND	GILL PIZZA LIMITED First Respondent
AND	SANDEEP SINGH Second Respondent
AND	JATINDER SINGH Third Respondent
AND	MANDEEP SINGH Fourth Respondent
AND BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
AND	MALOTIA LIMITED First Respondent
AND	SANDEEP SINGH Second Respondent
AND	MANDEEP SINGH Third Respondent
AND	JATINDER SINGH Fourth Respondent

Member of Authority: Trish MacKinnon

Representatives: Claire English, counsel for Applicants  
Guido Ballara, counsel for Respondents  
Stephen Langton, counsel for Intervenor (Restaurant Brands Limited)

Investigation Meeting: On the papers

Submissions Received: 16 August and 6 September 2018 from the Applicant  
30 August 2018 from the Respondent and the Intervenor

Determination: 17 December 2018

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Labour Inspector Vanessa Webb has brought a number of claims against Gill Pizza Limited (Gill) and Malotia Limited (Malotia). The claims are also made against persons who are either directors of one or both of those companies or who are alleged to exercise significant influence over their management.

[2] Between them, the first respondents operate five takeaway stores in the Wellington region. The stores are operated under franchise from Restaurant Brands Limited (RBL).

[3] Among the many claims brought by the Labour Inspector are several that relate to 28 delivery drivers for the takeaway stores.<sup>1</sup> The Labour Inspector claims those delivery drivers are employees and she brings minimum wage and holiday claims against the respondents on their behalf.

[4] The Labour Inspector also makes claims in respect of failure to issue employment agreements, failure to keep and maintain accurate holiday and leave records, and failure to keep and maintain accurate wage and time records in respect of those drivers.

[5] The respondents deny the delivery drivers are employees. They question the jurisdiction of the Labour Inspector to pursue, and the Authority to consider, matters relating to the status of the drivers.

[6] With the agreement of the parties the Gill and Malotia applications will be heard together because of the similarity of the claims and the commonality of the second to fourth respondents. RBL sought, and was granted, intervenor status on the basis of its involvement in the preparation of the delivery driver contract and the implications of the claims for other RBL franchisees. During a telephone conference with the parties it was decided the preliminary issue raised by the respondents and the intervenor would be determined on the papers by way of submissions.

[7] The determination has been issued outside the timeframe at s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

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<sup>1</sup> Two of the delivery drivers are employed or engaged by Gill and 26 by Malotia.

## Relevant law

[8] Section 228 of the Employment Relations Act 2000 (the Act) specifies actions that can be taken by a Labour Inspector. These are:

- (1) A Labour Inspector may commence an action on behalf of an employee to recover any wages or holiday pay or other money payable by an employer to that employee under the Minimum Wage Act 1983 or the Holidays Act 2003.
- (2) If a Labour Inspector commences an action under subsection (1), the Labour Inspector must not issue an improvement notice under section 223D or serve a demand notice under section 224 in respect of the same wages or holiday pay or other money.
- (3) Sections 131 and 132 apply, with the necessary modifications, to actions commenced under subsection (1).

[9] Section 6 of the Act concerns the meaning of "employee". The relevant parts of it provide as follows:

- (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; and
  - (b) – d n/a
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of services, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes 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.
- (4) n/a
- (5) The court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—
  - (a) employees under this Act; or
  - (b) employees or workers within the meaning of any of the Acts specified in section 223(1).
- (6) The court must not make an order under subsection (5) in relation to a person unless—

- (a) the person—
  - i. is the applicant; or
  - ii. has consented in writing to another person applying for the order; and
- (b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

[10] Section 161 of the Act concerns the Authority's jurisdiction. The relevant parts of s 161 provide as follows:

- (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including —
  - (a) ...
  - (b) ...
  - (c) matters about whether a person is an employee (not being matters arising on an application under section 6(5);
  - ...
  - (q) actions of the type referred to in section 228(1);
  - (r) ...

### **Submissions of the parties and the intervenor**

[11] In accordance with s 174E of the Act, I have not recorded all the helpful and comprehensive submissions made by the parties. I have, however, briefly summarised what I consider to be the main thrust of their arguments.

#### *The respondents' view*

[12] Counsel for the respondents, Mr Ballara, submits that s 228(1) of the Act does not give the Labour Inspector the power to bring the current action on behalf of the delivery drivers. He says the Labour Inspector, in bringing the claim, is seeking a status determination about the drivers from the Authority, which s 228 does not permit her to do.

[13] Section 161(1)(q) provides the Authority's jurisdiction to make determinations about "actions of the type referred to in section 228(1)". Counsel submits the Authority's jurisdiction is constrained to matters brought by the Labour Inspector where those matters are already properly within s 228(1). Mr Ballara cites *GS Tech v*

*A Labour Inspector of the Ministry of Business, Innovation and Employment*<sup>2</sup> as authority for this.

[14] In counsel's submission s 161(1)(c) does not assist the Labour Inspector or afford jurisdiction to the Authority as there is no employment relationship between the parties, being the Labour Inspector and the respondents, and therefore there is no employment relationship problem. The Labour Inspector who, as the applicant and as defined by the Act, is not a party to an employment relationship with any of the respondents does not have the power to seek anything from the Authority under s 6 of the Act, whether that be on her own account or on behalf of any named individual.

[15] She does have the power under s 6(5) and (6) to seek a declaration from the Employment Court that one or more persons named in the application are employees, but the Court must not make such an order unless the person is the applicant or has consented in writing to another person applying for the order.

[16] In Mr Ballara's submission, the Labour Inspector has made an application without jurisdiction. She is now attempting retrospectively to repair that situation by gaining written consent from some individual delivery drivers to her raising a claim in the Employment Relations Authority on their behalf, including as to their employment status.

[17] However, in counsel's submission, the Labour Inspector does not have the power under s 228(1) to seek anything from the Authority under s 6 of the Act and is therefore acting *ultra vires* her powers. Mr Ballara submits that, equally under s 6, the Authority does not have the jurisdiction to make such a declaration about status.

*The intervenor's view*

[18] Counsel for the intervenor, Mr Langton, states the matter in different terms, but essentially endorses the submissions of counsel for the respondents. In his view the Labour Inspector does not have the power to apply on behalf of the delivery drivers for an Authority determination on their status, and the Authority does not have jurisdiction to make such a determination.

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<sup>2</sup> [2018] NZEmpC 84.

[19] The Labour Inspector has the power to bring an action for minimum entitlements under the Holidays Act and Minimum Wage Acts on behalf of the delivery drivers. However, because there is a dispute over the status of the delivery drivers and whether they are employees or not, that status issue first must be determined.

[20] In Mr Langton's submission the status issue is a separate "matter" from the Labour Inspector's s 228 action, and the Labour Inspector does not have the power to apply to the Authority to determine that matter. Nor does the Authority have the jurisdiction to determine that matter where the Labour Inspector is the applicant on behalf of the delivery drivers.

[21] In reaching that conclusion counsel relies on a similar analysis of s 228 and of the Authority's jurisdiction under s 161(1) as counsel for the respondents. He also cites *GSTech* as providing a further reason. This is that, if the Labour Inspector brings an action under s 228 on behalf of a person and the Authority determines the status issue, that person would have no right to challenge the Authority's determination.

[22] Counsel observes that, if the person was a party to the action, they would have the right to challenge the determination and, if a Labour Inspector brought a claim on their behalf under s 6(5), they would have had to provide written consent.

[23] Mr Langton submits that, if the Authority does not accept the intervenor's jurisdiction arguments, then the delivery drivers' consent, which he qualified must be informed and adequate, to the Labour Inspector bringing s 228(1) actions on their behalf must be provided.

*The applicant Labour Inspector's view*

[24] The Authority can only determine, and the Labour Inspector can only bring a claim, where an employment relationship exists. Counsel for the Labour Inspector, Ms English, submits that, where the employment relationship is unclear or disputed, the Authority must determine as a preliminary or interlocutory issue if an employment relationship exists. If it does, the Authority has jurisdiction and can determine the claim. If there is no employment relationship, the substantive claim cannot proceed.

[25] Ms English submits the Labour Inspectorate is not prevented by the wording of s 228 from bringing a claim to the Authority on behalf of a worker it believes to be

an employee, in situations where the respondent denies employee status. The Labour Inspector must be able to explain why she believes an employment relationship exists: when she does, that is sufficient to satisfy the requirement of s 228 for a claim to be made "on behalf of an employee".

[26] In support of these submissions, counsel refers to the purpose of the Act and, in particular, to s 3(ab) which provides that an object of the Act is to "promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court."

[27] Ms English notes that one of the purposes of the Act is to give Labour Inspectors enforcement powers. She also notes that the Authority was established to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

[28] Counsel submits the respondents' position is that a Labour Inspector cannot bring a claim in the Authority where the respondent denies the existence of an employment relationship. This is because the wording of s 228 authorises a Labour Inspector only to bring claims on behalf of an employee. Ms English submits that position is "inappropriately wide and wrong in law".

[29] In her view the Authority can exercise its power under s 6(2) and (3) of the Act to decide whether a person is employed by another person under a contract of service, and determine the real nature of the relationship between them. In Ms English's submission those powers are consistent with the jurisdictional power provided to the Authority under s 161(1)(c) of the Act.

[30] Ms English submits that s 6(5) and (6) are not applicable to the current case before the Authority and do not impact on the Authority's ability to exercise its powers under s 6(2) and (3). In her words:

There is no overlay in either section 228 of the Act, or in section 6 of the Act, which would require the applicant to obtain a declaratory judgment establishing jurisdiction in a higher court, before commencing enforcement action in the Authority. Such a requirement would limit the Authority's own jurisdiction in a way that is contrary to the specific wording of both section 6 and section 161 of the Act itself. It would also be contrary to the express enforcement powers given to Labour Inspectors, and to the

established procedures for determining challenges to jurisdiction set out in case law and the High Court Rules.

## Discussion

[31] I am attracted to the submissions of counsel for the Labour Inspector on the purpose of the Act with regard to both the Labour Inspectorate and the Authority, and to the pragmatic approach counsel takes to the current issues. However, *GSTech Limited*, in which the Chief Judge considered the interface between the matters a Labour Inspector may bring to the employment institutions and the jurisdiction of the Authority to deal with matters brought to it by the Labour Inspector, leads me to prefer the submissions of the respondents and the intervenor.<sup>3</sup>

[32] The court in that case, which concerned a challenge on a non de novo basis to a particular aspect of an Authority determination, considered the Authority's jurisdiction under s 161(1)(q) in relation to actions brought by a Labour Inspector under s 228(1). The matters were not factually similar to the issues currently under consideration but the findings of the court are of wider relevance in terms of its conclusions regarding statutory constraints on both the Labour Inspector and the Authority.

[33] The Chief Judge observed that the matter in that case was whether the person on whose behalf the Labour Inspector had brought claims had been paid his minimum entitlements and that "this was the only matter the Labour Inspector was statutorily entitled to bring before the Authority."<sup>4</sup>

[34] She stated that:

The Authority may make determinations about a raft of matters not brought by the Labour Inspector, including matters relating to the recovery of wages or other money under s 131 (arrears) and matters related to a breach of an employment agreement. But it is the employee who must personally pursue such a claim.  
(Footnotes excluded)

[35] The Chief Judge said the case "illustrated the difficulties of applying a very broad interpretation of "the matter" to encapsulate anything to do with (the

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<sup>3</sup> n2 above.

<sup>4</sup> n2 at [16].

employee's) wage entitlements, whether under the Minimum Wage Act or not, and regardless of the identity of the parties."<sup>5</sup>

[36] The nub of the respondents' and intervenor's submissions, following *GS Tech*, is that the Labour Inspector is constrained by s 228(1) to bring only actions on behalf of employees to recover wages, holiday pay or other monies under the Minimum Wage Act 1983 & Holidays Act 2003.

[37] Asking the Authority to determine the real nature of the relationship between the 28 delivery drivers and the respondents, under s 6 of the Act, is not an action the Labour Inspector is empowered to take under s 228. As counsel for the respondents submitted, "...the Inspector does not have the power to seek anything from the Authority under s 6 of the Act, whether that is on her own account or on behalf of any named individual..."

[38] I accept that submission and the corollary that the Authority has no jurisdiction under s 161(1)(q) to investigate a matter brought to it by the Labour Inspector, acting outside her jurisdiction.

[39] Nor do I find it has jurisdiction to determine the drivers' status under s 161(1)(c). The subsection gives the Authority the power to determine matters relating to whether a person is an employee, with the exclusion of matters arising on an application under s 6(5). Section 6(5) provides the court, and not the Authority, with the jurisdiction to determine status claims brought by Labour Inspectors, where the persons on whose behalf the claims are made have consented in writing.

[40] While the Authority has the jurisdiction under s 161(1)(c) and s 6(2) to determine whether a person is an employee, the Labour Inspector does not have the right to raise that matter, except by application to the court under s 6(5). That section requires the written consent of the drivers to the application. If the Authority had jurisdiction under s 160(1)(c) there would be no corresponding requirement for the drivers to agree to their status being considered, determined and potentially changed.

[41] The respondents assert it would make no sense for the Authority to be able to use its power to make determinations in cases brought by the Labour Inspector without also having to require each employee's written consent. I accept that

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<sup>5</sup> n2 at [17].

submission and conclude the Authority does not have the power in the current situation to determine whether the delivery drivers are employees under s 160(1)(c) and s 6(2).

[42] In reaching that conclusion I am also influenced by the difficulty delivery drivers would have in challenging a determination of the Authority as to their status, given that they are not parties to the proceedings.

[43] For the reasons given above I find the Labour Inspector cannot proceed with her claims in respect of the respondents' delivery drivers unless and until their status has been determined. That could be by the Labour Inspector, with the written consent of the delivery drivers, applying to the court for a declaration as to their status in accordance with s 6(5) and (6) of the Act.

[44] Alternatively, it could be by the delivery drivers themselves asking the Authority to determine the real nature of their relationships with the respondents.

[45] The Authority will contact the parties and intervenor shortly to arrange a telephone conference to discuss the progression of the other claims brought by the Labour Inspector.

### **Costs**

[46] The issue of costs is reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**