

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 121  
3136302

BETWEEN	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES INCORPORATED First Applicant
AND	MELANIE GOVENDER Second Applicant
AND	MINISTRY OF EDUCATION Respondent

Member of Authority:	Robin Arthur
Representatives:	Omar Hamed, advocate for the Applicant Susan Hornsby-Geluk, counsel for the Respondent
Investigation:	On the papers
Submissions received:	On 17 February and 3 March 2022 from the Respondent and on 24 February 2022 from the Applicant
Determination:	1 April 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination concerns a preliminary issue raised by the Ministry of Education about the Authority’s jurisdiction to investigate and determine an application from the Association of Professionals and Executive Employees Inc (APEX) and Melanie Govender.

[2] The Ministry operates an “internship scholarship programme” for postgraduate students of educational psychology. Ms Govender was awarded one of those

scholarships for a practicum placement as an intern psychologist in the Ministry's Auckland office from 4 February 2019 to 8 November 2019. The scholarship included payment of \$25,000, made in two instalments during the placement.

[3] The matter APEX and Ms Govender have asked the Authority to consider is whether what she did during her internship meant Ms Govender was really an employee of the Ministry and was therefore entitled to the terms and conditions of a multi-union collective agreement in effect at that time.<sup>1</sup> They do so because the agreement's coverage clause includes "intern psychologists" among its list of positions and job types. They also point to this clause referring to specific arrangement for appointments of intern psychologists:

2.2.8 Appointment to positions of Education Specialist Trainee (EST) and Intern Psychologist

- (a) Subject to the requirements of the Employment Relations Act appointment to both the EST and Intern Psychologist positions will be by way of fixed term appointment.
- (b) Following completion of a recognised Psychologist Internship Programme there is no expectation of ongoing employment past the date specified in the letter of appointment and/or employment agreement.

[4] In its reply to the application, the Ministry denied the internship arrangements with Ms Govender amounted to employment but also said the Authority did not have jurisdiction to determine the issue of her employment status anyway. Instead, the Ministry said that status issue could only be resolved by the applicants seeking a declaration from the Employment Court on whether or not Ms Govender was an employee as defined in the Employment Relations Act 2000 (the Act).

### **The Authority's investigation**

[5] By agreement with the parties this preliminary issue of jurisdiction has been determined 'on the papers'. Those papers comprised a statement of problem, an amended statement of problem, affidavits from Ms Govender and a psychologist employed at the Ministry setting out their accounts of the supervised case work and field work done by its intern psychologists, a statement in reply, an amended statement in reply, various documents attached to those statements and written submissions from the parties about the jurisdiction.

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<sup>1</sup> Ministry of Education, NZEI Te Riu Roa and APEX Multi-Union Collective Agreement for Field Staff from 3 December 2018 – 26 February 2021.

[6] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. While the thorough written submissions made by the parties' representatives on this preliminary issue have been carefully considered, this determination did not need to set out all that was said in them.

### **The relevant provisions**

[7] Section 6 sets the following provisions for the Authority and the Employment Court considering whether a person is an employee:

#### **6 Meaning of 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;** and
  - (b) includes —
    - (i) a homeworker; or
    - (ii) a person intending to work; but
  - (c) excludes a volunteer who —
    - (i) does not expected to be rewarded for work to be performed as a volunteer; and
    - (ii) receives no reward for work performed as a volunteer; and
  - (d) ...
- (1A) ...
- (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 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) ...
- (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.

[8] How section 6 operates has to be considered in light of the respective jurisdictions of the Authority and the court:

### 161 Jurisdiction

- (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)):**
  - ...
  - (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort);
  - (s) determinations under such other powers and functions as are conferred on it by this or any other Act.

### 187 Jurisdiction of court

- (1) The court has exclusive jurisdiction—
  - (a) ...
  - (b) ...
  - (c) ...
  - (d) ...
  - (e) ...
  - (f) **to hear and determine, under section 6(5), any question whether any person is to be declared to be—**
    - (i) **an employee within the meaning of this Act; or**
    - (ii) a worker or employee within the meaning of any of the Acts referred to in section 223(1):

[9] Also relevant to that consideration is the object of the Act, which includes the following:

### 3 Object of this Act

The object of this Act is—

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
  - (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
  - (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
  - (iii) by promoting collective bargaining; and

- (iv) ...
- (v) ...
- (vi) **by reducing the need for judicial intervention; ...**

[10] Determining the jurisdiction issue is an exercise of the discretion provided to the Authority in clause 1 of Schedule 2 of the Act to deal with any question connected with the construction of this Act:

### **1 Construction of employment agreements and statutory provisions**

- (1) The Authority may, in performing its role, deal with any question related to the employment relationship, including—
  - (a) any question connected with an employment agreement, being a question that arises in the course of any investigation by the Authority;
  - (b) any question connected with the construction of this Act or of any other Act, being a question that arises in the course of any investigation by the Authority
- (2) Subclause (1)(b) has effect in relation to a question even though that question concerns the meaning of this Act (being the Act under which the Authority is constituted) or of an Act under which the Authority operates in a particular case.

### **The Ministry’s objection to the Authority’s jurisdiction**

[11] The Ministry’s opposition to the Authority’s jurisdiction relied, in essence, on two propositions.

[12] The first was that the application from APEX and Ms Govender was “in reality” or “fundamentally” seeking a declaration of her status and s 6(5) of the Act expressly and conclusively reserved such a question to the Employment Court to decide.

[13] The second was that a decision of the Court of Appeal which appeared to contradict that first proposition was “distinguishable on its facts”. If its second proposition was correct, the Ministry submission was again that an application to the Employment Court was only means by which the employment status (or otherwise) of Ms Govender could lawfully be considered and decided.

#### *Content of the statement of problem*

[14] In their original application to the Authority one of the remedies sought by APEX and Ms Govender was “a declaration under section 6 of the [Act] that Melanie Govender was an employee of the Ministry of Education between 4 February 2019 and 8 November 2019”.

[15] The application was addressed to the Authority and included a section with a subheading: “Real Nature of the Intern and Ministry Relationship”. The subheading appeared to refer to the phrase found in s 6(2) of the Act that allows for “the court or the Authority (as the case may be)” to “determine the real nature of the relationship” between two persons alleged to be in an employment relationship.

[16] However, in its reply, the Minister took the view that use of the phrase “a declaration” meant the matter fell within the scope of the exclusive jurisdiction reserved to the Employment Court in s 187 of the Act to hear and determine, under s 6(5), any question whether any person was to be “declared” to be an employee within the meaning of the Act.

[17] When asked to clarify whether they were seeking such a declaration, APEX and Ms Govender said the word was used in error. They lodged an amended statement of problem in which the remedies sought were described, firstly, as a determination under s 6(2) of the Act and, secondly, a resolution of a dispute under s 129 of the Act of the interpretation of the collective agreement’s coverage term referring to intern psychologists. If those remedies were granted in their favour they also sought orders for Ms Govender to receive payments and service entitlements under the collective agreement for the time spent as an intern at the Ministry.

[18] The Ministry submitted that APEX and Ms Govender could not be permitted to reframe their claim in an attempt to avoid the jurisdictional bar of s 187(f) of the Act as what they sought was “the very type of claim” that s 6(5) was intended to address. And the Ministry submitted that sub-section made it clear it was only the Employment Court, that could make such a decision.

[19] However, as APEX and Ms Govender submitted in response, the jurisdictional question could not properly or fairly be determined on a narrow technical question about whether or not they were entitled to amend the wording used in their application. Of course they were. Their explanation that the word ‘declaration’ had been used in error in the first statement of problem, and their correction in an amended statement of problem to say they sought a ‘determination’ under s 6(2) of the Act, could reasonably be accepted as their description of the nature of the application they sought to pursue.

[20] It is also consistent with, but contrary to the Ministry’s approach, how the Act clearly intends the Authority to operate as an investigative body. As noted in the

Supreme Court's decision in *FMV v TZB* the Authority is not bound by the way the parties have framed their dispute:<sup>2</sup>

If it considers the parties have not understood the real nature of their problem, it can reframe the problem and resolve that. The design of the Authority is therefore premised on a fact-oriented, merits-based approach; a departure from the position under the [Employment Contracts Act 1991].

[21] How the Supreme Court in *FMV* then went on to describe the Authority's jurisdiction and operation under s 161 of the Act was also relevant to the specific issue for resolution in this determination:<sup>3</sup>

[60] Section 161 must therefore be read in the above context. Its language reflects the relational framework of the Act and drives the fact-based, problem-solving approach of the Authority. The Authority has exclusive jurisdiction to make determinations about "problems generally", not specific causes of action. The only requirement is that the problem must be an "employment relationship" one; that is, it must relate to or arise from the "employment relationship" in its entire sense as discussed above.

[61] "Problem" is not separately defined. But it is obviously and, it must be presumed, intentionally, used in the Act in a non-technical sense. It just means a difficulty or controversy to be resolved. It is an everyday word intended to be applied by employers and employees to everyday difficulties in a work context; and by experienced Authority members, employment advocates and union officials with genuine expertise in the work of the employment institutions who may or may not have wider legal training. Problems are not legal categories, they are factual phenomena. The addition of the modifier "generally" in s 161(1) serves to underscore the intention to create a comprehensive jurisdictional class without fine or technical distinctions at the boundaries. The Authority's function is to resolve problems in employment relationships.

[22] In that light the question of jurisdiction could not be resolved solely on a technical or speculative point about a change to a word in a statement of problem. Rather, it had to be resolved on the substantive point of the Ministry's argument – whether or not any question regarding employment status can only be decided by an application to the Employment Court under s 6(5) of the Act.

*The Act allows the Authority to determine status questions*

[23] The meaning of the provisions in s 6, s 161 and s 187 of the Act must be ascertained from its text and in light of its purpose and its context, including indications provided elsewhere in the Act.<sup>4</sup>

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<sup>2</sup> *FMV v TZB* [2021] NZSC 102 at [58] citing s 160(3) of the Act.

<sup>3</sup> *FMV*, above n 2, at [60]-[61] (footnotes omitted).

<sup>4</sup> Legislation Act 2019, s 10.

[24] The text of s 6(2) of the Act makes it clear that there are circumstances where either the Authority or the Employment Court may be called upon to determine where a person is an employee or not. It acknowledges that those circumstances may vary because it uses the phrase “as the case may be”.

[25] In the case of the court, one such circumstance is where the court is considering a challenge on a de novo basis from an earlier determination of the Authority and, if it is an issue in the case, may be called upon to look afresh at whether or not the real nature of a relationship was one of employment.

[26] Another circumstance, as is clear from the text of s 6(5), is where a person has opted to seek a declaration from the court as to whether that person is an employee. This is an application that s 6(5) *allows* to be made directly to the court. However there is no requirement, from a proper reading of the text and context of s 6, that any and all such questions about whether or not a person is an employee *must* be addressed to and decided by the court. Section 6(2) clearly provides for the Authority to address and determine such a question if it arises in the course of considering an application to it.

[27] This conclusion is consistent with the interpretation of s 6 of the Act reached in relatively recent decisions of the Court of Appeal and the Supreme Court looking closely at this very point about the extent and nature of the relative jurisdictions of the Authority and the Employment Court.<sup>5</sup>

[28] In doing so the superior courts addressed how the reference in s 161(1)(c) to the Authority’s express exclusive jurisdiction to make determinations about whether a person is an employee should be reconciled with the Court’s exclusive jurisdiction under s 187(1)(f) to hear and determine under s 6(5) “any” question whether “any” person is to be declared an employee. As the Court of Appeal put it (*italicising the word if*):<sup>6</sup>

The natural and ordinary meaning of s 161(1)(c) is that the question of employment status is only taken out of the [Authority]’s hands *if* a s 6(5) application has been made. In other words, 6(5) is the “carve out” provision, not s 161(1)(c).

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<sup>5</sup> *A Labour Inspector v Gill Pizza Limited & Ors* [2021] NZCA 192 and *Gill Pizza & Ors v A Labour Inspector* [2021] NZSC 184.

<sup>6</sup> *A Labour Inspector*, above n 5, at [34].

[29] The Court of Appeal also expressly rejected a submission that it would be of greater benefit to parties if the provisions of s 6 were to be read as imbuing the Employment Court with exclusive jurisdiction on employee status issues:<sup>7</sup>

[54] ... The Authority and the Court have very different roles under the ERA and the Authority's decisions are of course subject to challenge in the Court. However, the Authority is expressly recognised as the primary investigative body with the power and expertise to make factual findings regarding status. Conferring on the Court the exclusive jurisdiction to determine status is inconsistent with the express object of the ERA to recognise that judicial intervention at the lowest level needs to be that of a specialist decision making body that is not inhibited by strict procedural requirements.

[30] Rather, an application to the Employment Court for a declaration is to be seen as an option for parties, where they consider it appropriate. Such an application is not a requirement in every case. It is complementary to the means provided under s 161(1) for parties to seek a determination in the Authority, not exclusive of it. However, once an application for a declaration is made to the court, it is the court, and the court alone, who can make the appropriate declaration, one way or another, about status.

[31] The Supreme Court's conclusion was to the same effect as the Court of Appeal's decision that s 6(5) did not exclude the Authority from jurisdiction under s 161(1)(c) in matters relating to employment status:<sup>8</sup>

For our part (and in agreement with the Court of Appeal), we do not see any reason to adopt an interpretation that differs from the plain meaning of the words in s 161(1)(c) in order to exclude from the jurisdiction of the Authority matters relating to status that are not, in fact, raised in the context of an application under s 6(5).

*The Gill dicta are not distinguishable*

[32] The Ministry submitted that the Court of Appeal's conclusions in *Gill Pizza* was distinguishable and did not apply in the facts of the case that APEX and Ms Govender sought to pursue. Its submissions, dated 17 February and 3 March 2022, did not refer to the Supreme Court's decision of 21 December 2021 upholding the Court of Appeal's conclusions.

[33] In the *Gill Pizza* case the issue of employment status arose as a preliminary issue for a Labour Inspector pursuing an action permitted under s 228 of the Act to recover

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<sup>7</sup> *A Labour Inspector*, above n 5, at [54].

<sup>8</sup> *Gill Pizza*, above n 5, at [49].

minimum wage and holiday entitlements on behalf of employees. The question of jurisdiction was, in part, resolved by an express reference to actions being taken under s 228(1) in the list of problems set out in s 161 as being within the Authority's exclusive jurisdiction.

[34] Another difference, from the factual scenario in *Gill Pizza*, was submitted to be that the respondent employer in that case had raised the question of employment status as a defence to the Inspector's claim. It was not a situation where a person claiming to be an employee had made an application for that question to be resolved.

[35] Neither difference was sufficient to displace the nature or influence of the superior courts' analysis of s 6 as a whole and their conclusions on how the lines between the jurisdiction of the Authority and the Court fell.

[36] The Ministry identified the following part of a paragraph from the Court of Appeal's decision as supporting its submission that where employment status was a primary claim, as it is with Ms Govender, only the Employment Court could consider the issue:<sup>9</sup>

Section 6(5) provides a stand-alone means by which the status of an individual or a class of persons can be determined other than in the context of actions that are specifically provided for elsewhere in the ERA, such as an action under s 228(1).

[37] However the flaw in that submission is found by referring to the whole, rather than only part, of the paragraph:

In our view the proper interpretation of ss 6(5), 161(1)(q) and 228(1) requires the Authority to determine all aspects of an action brought under s 228(1). **This does not undermine the efficacy of s 6(5), which we see as complementary to s 161(1).** Section 6(5) provides a stand-alone means by which the status of an individual or a class of persons can be determined other than in the context of actions that are specifically provided for elsewhere in the ERA, such as an action under s 228(1).

[38] There is no exclusivity between the two provisions, rather they are complementary. Where the 'stand-alone means' of a s6(5) declaration may assist resolving the parties' problem, it is available as an option. It is a situation where it 'may' be used, not 'must' be used. In that respect, it is similar to the choice of procedures than an aggrieved party has in pursuing a discrimination claim that may

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<sup>9</sup> *A Labour Inspector*, above n 5, at [56].

amount to a personal grievance under the Act or a complaint under the Human Rights Act 1993. Once the choice is made in such cases, resolution is then made in the appropriate forum.<sup>10</sup>

[39] One further point about the operation of the respective jurisdictions under s 6 of the Act also arises from reviewing the decisions in *Gill Pizza*. While the Court of Appeal and the Supreme Court disagreed with the Employment Court's decision about the extent of its jurisdiction regarding actions by the Labour Inspector, the Employment Court's decision had not taken issue with what it called the Authority's "general jurisdiction" and the superior courts did not disagree with that part of the Employment Court's decision:<sup>11</sup>

While the Authority has a general jurisdiction under s 161(1)(c) to determine matters about whether a person is an employee, we do not see that jurisdiction as extending to actions brought by a Labour Inspector under s 228(1). That is because jurisdiction to determine s 228(1) actions has been specifically conferred on the Authority under s 161(1)(q).

### **Outcome**

[40] For the reasons given above, neither of the propositions advanced by the Ministry have been established. Rather APEX and Ms Govender have correctly submitted that the problems they have asked the Authority to investigate and determine are within the jurisdiction of the Authority.

[41] Accordingly, the Authority's investigation of the application from APEX and Ms Govender is now to proceed under timetable directions agreed earlier with the parties in the event that this determination found the Authority had jurisdiction.

[42] Costs in relation to the preliminary issue are reserved.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>10</sup> Employment Relations Act 2000, s 112.

<sup>11</sup> *A Labour Inspector v Gill Pizza Limited & Ors* [2019] NZEmpC 110 at [12].