IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA553/2022
[2025] NZCA 219

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

Hearing:	9 May 2024
Court:	Courtney, Katz and Cooke JJ
Counsel:	K F Radich and G R La Hood for Appellant T P Cleary and P H Fisher for Respondent
Judgment:	5 June 2025 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B We answer the question on appeal as follows:

> **Does the Employment Relations Authority have jurisdiction to hear an application, brought by a purported employer against the Chief Executive of the Ministry of Business, Innovation, and Employment, the Labour Inspector and/or its workers, for a bare declaration that its workers are not employees under s 6(1) of the Employment Relations Act 2000?**
>
> **No.**

C The Employment Court judgment is set aside. The appellant's strike-out application in the Employment Court is granted.

D The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS

REASONS OF COURTNEY AND KATZ JJ

(Given by Courtney J)

Introduction

[1] Section 161(1) of the Employment Relations Act 2000 (Act) confers on the Employment Relations Authority (Authority) exclusive jurisdiction to make determinations about employment relationship problems. The issue arising in this appeal is whether a business owner who denies the existence of an employment relationship can seek a determination from the Authority that workers in the business are not employees.

[2] The respondent, Hairland Holdings Ltd (Hairland), trading as Sharing Shed, operates a walk-in hairdressing business. In 2018, when the present proceedings began, it had about 150 hairstylists working in 25 salons nationwide. Following an approach by some of its hairstylists to a lawyer, a Labour Inspector investigated whether they were employees and, if so, whether they had received their minimum statutory entitlements. The Labour Inspector concluded they were employees and that there had been a breach of minimum entitlements. She sought a response from Hairland on possible enforcement action.

[3] Hairland considered that the hairstylists were independent contractors, not employees. Rather than wait for the Labour Inspector to take further steps, it pre-emptively filed a statement of problem with the Authority, seeking a determination under s 161(1)(c) of the Act that the hairstylists were not employees. The Chief Executive of the Ministry of Business, Innovation, and Employment, who was

the only respondent, contended that the Authority did not have jurisdiction to determine the claim because there was no employment relationship between her and Hairland, and because s 161(1)(c) provided the Authority with only an incidental rather than stand-alone power to determine employment status.

[4] Shortly afterwards, the Labour Inspector filed a claim under ss 228 and 229 of the Act on behalf of five hairstylists, seeking unpaid minimum entitlements and the production of documents that an employer is required to keep. Hairland responded that the Authority did not have jurisdiction to determine that claim because (on its view) the workers were not employees, and their status could only be determined by the Employment Court under s 6(5) of the Act. Hairland also contended that the Labour Inspector's action was an abuse of process because it raised the same issue as Hairland's own claim.

[5] The Authority decided that it did not have jurisdiction to determine Hairland's claim but did have jurisdiction to determine the status of the hairstylists in the context of the Labour Inspector's claim. It did not consider the Labour Inspector's action to be an abuse of process.[1]

[6] Hairland challenged these determinations in the Employment Court.[2] The Chief Executive applied to strike out the challenge.[3]

[7] Hairland's challenge was stayed pending the outcome of the Supreme Court's decision in *Gill Pizza Ltd v Labour Inspector*, which confirmed that the Authority has jurisdiction to determine employment status in an application by a Labour Inspector under s 228.[4] Hairland accepted that its challenge to the Authority's decision regarding jurisdiction to determine the Labour Inspector's claim would fail as a result of

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1 *Hairland Holdings Ltd v Chief Executive of the Ministry of Business, Innovation, and Employment* [2018] NZERA Christchurch 196 [Authority determination] at [39], [55]–[56] and [65]–[68].

2 Employment Relations Act 2000, s 179.

3 Employment Court Regulations 2000, reg 6; High Court Rules 2016, r 15.1; *Malcolm v Chief Executive of the Department of Corrections* [2022] NZEmpC 39 at [64]–[67]; and *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].

4 *Hairland Holdings Ltd v Chief Executive of the Ministry of Business, Innovation, and Employment* [2021] NZEmpC 221 at [6]; and *Gill Pizza Ltd v Labour Inspector* [2021] NZSC 184, [2022] 1 NZLR 1 at [26], [36] and [49].

Gill Pizza.[5] It maintained its challenge to the other aspects of the Authority's determination.

[8] The Employment Court declined the Chief Executive's strike-out application.[6] It also determined the substantive question of the Authority's jurisdiction, holding that the Authority had jurisdiction to determine Hairland's application under s 161(1)(c).[7]

[9] The Chief Executive was granted leave to appeal to this Court on the following question:[8]

> Does the Employment Relations Authority have jurisdiction to hear an application, brought by a purported employer against the Chief Executive of the Ministry of Business, Innovation, and Employment, the Labour Inspector and/or its workers, for a bare declaration that its workers are not employees under s 6(1) of the Employment Relations Act 2000?

The relevant statutory provisions

[10] At issue in the question on appeal are the meaning of employment relationship problem as that appears in s 161(1) and the scope of s 161(1)(c) and (r).

[11] Section 5 contains definitions of both employment relationship and employment relationship problem, which apply unless the context requires otherwise.

[12] "Employment relationship" means "any of the employment relationships specified in section 4(2)". The relationships are those between:[9]

> (a) an employer and an employee employed by the employer:
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> (b) a union and an employer:
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> (c) a union and a member of the union:
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> (d) a union and another union that are parties bargaining for the same collective agreement:

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5 *Hairland Holdings Ltd v Chief Executive, Ministry of Business, Innovation and Employment (No 2)* [2022] NZEmpC 169, [2022] ERNZ 799 [Employment Court judgment] at [14].

6 At [32] and [34]–[39].

7 At [28]–[30].

8 *Chief Executive of the Ministry of Business, Innovation, and Employment v Hairland Holdings Ltd* [2023] NZCA 81 [leave judgment] at [22].

9 Employment Relations Act, s 4(2).

(e) a union and 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.

[13] "Employment relationship problem" is defined as:[10]

> **employment relationship problem** includes 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

[14] Both the Authority and the Employment Court have jurisdiction to determine the status of workers, though the jurisdiction of each is distinct. Under s 161(1), the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. That subsection relevantly provides:

> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
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> …
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> (c) matters about whether a person is an employee (not being matters arising on an application under section 6(5)):
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> …
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> (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):

[15] Section 161(1)(c) carves out of the Authority's jurisdiction matters arising on an application under s 6(5), which confers power on the Employment Court to determine applications for declarations as to employment status. Section 6, which defines "employee", relevantly provides:

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[10] Section 5 definition of "employment relationship problem".

(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.

[16] Section 187(1)(f) confers on the Employment Court the exclusive jurisdiction to determine applications made under s 6(5).

The issue in the Authority

[17] In response to the Chief Executive's argument that it was not the correct respondent, Hairland indicated to the Authority that it would consent to the Labour Inspector being substituted for the Chief Executive if the Authority considered that appropriate.[11] The Authority therefore considered Hairland's arguments on the basis of either the Chief Executive or the Labour Inspector being the respondent.[12]

[18] Hairland maintained that the disagreement between it and the Labour Inspector as to whether the contracts between Hairland and the hairstylists were employment agreements was an employment relationship problem as defined in s 5, and therefore within the scope of s 161(1) and the Authority's jurisdiction. It argued that because the Authority had exclusive jurisdiction under s 161(1)(c) to determine whether a person is an employee, it was bound to determine Hairland's application, and that the absence of an accepted employment relationship did not preclude it from doing so.[13]

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11 Authority determination, above n 1, at [23].
12 At [28].
13 At [23].

[19] The Authority held that because there was no employment relationship between Hairland and either the Chief Executive or the Labour Inspector, there was no employment relationship problem within the definition in s 5.[14] It acknowledged that it had jurisdiction to determine specified matters between parties who were not in an employment relationship but considered that Hairland's application did not fall within any of those categories.[15] It therefore had no jurisdiction to determine Hairland's claim.

The issue in the Employment Court

[20] The Judge summarised the argument advanced for the Chief Executive and the Labour Inspector as follows:[16]

> [22] … The difficulty said to confront the company was that the Act does not contemplate a party in its position seeking a declaration about the status of its staff. Section 6(5) is silent about an application by a party seeking a declaration that it is not the employer or that workers are not employees. Likewise, s 161(1)(c) says nothing about an application by a party claiming not to be an employer. The submissions invited the Court to conclude that Parliament intended to limit who could seek a declaration as to the status of a worker to exclude Hairland's proceeding.

[21] However, the Judge rejected that argument and instead accepted Hairland's submission that an employment relationship is not necessary for an employment relationship problem to arise — all that is needed is a problem or controversy arising in the work context.[17] Hairland maintained that the disagreement between it and the Labour Inspector is such a controversy and falls within s 161(1)(c).

[22] In concluding that the Authority had jurisdiction to determine Hairland's claim, the Judge relied on the Supreme Court's decision in *FMV v TZB*:[18]

> [29] On Mr Cleary's [counsel for Hairland] approach the identity of the applicant, seeking to establish the status of a worker, is immaterial so long as there is a problem or controversy in the work context to resolve.
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> [30] I agree with Mr Cleary. Given the Supreme Court's decision in *FMV* and the Authority's exclusive jurisdiction, *if the company can establish the*

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14 At [39].
15 At [32], [33] and [37].
16 Employment Court judgment, above n 5.
17 At [28]–[30].
18 Emphasis added. Referring to *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466.

> *existence of a problem or controversy arising in the work context, it falls to be dealt with by the Authority*. The status of the hairstylists as employees is disputed by Hairland and that disagreement must constitute a problem or controversy in the work context. It follows, therefore, that the Authority has jurisdiction to entertain the claim. Additional support for that conclusion comes from Hairland's ability to defend the Inspector's claim by denying the existence of an employment relationship; in such a situation, status would need to be resolved.

[23] The Judge also considered it relevant — and supportive of his interpretation of s 161(1)(c) — that if Hairland's claim did not fall within the jurisdiction of the Authority under s 161(1)(c) it would have no recourse in any other forum.[19]

[24] The Judge did not consider that the naming of the Chief Executive as a respondent in the proceeding was fatal. He accepted that the Chief Executive was not the appropriate party. He considered, however, that the Labour Inspector might properly be named as a respondent and noted, too, that the hairstylists were entitled to be heard given their status would be placed in issue. The deficiencies were therefore capable of being cured and Hairland's challenge should not be struck out.[20]

The parties' positions on appeal

The Chief Executive and the Labour Inspector

[25] Advancing the case for the Chief Executive, Ms Radich and Mr La Hood submitted that on both a purposive interpretation and the plain meaning of the text, the problem identified by Hairland for determination fell outside the scope of s 161(1) which only confers jurisdiction to determine employment relationship problems, as that phrase is defined in s 5. Ms Radich argued that the existence of an employment relationship problem is the gateway into s 161(1) and an employment relationship problem can only exist if there is an employment relationship. Since Hairland denies that any employment relationship exists, the matter does not fall within s 161(1).

[26] Mr La Hood also argued that, while the Authority has jurisdiction to determine the status of workers when that issue arises in claims filed under the Act — for example a claim under s 228, as in *Gill Pizza* — no mechanism exists for a business

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19 Employment Court judgment, above n 5, at [31].
20 At [34].

owner to seek a bare declaration as to status. The scheme of the Act is for the Authority to provide determinations on employment relationship problems as the means of accessing minimum entitlements or pursuing various claims. But in all such cases, the worker's status as an employee is the gate through which they or the other relevant party must pass. The only means by a which a bare declaration as to employee status could be sought is an application to the Employment Court under s 6(5). The constraints on such applications mean that this course is not available to someone in Hairland's position. In summary, the scheme of the Act does not recognise a right for employers to seek a determination as to status, much less a business owner who denies being an employer.

Hairland

[27] Mr Cleary, for Hairland, did not accept that there must be an employment relationship in existence for it to seek a declaration as to status from the Authority. He argued that the inclusive definition of employment relationship problem in s 5 encompasses any problem arising in a work context even if no employment relationship exists. He relied on the Supreme Court's decision in *FMV* as confirming that an employment relationship is not necessary for there to be an employment relationship problem.

[28] Mr Cleary also contended that s 161(1)(c) should be treated as informing the meaning of "employment relationship problems" in the introductory words to s 161(1) and allowing s 161(1) to be read in a practical way that would allow a contracting principal to access the exclusive jurisdiction of the Authority. Alternatively, he submitted that s 161(1)(c) was capable of being a stand-alone jurisdictional head and the dispute created by the Labour Inspector's assertion of an employment relationship fell within its scope.

[29] As a further alternative, Mr Cleary submitted that Hairland's claim fell within s 161(1)(r), as being an action "arising from or related to … the interpretation of this Act". He argued that Hairland would be asking the Authority to determine a contest over the interpretation of s 6.

The question on appeal

The purpose and scheme of the Act

[30] The meaning of s 161(1) is to be ascertained from its text and in light of its purpose and its context.[21] The purpose of the Act includes, relevantly, "build[ing] productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship".[22] The statutory scheme is the context in which s 161(1) is to be read. The scheme is well understood, having been considered extensively by the Supreme Court in *FMV* and *Gill Pizza*.[23] We draw on both decisions for the following summary of the relevant features.

[31] First, although employment agreements are important in the statutory scheme, the wider employment relationship is the focus of the Act.[24] This is reflected in the incorporation of the principle of good faith into the employment relationship and in the broad definition of employment relationships, which includes not only the relationship between an employer and employee, but also between a union and employer, a union and union member, a union and another union or its member bargaining for or party to the same collective agreement and employers bargaining for the same collective agreement.[25]

[32] Secondly, the Act is designed to empower parties to employment relationships to resolve their own problems where possible and without unnecessary judicial intervention. These aims are reflected in the institutions established under pt 10 of the Act, the Authority and the Employment Court, and in the objects of those institutions and their processes, as set out in s 143.[26]

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21 Legislation Act 2019, s 10(1).

22 Employment Relations Act, s 3(a).

23 *FMV v TZB*, above n 18, at [60]–[76]; and *Gill Pizza Ltd v Labour Inspector*, above n 4, at [46]–[51].

24 *FMZ v TZB*, above n 18, at [46].

25 At [47]–[52]; and Employment Relations Act, ss 3–4 and 5 definition of "employment relationship".

26 *FMZ v TZB*, above n 18, at [54]; *Gill Pizza Ltd v Labour Inspector*, above n 4, at [9]; and Employment Relations Act, ss 3 and 143.

[33] To these ends, the Authority is an investigative body whose job is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case.[27] Where this approach is not appropriate to the dispute or a party is dissatisfied with the Authority's determination, the matter may be dealt with by the Employment Court, where the process is more formal and adversarial.[28] The focus of pt 10 is on "practical, specialised, speedy and informal dispute resolution that is accessible to all parties".[29]

Section 161(1)(c)

FMV v TZB

[34] Both parties relied on the Supreme Court's decision in *FMV* but took different views as to its effect.

[35] The facts of *FMV* were quite different from the present case but the breadth of the Supreme Court's consideration of the Act's scheme means that it must be treated as generally applicable to the aspects of the Act with which we are concerned. In particular, the Supreme Court articulated a test for identifying an employment relationship problem.[30]

[36] *FMV* concerned claims brought by a former employee against her employer in both the Authority and the High Court. In the Authority, she alleged bullying, discrimination, negligence and breach of contract, and in the High Court she alleged negligence in failing to provide a safe workplace. The central issue was whether, given the Authority's exclusive jurisdiction under s 161(1), the High Court had jurisdiction to determine the proceedings filed in that court.

[37] Williams J, writing for the majority, extensively reviewed the purpose and scheme of the Act. He considered that, as a result of the definition of employment relationship problem in s 5, s 161(1) effectively reads "[t]he Authority has exclusive jurisdiction to make determinations about any problems relating to or arising out of

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27 *FMZ v TZB*, above n 18, at [57]; and Employment Relations Act, s 157.
28 *FMZ v TZB*, above n 18, at [59].
29 At [55].
30 At [93].

employment relationships, generally".[31] Later, having described the scheme of the Act, the Judge said:[32]

> [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"* …
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> [61] "Problem" is not separately defined. … 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.*

And later:[33]

> [92] In enacting s 161(1), the legislature specifically chose not to ground the Authority's jurisdiction in the way claims might be pleaded or traditionally categorised. It used a non-technical term, "problem", to ensure legal form did not distract the decision maker from focusing on the factual substance of the difficulty confronting the parties. That is the reason "problem" is not a legal category alongside property, or tort, or equity, but a supervening class that … arises from an employment relationship. …
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> [93] If a "problem" encompasses any kind of difficulty or controversy, when does it relate to arise out of the employment relationship? … The question is simply one of fact. *If the controversy arises during the course of the employment relationship and in a work context, then it will be an employment relationship problem. ...*
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> [94] To be clear, given the test is factual, it will not matter whether other causes of action may also arise from the controversy between the parties. That a controversy can also be pleaded without reliance on what is described (with unhelpful circularity) as an "employment right or interest" does not itself take it outside the scope of "employment relationship problem". All that matters is whether the controversy arose during the course of the employment relationship and in the work context. …
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> [95] It is therefore misleading to ask whether a pleaded claim *is* an employment relationship problem. Claims cannot *be* problems in the factual sense; problems can only give rise to claims. The correct question is whether

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31 At [22].

32 Footnotes omitted and emphasis added.

33 Footnotes omitted and emphasis added.

> the claim *reflects a problem* that relates to or arises from an employment relationship.

[38] It can be seen immediately that, as Ms Radich submitted, the Employment Court Judge incorrectly stated the effect of *FMV* as requiring only that a problem arise in a work context for it to be an employment relationship problem.[34] The statements in *FMV* are clear that the Authority's jurisdiction under s 161(1) only arises where there is both an employment relationship and a problem that relates to or arises from that relationship, in the work context.[35] If there is no employment relationship, there can be no employment relationship problem.

[39] Nevertheless, Mr Cleary submitted that in *FMV* the Supreme Court expressly decided that parties do not need to be in an employment relationship to have an employment relationship problem. This submission relied on a comment by Williams J made at the end of a discussion about situations that would properly be regarded as employment relationship problems, and so within the Authority's jurisdiction under s 161(1). These included so-called "split" proceedings where proceedings are brought against multiple defendants, only one or some of which are parties to an employment relationship. The Court recognised that such a situation could result in proceedings in both the Authority in respect of the employee, and in the High Court in respect of the third parties who are not employees. At the end of his discussion, Williams J added:[36]

> [104] To be clear, we do not suggest that only parties to employment relationships can have employment relationship problems, or bring or defend proceedings in the Authority. The important element is the nature of the problem, not the identity of the parties. For example, in *Waikato Rugby*, a disagreement between the New Zealand Rugby Football Union Inc (NZRFU) and the Waikato Rugby Union Inc over which union a player should represent was appropriately seen as an employment relationship problem because it was a disagreement over NZRFU's employment agreement with the player.

[40] Mr Cleary submitted that this statement meant an employment relationship was not necessary for an employment relationship problem to exist. Given the context in which these comments were made, we do not accept that Williams J meant to convey

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34 Employment Court judgment, above n 5, at [30].
35 *FMV v TZB*, above n 18, at [92]–[94].
36 Footnote omitted, citing *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* [2002] 1 ERNZ 752 (EmpC) at [52].

this. Rather, he was simply observing that even if a party is *not* in a direct employment relationship — such as a third party in some contexts — they may still be involved in a matter that qualifies as an employment relationship problem if the issue relates to or arises out of an employment relationship. This is apparent from the decision in *Waikato Rugby*, which the Judge cited.

[41] Although the facts of *Waikato Rugby* were entirely different from the present case, the Employment Court Judge's reasoning in that case makes it clear that the existence of an employment relationship is necessary for there to be an employment relationship problem. The dispute in *Waikato Rugby* arose from the contractual arrangements for the secondment to provincial rugby unions of players employed under a collective employment agreement by New Zealand Rugby Promotions Ltd (NZRP), a subsidiary of New Zealand Rugby Football Union Inc (NZRFU). Secondment was effected by a Player Secondment Agreement. The relationship between NZRP and the provincial rugby unions was governed by a separate Participation Agreement.[37]

[42] The case concerned the secondment of a player, Mr Manu, who was employed under the collective employment agreement. Prior to the relevant period he had been seconded to Waikato Rugby Union Inc (WRU) pursuant to the Player Secondment Agreement. However, for the relevant period, he was seconded to Auckland Rugby Football Union Ltd (ARFU) pursuant a separate agreement, the "Manu Agreement". Mr Manu indicated that he did not wish to be bound by that agreement and instead wished to remain with WRU. The dispute was between ARFU (which wished to select Mr Manu) and WRU (which wished to retain him). NZRP decided that the Manu Agreement was valid and enforceable. WRU did not accept the decision. It asserted, further, that in making the decision, NZRP was itself in breach of the Participation Agreement.[38]

[43] WRU brought a proceeding against NZRFU in the Authority. Mr Manu was not a party. The proceedings were removed to the Employment Court, where the issue for determination was whether there was jurisdiction for the Court to hear the claim,

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37 At [8]–[19].
38 At [2].

given that the named parties were not in an employment relationship and the dispute was over the interpretation of the contractual agreements between them.[39] The Employment Court held that jurisdiction existed under s 161(1), notwithstanding Mr Manu's absence as a party.[40] Having observed that WRU was not a stranger to the contractual relationship but a party to it by way of the secondment agreement, the Judge said:

> [50] In summary, it becomes clear that the jurisdiction of the Authority and the Court has been widened under the [Employment Relations Act]. The legislation does not focus on who may bring an employment relationship problem to the Authority/Court but rather defines the jurisdiction according to the subject-matter. The subject-matter focuses on employment relationship problems which are broadly defined. The implication of this is that it is possible for persons who are not direct parties to an employment agreement to file a statement of problem so long as the problems in it are related to or arise out of matters listed in s 161 and are not otherwise excluded from the jurisdiction by the [Employment Relations Act].

[44] The Judge went on to identify the specific provisions of s 161(1) under which jurisdiction could arise. It is clear from that analysis that the Judge treated the existence of the collective employment agreement as essential to the jurisdictional question. She commented that: on the pleadings, the dispute was about the operation and application of the employer's obligations under both the collective employment agreement and the secondment agreement;[41] the claim could also be categorised as an employment relationship problem about a breach of an employment agreement because it alleged breaches of the Participation Agreement and the Player Secondment Agreement, which embodied the collective employment agreement;[42] and the statement of problem revealed an employment relationship problem that arose from or was related to the employment relationship between Mr Manu and NZRP.[43] In short:[44]

> One approach to this matter is to ask whether this action would have arisen if there were no employment relationship. The answer is no. The parties are here because there is a dispute about the contractual relations between the parties which govern the way in which rugby players in general and Mr Manu in particular are employed.

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39 At [1].
40 At [51]–[53].
41 At [52(1)], citing Employment Relations Act, s 161(1)(a).
42 *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)*, above n 36, at [52(2)], citing Employment Relations Act, s 161(1)(b).
43 *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)*, above n 36, at [52(3)], citing Employment Relations Act, s 161(1)(r).
44 *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)*, above n 36, at [52(3)].

[45] Mr Cleary sought to bring Hairland's situation within s 161(1) on the basis that, as with the respondents in *Waikato Rugby*, Hairland "is no stranger to contractual relationships with the complainants". However, this submission misses the point. The contractual relationship to which the Judge referred in *Waikato Rugby* was the secondment agreement, which effectively incorporated the collective employment agreement.[45] *Waikato Rugby* does not support the general proposition that an employment relationship problem can arise in the absence of an employment relationship. It merely recognises that a dispute between parties who are not directly in an employment relationship may nevertheless be an employment relationship problem if it arises from an employment relationship.

[46] In terms of the test articulated in *FMV*, there is no employment relationship problem in the present case. However, in *FMV* the existence of an employment relationship was not in dispute.[46] In the present case, Hairland rejects the possibility of its workers being employees and instead relies on the Labour Inspector's assertion of an employment relationship as the basis for an employment relationship problem. Given that difference, we need to consider whether a party that itself denies the existence of an employment relationship but is asserted to be an employer by another entity (here, the Labour Inspector) can seek a determination from the Authority under s 161.

Does the Labour Inspector's assertion that Hairland is an employer create an employment relationship problem?

[47] Hairland's statement of problem in the Authority identifies the relevant employment relationship problem as being "[t]he status of contractors engaged by [Hairland]". Hairland asserted that no employment agreements existed but referred to the Labour Inspector's conclusion that the relationship between Hairland and the hairstylists was an employment relationship. Hairland contends that the Labour Inspector's assertion that it is an employer gives rise to an employment relationship problem, either as that is properly interpreted or by virtue of s 161(1)(c)

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45 At [52(1) and (2)].
46 *FMV v TZB*, above n 18, at [3]–[4].

on a stand-alone basis. As a result, it should be able to seek a determination without waiting for the Labour Inspector to take action.

[48] As to the correct interpretation of employment relationship problem, Mr Cleary submitted that the inclusive wording of the definition means that its scope extends beyond "a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship", with the only restriction being the problems with fixing new terms and conditions, which are expressly excluded.[47] On that reading, an employment relationship problem may include matters or problems outside an employment relationship.

[49] As to the effect of s 161(1)(c), Mr Cleary argued that the wording of this paragraph should inform the meaning of employment relationship problem in the introductory words to s 161(1). Alternatively, s 161(1)(c) is capable of being a stand-alone jurisdictional head and the dispute Hairland identifies is within its scope. Mr Cleary argued that, although Hairland does not have an employment relationship, it does have a "matter" — the word used in s 161(1)(c) — and should therefore be able to access the Authority for a determination on that.

[50] We do not accept these submissions. Notwithstanding the use of "includes" in the opening words of the definition, the meaning to be given to "employment relationship problem" is expressly constrained by the words "relating to or arising out of an employment relationship".[48] While the words "relating to or arising out of" have very wide import they nevertheless require some connection between the problem and an employment relationship, as defined in s 4(2). The definition of employment relationship is exhaustive, and Mr Cleary did not seek to argue that it might be interpreted more widely. On Hairland's stated position, no employment relationship exists in this case and therefore no employment relationship problem exists.

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47 Employment Relations Act, s 5 definition of "employment relationship problem".

48 On the interpretation of definitions introduced by the word "includes", see RI Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 567–571.

[51] Nor do we accept the argument that s 161(1)(c) can affect the meaning of the introductory words or is capable of being a "stand-alone" jurisdiction.[49] The introductory words to s 161(1) define the scope of the Authority's jurisdiction. The paragraphs that follow those words must fall within the ambit of that jurisdiction. That means that a "matter" under s 161(1)(c) must still involve an employment relationship problem — and necessarily be founded on an employment relationship.

[52] Save for paras (c) and (r) (the latter of which we come to later), the employment relationship problems identified in s 161(1) are all premised on an actual employment relationship — that is to say they assume the existence of an employment relationship (as that is defined in s 5) and are simply concerned with problems that arise from that relationship. Section 161(1)(c) would be a notable exception if "matters" were interpreted as treating doubt over the existence of an employment relationship, in itself, as an employment relationship problem.

[53] The only means by which Hairland could argue that the meaning of employment relationship problem in s 161(1) extends to a dispute arising from the mere assertion of an employment relationship would be to argue that the context of s 161(1) requires a departure from the statutory definitions of both employment relationship problem and employment relationship — in other words, invoking the chapeau qualification "unless the context otherwise requires" in s 5. Although Mr Cleary did not express himself in exactly this way, he did submit that an extended meaning of employment relationship problem would enhance the Authority's function under s 161(1)(c); permitting a business owner whom the Labour Inspector asserts is an employer to access the Authority for confirmation by way of a declaration would satisfy the purpose of providing a practical, specialised, speedy and informal dispute resolution process that is accessible to all parties. Further, Hairland has no other recourse.

[54] We have already discussed the purpose and relevant context in light of which s 161(1) is to be interpreted. Hairland would need to show that these require a meaning beyond the statutory definitions. The fact that a wider meaning might be desirable in

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[49] As opposed to the incidental jurisdiction which the Supreme Court confirmed in *Gill Pizza Ltd v Labour Inspector*, above n 4, at [26], [36] and [49].

a particular case is insufficient to justify departing from a defined meaning. A statutory definition will only be displaced by strong indications of a contrary meaning.[50]

[55] It will be evident from our earlier summary that the focus of the Act is very strongly on resolving issues that have their genesis in an employment relationship. Under s 157(1), the role of the Authority is "resolving employment relationship problems". That provision can only be read as relating to employment relationship problems as defined in s 5, which necessarily imports the definition of employment relationship. It would be inconsistent to treat s 161(1) as conferring jurisdiction on the Authority that is wider than its statutory role.

[56] We acknowledge the apparent tension between s 5 (definition of "employment relationship problem") and s 161(1)(c) (jurisdiction of the Authority to determine whether a person is an employee). However, this tension can be readily reconciled through a purposive and contextual interpretation of the relevant provisions. The Authority has the exclusive jurisdiction to determine employment relationship problems pursuant to s 161. Hence, the threshold requirement for bringing a claim before the Authority is that one of the parties asserts that there is an employment relationship problem. If the other party denies the existence of an employment relationship, in essence, that is a challenge to the Authority's jurisdiction. As the Supreme Court noted in *Gill Pizza*, employment status is a jurisdictional fact that the claimant is required to prove in proceedings before the Authority.[51] Section 161(1)(c) therefore empowers the Authority to determine this preliminary jurisdictional issue before proceeding to determine the substantive employment relationship problem before it (assuming it finds the existence of an employment relationship). There is nothing unusual in such a course — courts, arbitrators and other quasi-judicial bodies are commonly required to determine the scope of their own jurisdiction before embarking on a determination of the substantive issue or problem before them.

[57] The case law, including the Supreme Court decisions in *Gill Pizza* and *Bryson v Three Foot Six Limited*, illustrates the correct operation of s 161(c) in practice.[52] In

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50 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [62]–[65]; and Carter, above n 48, at 571–576.

51 *Gill Pizza Ltd v Labour Inspector*, above n 4, at [42].

52 *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721.

both cases the applicants filed proceedings in the Authority in respect of substantive employment relationship problems.[53] The respondents challenged the Authority's jurisdiction on the basis that the relevant workers were not employees but independent contractors. In both cases the Authority issued a preliminary determination on the jurisdictional issue, which was the subject of subsequent appeals. Counsel did not refer to any previous cases, however, where a declaration as to status has been sought before the Authority on a stand-alone basis, in isolation from a substantive employment relationship problem.

[58] In our view the scheme of the Act does not contemplate a person in Hairland's position accessing the Authority for a bare declaration as to employment status, independent of any allegation of a substantive employment relationship problem. The Act recognises "the inherent inequality of power in employment relationships", given that employees typically have less power and resources than their employers.[54] Allowing a person in Hairland's position to seek a determination from the Authority as to the existence an employment relationship, without more, would expose workers to the expense, inconvenience and stress of contesting the proceedings, or risking an outcome that may be contrary to their interests. In this case, the Employment Court recognised that the issue of status ought not be determined without the hairstylists concerned being able to be heard.[55] But simply recognising the right of the person whose status is in issue to be heard does not address the fact that the person may not be in a position to engage in that litigation.

[59] Moreover, allowing status to be determined by the Authority in the absence of any other problem would undermine s 6(5), which confers on the Employment Court exclusive jurisdiction to make declarations as to status. In *Gill Pizza* the Supreme Court recognised that s 6 was not a code in relation to issues concerning the status of a person alleged to be an employee, so that a case in which status was in issue could be determined by the Authority under s 161(1)(c).[56] But the Court expressly

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53 In *Gill Pizza* the Labour Inspector commenced an action in the Authority to recover arrears of holiday pay and other entitlements said to be owing to delivery drivers (falling within s 161(1)(q)). In *Bryson*, Mr Bryson commenced a personal grievance claim in the Authority against his alleged employer (falling within s 161(1)(e)).

54 Employment Relations Act, s 3(a)(ii).

55 Employment Court judgment, above n 5, at [34].

56 *Gill Pizza Ltd v Labour Inspector*, above n 4, at [52].

differentiated between the specific procedure in s 6(5) for a declaration and an enforcement action in which status arose as a jurisdictional fact to be proved as part of the overall claim. It referred to the concern expressed during parliamentary debate over the Bill that became the Act that a person's status could be determined on the application of a union or Labour Inspector without the person's consent. The Court noted that this concern was addressed by the inclusion of the provision that became s 6(6), which requires the consent of the worker concerned to an application as to employment status.[57] If Hairland's argument were correct a worker could be exposed to litigation over their status without their consent. We cannot accept Parliament intended to allow the protection conferred by s 6(6) to be circumvented in the way the Hairland proposes.

[60] The Employment Court noted that "there is nowhere else for Hairland to go if it wants a decision about its relationship with the hairstylists" — a point emphasised by Mr Cleary in submissions.[58] Mr Cleary submitted that an interpretation of the Act that precluded a party who is asserted to be an employer from being able to obtain a pre-emptive declaration of status from the Authority would result in unfairness, given that workers are able to seek such a declaration from the Employment Court under s 6(5).

[61] Parliament chose not to include parties who are merely asserted to be employers in the category of persons who can seek a declaration of status from the Employment Court under s 6(5). If Parliament had intended that such parties have the right to seek a bare declaration of employment status it would have been very straightforward to include them within s 6(5). In our view, it would be contrary to parliamentary intent to interpret s 161(1)(c) as conferring such a right on those parties. That is particularly so given that the critical procedural safeguards contained in s 6(6) are absent from s 161(1)(c). Section 6(6) provides that an application may be brought by a person other than the worker concerned, such as a Labour Inspector or union, but only with the individual written consent of the worker. This protection is notably absent from s 161(1)(c). That, as well the objects of the Act, weigh strongly against the view that Parliament intended s 161(1)(c) would provide a back-door mechanism

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57 At [55]–[58].
58 Employment Court judgment, above n 5, at [31].

for parties who are asserted to be employers to seek a declaration of status from the Authority, without the worker concerned having the benefit of the express procedural protections in s 6(5).

[62] As noted above, the objects of the Act include the need to acknowledge and address the inherent inequality of power in employment relationships. In our view, s 6(5)–(6) reflects this power imbalance and is directed at protecting current or future workers, rather than shielding employers from potential liability. Allowing employers — or those who deny being employers — to initiate applications under s 161(1)(c) could open the door to tactical litigation, where declaratory orders are sought to preclude future employment claims, especially in marginal or ambiguous employment relationships (such as those involving casual workers or the gig economy). Declaratory proceedings without the safeguards in s 6(5)–(6) could be used to exert pressure on current or former workers and compel them to choose between either pre-emptively "settling" issues of employment status or defending complex and expensive legal proceedings that they did not initiate or seek, in circumstances where there is no live employment relationship problem. Similarly, the courts have long been cautious of the potential for abuse of the general jurisdiction to grant declaratory relief.[59] Lord Sterndale MR, commenting on the approach to declaratory judgments, observed that "[p]roperly used, they are very useful; improperly used, they almost amount to a nuisance."[60]

[63] Fairness for employers is achieved, however, by providing a mechanism under s 161(1)(c) that enables them to challenge employment status when it is material to a live employment dispute. This ensures those who deny the allegation that they are employers can defend themselves fully against any claims that may be made against them.

[64] There is nothing unfair or unusual in expecting persons engaged in business to assess their legal and regulatory obligations (taking appropriate advice, as needed) and structure their affairs to comply with all relevant legal and regulatory requirements

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59 See Lord Woolf and Jeremy Woolf *The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [4–13]–[4–17].

60 *Gray v Spyer* [1922] 2 Ch 22 (CA) at 27.

(including, for example, in the areas of local body, tax, resource management, competition, tenancy and consumer obligations law). Generally, the courts will be reluctant to grant declarations on abstract questions, where there are questions of fact to be determined, if there is another more appropriate jurisdiction or if there is no controversy between the parties.[61] Businesses are expected to know and understand the law, and to carry the risk of enforcement if subsequently found to be non-compliant.

[65] In conclusion, the mere assertion by the Labour Inspector that the hairstylists are employees does not, in itself, give rise to an employment relationship problem for the purposes of s 161(1). We acknowledge that this outcome means that Hairland effectively has no recourse to declaratory relief as to employment status in the absence of a live employment relationship problem. However, for the reasons outlined above, we are satisfied that the scheme of the Act does not require that. The Labour Inspector's assertion of an employment relationship has no practical effect unless the Labour Inspector brings proceedings, which she has done. In those proceedings, the workers' status will be a jurisdictional fact for the Labour Inspector to prove and which Hairland can contest. Hairland is not disadvantaged. This, in our view, is what the scheme of the Act contemplates.

Section 161(1)(r)

[66] Mr Cleary also argued that s 161(1)(r) offers an independent statutory recourse for Hairland to seek a declaration from the Authority as to the status of the hairstylists. For convenience we set out s 161(1)(r) again:

> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
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> …
>
> (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the

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61 See *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA) at [30]; *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 at [78]; *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [5]; and *Whitehouse Tavern Trust Board v Department of Internal Affairs* [2014] NZHC 662, [2014] NZAR 605 at [39]. See also Jessica Gorman and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [DJ10.01].

> employment relationship or related to the interpretation of this Act (other than an action founded on tort):

[67] Mr Cleary submitted that s 161(1)(r) splits the Authority's power to determine a problem related to arising from an employment relationship from its power to determine "any other action … arising from or related to … the interpretation of this Act". As a result, there is no prerequisite for an employment relationship problem. A contested interpretation of the Act suffices. Mr Cleary relied on Williams J's description in *FMV* of s 161(1(r) as a catch-all to support his argument.[62]

[68] This argument must fail because it is not possible to ignore the introductory words to s 161(1) that define the scope of the Authority's jurisdiction. Hairland must still be able to identify a problem relating to or arising out or an employment relationship. For the reasons already discussed, the mere assertion of such a relationship by the Labour Inspector does not suffice.

[69] Williams J's description of s 161(1)(r) as a catch-all needs to be read in the context of his surrounding comments. Having observed, in relation to the meaning of employment relationship problem, that "[a]ll that matters is whether the controversy arose during the course of the employment relationship and in the work context", Williams J added:[63]

> This necessarily means that if a controversy *can* be framed in terms of one or more of the examples in s 161(1)(a)–(qd), it *must* be brought in the Authority as an employment relationship problem. If it does not fit within any of those examples, it will then be a question of whether the problem nevertheless relates to or arises out of an employment relationship in terms of the open-textured introductory language of s 161(1) and the catch-all in paragraph (r).

[70] These comments make it clear that Hairland must still be able to identify a problem relating to or arising out of an employment relationship.

[71] In any event, the question that Mr Cleary identified as raising a question of interpretation could not properly be described as such. Mr Cleary submitted that the question whether Hairland's workers are employees under s 6 is one of interpretation.

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62 *FMV v TZB*, above n 18, at [94].
63 At [94] (footnote omitted and emphasis in original).

But the approach required by s 6 to determining employment status is well settled.[64] Applying a well-settled approach to the facts at hand does not raise any question of interpretation.

Costs

[72] Costs were reserved on the application for leave to appeal.[65] Hairland contested that application. Where leave is contested and the appeal is allowed, there will normally be no award of costs with respect to the application, unless the respondent's opposition was unreasonable.[66] Hairland's opposition was not unreasonable. It was in fact partially successful as leave was declined on a second proposed question.[67] We therefore consider it appropriate for there to be no award of costs with respect to the leave application.

[73] It was undisputed costs should follow the event on the appeal.

Result

[74] The appeal is allowed.

[75] We answer the question on appeal as follows:

> Does the Employment Relations Authority have jurisdiction to hear an application, brought by a purported employer against the Chief Executive of the Ministry of Business, Innovation, and Employment, the Labour Inspector and/or its workers, for a bare declaration that its workers are not employees under s 6(1) of the Employment Relations Act 2000?
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> No.

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64 *Bryson v Three Foot Six Ltd*, above n 52; *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705, (2021) 18 NZELR 623; and *Rasier Operations BV v E Tū Inc* [2024] NZCA 403, [2025] 2 NZLR 150 at [123].

65 Leave judgment, above n 8, at [24]. The Chief Executive was also granted an extension of time to file an application for leave to appeal. Hairland abided the decision of the Court on that application. There was no order as to costs.

66 Court of Appeal (Civil) Rules 2005, r 53G(5)(b).

67 Leave judgment, above n 8, at [18]–[20] and [23].

[76] The Employment Court judgment is set aside. The appellant's strike-out application in the Employment Court is granted.

[77] The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF COOKE J

[78] I would dismiss the appeal. I consider that the Authority had jurisdiction to deal with a question of whether Hairland's workers were employees on the plain wording of s 161(1)(c) of the Act, and that this is confirmed when the meaning of the section is considered in light of its purpose and context. For that reason I consider that Judge Smith correctly dismissed the strike-out application.

[79] Section 161 provides:

> **161 Jurisdiction**
>
> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
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> …
>
> (c) matters about whether a person is an employee (not being matters arising on an application under section 6(5))
>
> …

[80] This gives the Authority jurisdiction to determine whether a worker is an employee. I do not accept the argument that there must first be an employment relationship before the Authority has this jurisdiction. I see that argument as circular, and depriving the legislation of its plain meaning. This is precisely the issue that the Authority is given jurisdiction to determine. By definition, a disagreement over whether a worker is an employee is an employment relationship problem.[68]

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[68] The definition of "employment relationship problem" in s 5 only "includes" the matters identified, and s 161(1) refers to such problems "generally", so the use of these terms does not change the plain meaning of s 161(1)(c).

[81] A complication arises from the carve out of applications to the Employment Court under s 6(5). Does this mean that the parties must proceed before the Court? The appellant's argument is ultimately that this procedure is the mandatory procedure for resolving disputes over employment status. But this argument was rejected by the Supreme Court in *Gill Pizza*. The Supreme Court held:[69]

> [47] As just mentioned, s 161(1)(c) specifically carves out from the Authority's jurisdiction "matters arising on an application under section 6(5)". The Court of Appeal considered that this excluded from the Authority's jurisdiction only matters arising on an application that had actually been made to the Employment Court under s 6(5). In this respect, it differed from the Employment Court, which said in relation to this carve-out:
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> > We do not think this phrase can sensibly be read as only including those matters which have in fact been pursued by way of application under s 6(5).
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> …
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> [49] 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).

[82] This conclusion is significant not only because it emphasises the plain meaning of these very provisions, but also because of the ultimate conclusion. The jurisdiction to determine whether someone is an employee contained in s 6(5) and s 161(1)(c) is overlapping. Both the Court and the Authority have jurisdiction to determine that question. The Authority's jurisdiction is only excluded if there is, in fact, an application on foot before the Court.

[83] I also consider that a finding that the Authority has no jurisdiction, and that the parties must initiate proceedings in the Employment Court to resolve such disputes, is contrary to the purpose of the Act. Given the Act's focus on the "practical, specialised, speedy and informal dispute resolution that is accessible to all parties",[70] workers in the position of hairstylists, and businesses in the position of Hairland, need to have access to the Authority, and should not be required to commence more formal proceedings before the Court. That is a key feature of the dispute resolution scheme

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69 *Gill Pizza Ltd v Labour Inspector*, above n 4 (footnotes omitted).
70 *FMV v TZB*, above n 18, at [55].

established by the Act. Moreover, given s 6(6), a person employing workers could only initiate proceedings in the Court with the written consent of the relevant workers. This could deprive parties such as Hairland of any process in the Court or Authority to resolve the problem if consent was not forthcoming.

[84] I do not agree that the terms of s 6 call for s 161(1)(c) to be given a different interpretation. Section 6(2) expressly contemplates the Authority having jurisdiction as it refers to "the court or the Authority (as the case may be)" addressing whether a person is an employee. Section 6(5) gives the Court a broader jurisdiction to make declaratory orders binding non-parties, and on the application of parties other than the alleged employer or workers in question.[71] The Authority does not have that power, and is confined to addressing individual employment problems between parties. But there are protections introduced in s 6(6) in relation to the Court's declaratory jurisdiction: the affected workers must either be the applicant, or consent in writing; and the person alleged to be an employer must either be a party, or be given a right to be heard. If those conditions are not met the Court cannot make an order binding the alleged employer or affected worker. I do not agree that these procedural safeguards applicable to the Court's "in rem" jurisdiction mean that the Authority does not have jurisdiction to address a disagreement over whether particular workers are employees.

[85] Two arguments were nevertheless advanced before us that an alternative interpretation should be given to s 161(1)(c).

[86] First, the appellant argues that the Authority only has jurisdiction under s 161(1)(c) when there is some *other* employment relationship problem in addition to the question whether the person is an employee. This means that one of the other paragraphs of s 161(1) needs also to be engaged before the Authority has jurisdiction under s 161(1)(c). I do not consider that this is consistent with the plain wording of this section, and it would deprive the provision of its purpose. If a worker's sole grievance is that they are being treated as a contractor and not an employee, the worker should be able to bring that claim to the Authority and not be forced to initiate Employment Court proceedings under s 6(5). Such an interpretation would also

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[71] Other parties, such as the employer or workers are included by the words "1 or more other persons".

incentivise the artificial formulation of other disputes — such as a personal grievance — to engage the Authority's jurisdiction. I also consider this interpretation to be inconsistent with the Supreme Court's conclusion in *Gill Pizza* that the jurisdiction is overlapping, and the majority's conclusion in *FMV v TZB* that the Authority's jurisdiction is broad and directed to resolving all relevant difficulties and controversies.[72]

[87] The appellant's second argument advanced in oral submissions — that the right to access the Authority to determine whether a worker is an employee under s 161(1)(c) is a right that exists only for the workers and cannot be initiated by the person said to be an employer — is not a limitation that is found within the provision. I accept that some of the employment problems listed in s 161(1) can only be initiated by the employee. For example, s 102 provides that it is an employee that may bring a personal grievance. But there is no such restriction expressly or implicitly applying in relation to disputes about employment status under s 161(1)(c). Other employment problems listed in s 161(1) can be subject to proceedings in the Authority initiated by an employer. For example, an employer can initiate a proceeding in the Authority in relation to alleged breaches of the employment contract under s 161(1)(b). For the same reasons, an employer can initiate the Authority's procedures in relation to a dispute about whether a person is an employee.

[88] In their written submissions the appellant emphasised that employers had no ability to bring proceedings "in rem". That was a jurisdiction under s 6(5) that could only be exercised by employees and other identified persons such as unions and the Labour Inspector. The procedural limits identified in s 6(6) do not apply in the Authority. I agree with this point. Proceedings in the Authority must use the Authority's procedures. So there must be a "problem" between the person said to be an employer and the worker in question, and that worker will need to be named as a party to the Authority employment problem, as Judge Smith held.[73] The Authority processes cannot be used to make declarations about workers unless there is a

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72 *Gill Pizza Ltd v Labour Inspector*, above n 4, at [47]–[51]; and *FMV v TZB*, above n 18, at [60]–[67].

73 Employment Court judgment, above n 5, at [32]–[35].

qualifying problem between the person said to be an employer and that worker about their employment status.

[89] I do not consider that the meaning of the provisions is affected by the fact that, here, it is the Labour Inspector who has contended that the hairstylists are employees on behalf of these workers and not the workers themselves. In either case there is a dispute that means there is an employment relationship problem that is able to be addressed by the Act's procedures in the Authority as well as the Court.

[90] This background may give rise to a legitimate issue, however. Workers, including employees, should not be subject to oppressive proceedings, including by being dragged into the Authority against their will. Workers who are on the cusp of being contractors or employees are vulnerable, which is a reason why the Labour Inspector has powers to initiate processes to deal with their position. Smaller business may also find such proceedings challenging. But any concerns that proceedings are being used oppressively against workers is a case management issue. An individual worker can bring a claim in the Authority that they are being wrongly treated as a contractor rather than an employee. That claim could affect many more workers in the same workplace in essentially the same position. This ramification would need to be managed by the Authority, including by effectively staying any proceedings brought by workers or employers to allow a Labour Inspector procedure to be completed. But such a need to manage potential oppression, or potential effects on other workers, is a case management issue, not a jurisdiction issue. It is also important to recognise that these kinds of issues can arise more generally whenever individual claims potentially affect other employees in the same position.

[91] For these reasons I consider that the Employment Court was correct to dismiss the Chief Executive's application to strike out Hairland's proceedings in the Authority. I also agree with Judge Smith's conclusion that Hairland cited the wrong respondent to its claim in the Authority as the relevant hairstylists, and not the Chief Executive should have been named, but that this defect could be resolved by amended pleadings.[74] Further case management issues may arise if there are objection

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[74] At [34].

procedures commenced in the Authority under s 223E of the Act or the Labour Inspector seeks orders under s 6(5).[75] I consider the appeal should be dismissed.

Solicitors:
Ministry of Business, Innovation, and Employment, Wellington for Appellant
Clancy Fisher Oxner & Bryant, Tokoroa for Respondent

[75] There is a power to transfer proceedings from the Authority to the Court under s 178(2).