IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2022] NZEmpC 192
EMPC 230/2021

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
BETWEEN	E TŪ INCORPORATED First Plaintiff
AND	FIRST UNION INCORPORATED Second Plaintiff
AND	RASIER OPERATIONS BV First Defendant
AND	UBER PORTIER BV Second Defendant
AND	UBER BV Third Defendant
AND	PORTIER NEW ZEALAND LIMITED Fourth Defendant
AND	RASIER NEW ZEALAND LIMITED Fifth Defendant

Hearing:	13-17 June 2022, 20-23 June 2022, 30 June 2022 and 1 July 2022, and further submissions filed on 30 September 2022 and 5 October 2022
Appearances:	P Cranney, G Liu and E Griffin, counsel for plaintiffs G Service, S Howard-Brown and D Dahanayake, counsel for defendants
Judgment:	25 October 2022

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Declarations of employment status are sought on behalf of four Uber drivers,[1] Mr Abdurahman, Mr Keil, Mr Rama and Mr Ang. Similar applications have been advanced in other jurisdictions, with mixed results.[2] In the only New Zealand case to date an Uber driver, Mr Arachchige, was found not to be an employee.[3]

[2] On a general level the Uber cases reflect a testing of approach to determining employment status, and the reach of minimum employment entitlements, in light of fast-moving changes to the way in which work is done. As one leading academic has observed:[4]

> A common concern … is the sense that work is migrating from employment into these forms and thereby escaping labour law's grasp. … On a certain naive view, all the fuss is puzzling. After all, if labour law's raison d'etre is to address problems specific to a particular relational form (employment), then the decline of that form and the growth of others is no cause for worry. The old problems continue to be addressed where they occur, and the new forms fail to present these problems. Three types of reason might explain why work outside traditional employment should provoke a shout rather than this yawn. In order of increasingly profound challenge to an employment-centred 'idea of labour law,' these are misclassification, displacement, and exclusion.

[3] While the New Zealand government is giving consideration to legislative options for dealing with some of these issues,[5] this case must be answered within the current parameters of the law. It is convenient to set out those parameters at this point, prior to dealing with the particular features of this case and why the parties say they were or were not in an employment relationship with one another.

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1 I use this term in a general sense, for ease of reference.

2 See, for example, Oxford Pro Bono Publico *The Employment Status of Uber Drivers: A Comparative Report Prepared for the Social Law Project, University of the Western Cape* (October 2017).

3 *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, [2020] ERNZ 530.

4 Noah Zatz "The Impossibility of Work Law" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, Oxford, 2011).

5 Tripartite Working Group on Better Protections for Contractors *Report to the Minister for Workplace Relations and Safety* (December 2021).

Determining employment status – a purposive approach applies

[4] Employment status is the gate through which a worker must pass before they can access a suite of legislative minimum employment entitlements, such as the minimum wage,[6] minimum hours of work,[7] rest and meal breaks,[8] holidays,[9] parental leave,[10] domestic violence leave,[11] bereavement leave[12] and the ability to pursue a personal grievance.[13] Importantly it is also the gateway through to union membership and collective bargaining,[14] and the gate through which the Labour Inspector must pass before taking action on behalf of a worker, or against a workplace.[15]

[5] The width between the gate posts has always been important, but it is fair to say that it has assumed increased importance in light of the growing fragmentation, casualisation and globalisation of work and workforces in New Zealand.[16] More fundamentally, new ways of working have generated a degree of uncertainty as to the continued utility of the gate posts. As has recently been observed:[17]

> There are two major reasons why it may be difficult to distinguish employees from other workers. First, work, like life, tends to be a continuum where one state merges more or less seamlessly into another. The law, however, prefers distinct categories and clear boundaries. Inevitably, attempts to draw such distinctions result in boundary issues. Second, when boundary issues arise people will sometimes be tempted to exploit them. In particular, employers will seek to avoid the costs that follow employment status (for example, holidays and potential personal grievances) by trying to categorise workers as being other than employees while at the same time seeking to control and direct workers as if they were employees…
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> These problems have become more acute with changing forms of employment such as platform and gig work where the platform entrepreneurs go to considerable lengths to create structures to allow them to assert that they are not the employers of those performing the work and that the workers are not employees.

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6 Minimum Wage Act 1983, s 2.
7 Employment Relations Act 2000, s 67C.
8 Employment Relations Act 2000, pt 6D.
9 Holidays Act 2003, s 5.
10 Parental Leave and Employment Protection Act 1987.
11 Holidays Act 2003, s 72C.
12 Holidays Act 2003, s 69.
13 Employment Relations Act 2000, s 103.
14 Employment Relations Act 2000, pt 4; Commerce Act 1986, ss 27-29.
15 Employment Relations Act 2000, s 229.
16 See Ministry of Business, Innovation and Employment *Better protections for contractors: Discussion document for public feedback* (November 2019).
17 Gordon Anderson and Dawn Duncan *Employment Law in Aotearoa New Zealand* (3rd ed, LexisNexis, Wellington, 2022) at 83-84 (footnotes omitted).

[6] Ultimately the issue comes down to statutory construction – to what extent does the definition of employee contained within s 6 of the Employment Relations Act 2000 capture new ways of working? If, as I understood the defendants to say, the definition is simply designed to ensure that traditional employees are not deliberately miscategorised as independent contractors, it is likely that the gateway will become increasingly narrowed over time. If the definition, properly interpreted, has a broader purpose, the gateway will likely admit a more diverse range of workers.

[7] As the Court of Appeal has stated in the context of interpreting relationship property legislation:[18]

> Although the Act operates upon "property" as a subject-matter the law it lays down is not a part of the law of property in any traditional sense. Instead it is social legislation aimed at supporting the ethical and moral undertakings exchanged by men and women who marry by providing a fair and practical formula for resolving the obligations that will be due from one to the other… In that respect it can be regarded as one facet of the wider legislative purpose of ensuring the equal status of women in society.

[8] The Employment Relations Act, within which s 6 sits and plays a gatekeeper role, is similarly social legislation, serving a purpose well beyond the particular parties to the particular relationship. As the Court of Appeal made clear in *Reid*, such legislation must be approached in a way which recognises and supports the broader legislative purpose, rather than undermines its place within the fabric of society. Section 6, and the satellite provisions conferring minimum entitlements which sit around it, are designed to be protective; to regulate the labour market and ensure the maintenance of minimum standards. They reflect a statutory recognition of vulnerability based on an inherent inequality of bargaining power, that certain workers are unable to adequately protect themselves by contract from being underpaid or not paid at all for their work, from being unfairly treated in their work and from being overworked.

[9] It is this purpose which must be looked to when assessing whether an individual is or is not an employee, a point underscored by s 5 of the Interpretation Act 1999 and the Supreme Court's observations in *Commerce Commission v Fonterra Co-Operative Group Ltd* as to the relevance of legislative social objective to the

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[18] *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580.

interpretative exercise.[19] In other words, the task for the Court for the purposes of s 6 is to ascertain whether the individual is within the range of workers this social legislation was intended by Parliament to extend minimum worker protections to, including in the context of a rapidly evolving labour market.

[10] The Employment Relations Act defines an "employee" as follows:[20]

> **6 Meaning of employee**
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> (1) In this Act, unless the context otherwise requires, **employee**—
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> (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
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> (b) includes—
>
> (i) a homeworker; or
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> (ii) a person intending to work; but
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> (c) excludes a volunteer who—
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> (i) does not expect to be rewarded for work to be performed as a volunteer; and
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> (ii) receives no reward for work performed as a volunteer; and
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> (d) excludes, in relation to a film production, any of the following persons:
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> (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:
>
> (ii) a person engaged in film production work in any other capacity.
>
> (1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.
>
> (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
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> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.
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> (4) Subsections (2) and (3) do not limit or affect the Real Estate Agents

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19 "The meaning of an enactment must be ascertained from its text and in the light of its purpose." See too *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

20 Emphasis added.

Act 2008 or the Sharemilking Agreements Act 1937.

(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.

…

[11] As is clear, s 6 requires the Court to undertake a broad contextual inquiry to determine whether a worker is or is not an employee, reinforcing the utility of a purposive approach.

[12] There are two prerequisites. To fall within the definition of "employee" a worker must be engaged to work for hire or reward and be engaged under a contract of service. What amounts to a contract of service is not defined. It is to be assessed having regard to "the real nature of the relationship", which is itself to be assessed by considering "all relevant matters, including any matters that indicate the intention of the persons", while observing the statutory caution "not to treat as a determining matter any statement by the persons that describes the nature of their relationship."

[13] The Supreme Court's decision in *Bryson* is the leading authority on s 6.[21] The case was decided almost 20 years ago, and well before employment cases involving the gig economy and technology platforms began emerging. While the Court set out a number of common law indicia for assessing employment status (control, integration and the fundamental nature of the relationship), it made it clear that the indicia were not prescriptive. In this regard the Court said:

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21 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372.

> [33] The second supposed error of law identified by Ms Muir was that the Judge fell into error in saying that the real nature of the relationship could be ascertained by analysing the tests that have been historically applied such as control, integration, and the "fundamental" test. It will already be apparent that we see no error of law in this respect. *The Judge obviously was not suggesting that these three customary indicia were to be applied exclusively*. She correctly used them, in conjunction with the other relevant matters to which she referred, in an endeavour to determine the real nature of the relationship, as directed by s 6(2).

[14] I do not read *Bryson* as requiring a narrow approach to be adopted when construing s 6, or somehow relegating its application to more traditional workplace relationships. Rather the Supreme Court made it clear that a range of non-exhaustive common law tools may appropriately be deployed when determining the "real nature of the relationship" in any particular case. It seems to me that the approach simply reflects the open-textured way in which s 6 is drafted, allowing regard to be had to the different ways in which employment relationships manifest in practice and develop over time. If it were otherwise an important piece of social legislation which touches on the lives of millions of New Zealanders, and which is designed to regulate labour relations within the community and protect vulnerable workers, would ossify.

[15] What is "real" in terms of the nature of a particular working relationship depends on the prism through which the arrangement is viewed.[22] It is possible to adopt a strictly contractual approach to the task, seeking to identify the key characteristics of a commercial contract and, if they are absent, to conclude that no contract of service exists. But such an approach misses the central point. The point is that the rights sought to be asserted by the plaintiffs are created by statute, not by contract.[23] As one academic has pointed out, if contractual consent is a requirement for an employment right, the right is lost.[24] In New Zealand the point finds explicit legislative endorsement in s 238 of the Act. It provides that:

> **238 No contracting out**
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> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

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22 See Alan Bogg and Michael Ford "Between statute and contract: who is a worker?" (2019) 135 LQR 347.

23 *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at [69].

24 Ewan McGaughey "Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status" (2019) 48 ILJ 180 at 186.

[16] In summary, differentiating between workers who are employed and those who are not is not susceptible to a bright line test. Returning to fundamentals is, in my view, particularly helpful when dealing with new and developing ways of working, in the context of the increased fragmentation of workplaces and the growth of atypical working arrangements.[25] Employment relations legislation calls for an interpretative approach which acknowledges and advances the underlying social purposes of the statute.[26] The Employment Relations Act recognises and protects employment relationships and provides a gateway to the constellation-like suite of minimum standards legislation, via s 6. It is these features which determine the prism through which any particular relationship is to be assessed.

[17] In a nutshell the question to be asked and answered is whether s 6, construed purposively, was intended to apply to the relationship at issue when viewed realistically.[27]

The relevance or otherwise of overseas authorities

[18] I have already referred to the mixed results in cases involving Uber drivers. The defendants submitted that the Court would gain very limited assistance from the approach adopted in overseas jurisdictions, including from the recent United Kingdom Supreme Court decision in *Uber BV v Aslam*.[28] It was submitted that I should largely confine myself to consideration of the New Zealand Supreme Court's judgment in *Bryson* and this Court's judgment in *Arachchige*.[29]

[19] I accept that the statutory framework that applies in the United Kingdom materially differs from s 6. Nonetheless the Court's analysis of common law concepts,

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25 See, for example, Valerio de Stefano *The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy* (International Labour Office, Conditions of Work and Employment Series No 71,2016); International Labour Office "Non-standard forms of employment" (Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment, Geneva, February 2015).

26 See the discussion in *Uber BV v Aslam,* above n 23*,* at [70]. See generally Guy Davidov *A Purposive Approach to Labour Law* (2016, Oxford University Press, Oxford); Joe Atkinson and Hitesh Dhorajiwala "The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber*" (2022) 85 MLR 787.

27 See *Aslam*, above n 23, at [70].

28 *Aslam*, above n 23.

29 *Arachchige*, above n 3.

such as direction and control, provides a useful perspective. And while it is true, as Ms Service (counsel for the defendants) pointed out, that the Supreme Court did not find that the drivers were employees, it may be noted that it had not been asked to determine that issue – rather the applicant drivers had sought a declaration of "worker" status.[30] Similarly, I have considered a number of judgments from other jurisdictions, helpfully drawn to my attention by counsel.[31] Following the hearing, the Federal Supreme Court of Switzerland released two further relevant judgments, which the parties were provided with an opportunity to make submissions on.[32]

[20] Ultimately, the New Zealand Supreme Court's judgment in *Bryson* is binding and must be applied. I also agree that consistency of approach is desirable as between judgments of this Court. But that is not, and cannot be, the controlling principle. Each case must be dealt with on its own merits by applying the applicable law to the facts.[33] It is for the Court of Appeal and the Supreme Court in New Zealand to right the course if that is considered appropriate.

Onus?

[21] In *Cunningham v TNT Express Worldwide (NZ) Ltd* the Employment Court had held that the putative employer bore the onus of displacing a presumption of employment status for the purposes of s 6.[34] The Court of Appeal took a different view, observing that:[35]

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30 At [93]-[101]. Note that it has been suggested that on the case's findings of fact it is arguable that the drivers were employees: McGaughey, above n 24. Note too that a Bill is now before the House of Lords to remove the distinction between "worker" and "employee": The Status of Workers Bill to "make provision for the creation of a single status for workers by amending the meeting of "employee", "worker", "employer" and related expressions in the Trade Union and Labour Relations (Consolidation) Act 1992, the Employment Rights Act 1996 and cognate legislation; and for connected purposes."

31 These include a decision of the European Court of Justice dated 20 December 2017, a Court of Cassation (France) decision dated 12 May 2021, a Superior Labour Court (Brazil) decision dated 9 September 2020, and an Amsterdam District Court decision dated 13 September 2021. See also the Australian position: *Nawaz v Rasier Pacific Pty Ltd T/A Uber BV* [2022] FWC 1189; *Gupta v Portier Pacific* [2020] FWCFB 1698.

32 *Uber Switzerland GmbH v Service de police du commerce de lute contre le travail au noir*, 30 May 2022; *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, 30 May 2022.

33 The factual context disclosed by the extensive evidence in this case appears to have differed from that in *Arachchige*.

34 *Cunningham v TNT Express Worldwide (NZ) Ltd* [1992] 3 ERNZ 1030 (EmpC) at 1037-1038.

35 *Cunningham v TNT Express Worldwide (New Zealand) Ltd* [1993] 3 NZLR 681, [1993] 1 ERNZ 695 (CA) at 701.

> In any event the approach of the Employment Court to onus has to be seen, I think, as erroneous in law. If there is no evidence before the Court other than
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> evidence of outward indicia of an employment relationship, the onus is indeed on the alleged employer to displace that inference. But when it is common ground that the relationship is governed by a comprehensive written contract and when all the truly relevant primary facts are common ground (as they are here), no question of onus arises. It is then the responsibility of the Court to reach an affirmative decision one way or the other on how the contract should be classified.

[22] Applying the *Cunningham* Court of Appeal approach, no question of onus will arise in most s 6 cases.[36] It might be noted that *Cunningham* was decided under the Employment Contracts Act 1991 and before more recent common law developments focussing on the relational, rather than contractual, nature of the employment relationship. It might also be noted that generally it will be the putative employer who will be better placed to put material before the Court in support of any argument that the real nature of the relationship is (for example) one of independent contractor or volunteer, a point reflected in recent proposed amendments to the legislation in the United Kingdom and legislation passed in Canada.[37] In the present case the contractual documentation before the Court is clear and the core facts are not in dispute. Applying *Cunningham*, no question of onus arises. Even if it did, I do not consider this to be a case that turns on whether an onus has been discharged, for reasons which will become apparent.

Application of the law to the facts

[23] The key question in this case centres on the real nature of the relationship.[38]

[24] The answer to this question involves consideration of "*all* relevant matters". Parliament has only specifically identified one relevant matter, namely anything

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36 Compare *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223; *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [21]; *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 69, [2021] ERNZ 183 at [70]. Note that these cases involved triangular employment situations.

37 Status of Workers Bill 2021 (UK); California Labour Code, s 2775(b)(1). See also Guy Davidov and Pnina Alon-Shenker "The ABC Test: A New Model for Employment Status Determination?" (2022) 51 ILJ 235.

38 It was common ground that none of the plaintiff drivers fall within any of the included or excluded categories specifically provided for within s 6(1)(b), (c) or (d), and that each of them carried out driving work for hire and/or reward.

indicating the "intention of the persons". The Court is otherwise required to identify and consider any matters relevant to the assessment. The identification task must be informed by the empowering statute and the underlying objectives of the legislation,[39] and the particular context of the case before the Court.[40] In *Bryson* the Supreme Court identified the exercise of control, the extent of integration and consideration of whose business Mr Bryson worked for, the written and oral terms of the contract, any divergence from those terms in practice, and industry practice as relevant matters for the purposes of assessing whether he was an employee.

[25] I consider that the following matters are relevant to assessing the real nature of the relationship in this case (features of direction, control and integration are infused in each):

(a) the nature of the Uber business and the way it operated in practice;

(b) the impact of the Uber business model and its operation on the plaintiff drivers;

(c) who benefitted from the work undertaken by the plaintiff drivers;

(d) who exercised control over the plaintiff drivers' work, the way in which it was conducted and when and how it was conducted;

(e) any indications of intention, including what can be drawn from the nature, terms and conditions of the documentation between the parties; and

(f) the extent to which the plaintiff drivers identified as, and were identified by others as, part of the Uber business.

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39 *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA) at 322.

40 The latter point, namely that the relevance of factors to be considered is case dependent, was emphasised by the Supreme Court in *Bryson*, above n 21 at [34]-[36].

[26] The facts are pivotal to the analysis, and some of my factual findings are relevant to more than one of the above listed matters. I have, however, attempted to deal with each relevant matter sequentially.

The nature of the business

[27] Uber operates a digital labour platform. Globally such platforms are becoming increasingly commonplace, and New Zealand is no exception.[41]

[28] Put simply, the Uber platform works as follows. Riders download the Uber App; they advise Uber (via the App) of where they want to travel to; Uber (via the App) offers the trip to available drivers; an available driver accepts the offer, collects the rider and drives them to their chosen location. Eaters download the Uber App; they select a restaurant and order their food (via the App); Uber (via the App) offers the food pick-up and delivery trip to available drivers; an available driver accepts the offer, collects the food from the restaurant and drives the food to the Eater at their nominated address for delivery. Riders and eaters make payment to Uber; Uber makes payment to the drivers.

[29] Each of the defendants are separate legal entities but they all operate within the Uber group. The third and fifth defendants are involved in the Uber Rideshare business in New Zealand; the second and fourth defendants are involved in the Uber Eats business in New Zealand. The first defendant was the entity involved in the Rideshare business only prior to 1 December 2018.

[30] As explained by Ms Service, there are potentially ten different individual relationships involved in this case by virtue of the number of plaintiffs and the number of separate legal entities in the Uber group. For example, Mr Rama started work for Uber after 1 December 2018, and worked in both the ridesharing and food delivery businesses. He therefore has a potential relationship with the second, third, fourth and fifth defendants. In contrast Mr Ang only worked in the ridesharing business prior to

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[41] The number of online web-based and location-based platforms rose from 142 in 2010 to over 777 in 2020. See International Labour Organisation *World Employment and Social Outlook: The role of digital labour platforms in transforming the world of work* (23 February 2021) at 46-47.

1 December 2018 and therefore only has a potential relationship with the first defendant. The following table illustrates the situation:[42]

	Rasier Operations BV (1st def)	Uber BV (3rd def)	Rasier NZ (5th def)	Portier BV (2nd def)	Portier NZ (4th def)
Mr Ang	**NZ Rides Intermediate**				
Mr Rama		**NZ Rides Current**		**NZ Eats**	
Mr Keil	**NZ Rides Intermediate**	**NZ Rides Current**			
Mr Abdurahman		**NZ Rides Current**			

[31] The defendants placed much emphasis on what was said to be the true nature of their business model, submitting that an understanding of the marketplace and the way in which they were engaged in it was fundamental to determining the real nature of the relationship between each of them and each of the four drivers. In this regard the defendants characterised the Rideshare and Eats businesses as simply facilitating a contractual relationship between other players, namely a contractual relationship between the driver and the rider (Rideshare) and between the eater, the driver and the restaurant (Eats). On this analysis the Uber businesses did no more that assist others to transact, in much the same way (it was said) as Trademe or AirBnB. The easier it was for buyers (riders) and sellers (drivers) to directly interact with one another, the more popular the marketplace was likely to be. All of this is achieved via the Uber platform, a tool and infrastructure designed to match and facilitate. In this sense the defendants are simply the intermediary, minimising the hassles that the contracting parties (namely the riders and the drivers; the restaurant, the eater and the drivers) would otherwise face in contracting with one another.

[32] It is correct that the way in which the business model operates means that a number of the classic hallmarks of a traditional employment relationship are missing. So, for example, the plaintiff drivers were not obliged to be present in a physical

[42] The table is adopted from counsel for the defendants' submissions.

workplace at particular times to undertake their work on demand, or on stipulated days. They could log in and out of the App, take time off and work any number of hours subject to driving hour limitations provided for by legislation. However, while none of the defendants were operating a traditional employment model, Uber's characterisation of its merely-a-facilitator role was not supported by the evidence – particularly the evidence about the high level of control and subordination which characterised the relationships at issue, as I explain in more detail below.

Impact of Uber operating model

[33] The evidence was clear that it is Uber which dictates the contractual terms under which the plaintiff drivers performed services. They could not use the App unless they agreed to the terms and conditions that Uber had set, and which Uber can, and does, vary. Those terms and conditions reinforce the high degree of control and subordination in the relationship between Uber and each of the drivers.

[34] As the contractual documentation spells out, access to the App is non-transferrable. The plaintiff drivers were obliged to provide personal services,[43] they were not permitted to share their accounts and their individual driver identifications were to be used to log onto the App on each occasion the App was used.[44]

[35] Uber decides the cost of each trip and charges that to the customer. The rider pays Uber the fare for the trip. Uber pays the driver the fare, minus a service fee which Uber determines and which it deducts before payment is made to the driver for the ride. The fares Uber sets are made up of various components, including base fare, minimum fare, a booking fee, time costs (per minute) and distance costs (per kilometre). Each of these components is set by Uber. The driver has no control over setting the rates, determining the calculation methodology or deciding what label is applied to the fare. Uber retains the right to change the fare or delivery fee calculation at any time and in its sole discretion, to review or cancel a fare, and to make a full or partial refund to a customer. Uber Eats operates in a materially similar manner.

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43 Contrast *Independent Workers Union of Great Britain v The General Arbitration Committee* [2021] EWCA Civ 952. This decision is now subject to appeal to the UK Supreme Court.

44 Clause 15 states that access to the Driver App is provided on a "non-transferable, non-sublicensable" basis.

[36] Fare adjustments may be made by Uber if a trip has been "significantly different" from the route it has estimated. But Uber decides whether a trip has or has not significantly differed, and adjusts the fares charged accordingly.[45] The evidence disclosed that, where a driver wished to have a fare reviewed, it had to be done via Uber and was dealt with in Uber's discretion.

[37] Uber's very hands-on involvement in fare setting and review, and retaining to itself the ability to decide outcomes (and accordingly how much a driver would earn from a particular transaction), stands in contrast to its characterisation of the customer as being in a direct contractual relationship with the driver.

[38] It is true, as Ms Service pointed out, that a driver did retain some (at least theoretical) control over the fare because they were able to charge a lower fee if they wished. But it remained unclear how the ability of a driver to charge a lesser fare was relevant to the s 6 analysis. It can hardly be said to reflect a driver's ability to build their own business, particularly where the driver is constrained in their ability to establish an ongoing relationship with a rider and the reduction comes out of what would otherwise be paid to the driver.

[39] Uber applies a pricing system called "dynamic pricing", referred to as "surge" and "boost" for rides and meal deliveries respectively, during which time Uber increases the fare or delivery fee prices by applying a multiplier set by Uber. Dynamic pricing has the potential to impact a driver's earnings. However, it takes place at a time Uber considers appropriate, namely during times when it assesses that demand

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[45] See, for example, cl 8.3 of the Rasier NZ terms and conditions: "Rasier NZ reserves the right to adjust payment in relation to a particular Fare for reasons such as inefficient routes, failure to properly end a particular instance of Transportation Services in the Driver App or technical error in the Uber Services. In more serious situations, such as fraud … or User complaints, Rasier NZ may cancel a Fare entirely or if the Fare has already been paid, require reimbursement of the Fare from you." And cl 4.5 of the Portier NZ terms and conditions: "Portier NZ reserves the right to: (i) adjust the Delivery Fee for a particular instance of Deliver Services…; or (ii) cancel the Delivery Fee or if the Delivery Fee has already been paid, require reimbursement of the Delivery Fee from you for a particular instance of Delivery Services (*e.g.,* a communicated deadline for completion of delivery services was not met, … in the event of a User or Delivery Recipient complaint…)."

will sustain increases in fares in particular areas. Drivers have no control of this aspect of the business.

[40] Ms Service submitted that Uber is simply responding to supply and demand in the marketplace in terms of its approach to dynamic pricing. That is undoubtedly so – maximising profit margins via various means is what most businesses attempt to do. The point, in terms of the s 6 analysis, is the application of labour resources for this purpose and the degree of control it reflects in terms of the real nature of the relationship.

[41] The evidence disclosed that Uber's "Community Guidelines" play a central role in the performance management system. In this regard the Guidelines set out standards of behaviour which drivers are required to comply with. Uber drafted the Guidelines and amends them from time to time in its sole discretion. Uber retains the right to discipline drivers for any breach of the Guidelines, including by revoking access to the App. Uber can and does deactivate drivers, including without warning, logging them off the system, including if they have not accepted rides for a period. Reinstatement is at Uber's complete discretion, and requires attendance at a training programme (at the driver's expense) and then successfully maintaining appropriate ratings for a period of time (determined by Uber) after training has been completed. Uber may also issue warnings, which operate in a three-strike manner.

[42] It is also clear that Uber exercises significant control via its "reward" schemes, incentivising work during peak times and the acceptance of rides (withholding access to rewards if ratings slip below a certain level set by Uber). In this regard, the top tier, "Diamond" status, is achieved by accepting a certain number of rides and achieving a particular rating record. It is only when a driver has been accorded "Diamond" status by Uber that Uber discloses to the driver where a rider wishes to travel to. Slipping below "Diamond" status (which comes after warnings, couched as helpful encouragement) means that the driver is not told by Uber where the delivery address is until they arrive at the pick-up destination. Knowing the journey that a rider wants to take in advance of acceptance has obvious financial advantages for a driver as they are able to predict how profitable an available ride will likely be.

[43] Against this backdrop it is difficult to accept the defendants' submission that "encouragement" did not equate to control, and that the incentives offered, such as Uber Pro, provided access to benefits which a driver was free to take or leave. This benign characterisation lacked nuance. The reality, reflected clearly in the evidence before the Court, was that Uber exercised significant control over each of the drivers. While the means via which control was exercised are not generally associated with a traditional workplace, the underlying point remains the same: Uber was able to exercise significant control because of the subordinate position each of the plaintiff drivers was in and which its operating model was designed to facilitate and did facilitate.

[44] So, while it is true that the plaintiff drivers were not expressly directed by Uber to work, including at particular times, they were subject to very effective direction and control exercised in a much more subtle way, including via the rating system, the incentive scheme, prompts, "encouragement", a warning system, the disciplinary system and deactivation.

In whose interests is the work done?

[45] It is helpful to stand back and consider who was working for whose interests, effectively the fundamental test referred to in a number of cases over the years.[46] Those cases have tended to emphasise features such as the provision of tools, vehicles and uniforms as indicia of employment. But, as the cases also make clear, the existence of such arrangements may simply reflect a decision by the controlling party to minimise its costs and shift liability onto a subordinate party.

[46] While on one level it might be said that the plaintiffs were working in their own businesses, able to increase their earnings by working longer hours (subject to any applicable driving hour regulations), the assumption does not survive scrutiny in light of the evidence.

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[46] *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (CA). See also *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 184-185; *Bryson*, above n 21, at [32]-[33].

[47] As I have already observed, Uber sets the fares, collects the money and pays the drivers an amount it determines. The plaintiff drivers had no ability to set their own rates or charge more than the amount set by Uber and they exercised no control over the fare for individual trips, other than to charge a lower fare. The plaintiff drivers were prohibited from contacting any passenger or using personal passenger information made available via the App or otherwise.[47] They were obliged to transport passengers directly to their destination without unauthorised interruptions or stops along the way.[48] They had little or no ability to improve their economic position through professional or entrepreneurial skill. Rather, the opportunity to grow their own business was effectively non-existent. The only way they could increase their earnings was by working longer hours while meeting Uber's requirements.

[48] The plaintiff drivers obtained work via Uber and Uber's brand, and it was Uber which connected the customer with the driver, rather than the driver. The connection between Uber and the driver, and Uber and the customer, is reflected in the way in which soiling is dealt with. If a rider soils a vehicle during a ride, a driver can claim a cleaning fee. The cleaning fee is not recoverable by the driver directly from the rider. Rather the driver must seek recovery from Uber, which, in its sole discretion, determines whether to make such a payment and, if it does, Uber charges the fee to the rider.

[49] There was no evidence that the drivers advertised or promoted their own business via the work they did while logged in to the Uber App. They were not free to organise their work other than in respect of when and if they logged in to the Uber App and the rides they accepted or declined, which (as I have already observed) were choices made under the shadow of significant adverse consequences, determined and unilaterally imposed by Uber.

[50] These features of the relationship stand in marked contrast to those that usually apply to a person who operates their own business. A person who operates their own business is generally able to run it as they see fit, including, for example, by setting

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47 At cl 2.
48 At cl 3.

prices, marketing, service standards, the way in which complaints are dealt with and bringing in substitute labour.

[51] Stripped back to its fundamentals, Uber is the only party running a business. It is in charge of marketing, pricing and setting the terms and nature of the service provided to riders, restaurants and eaters. The Uber business is reliant on drivers providing personal labour for the benefit of its transport service, to be performed as dictated by Uber. The plaintiff drivers were required to provide their labour with due skill, care and diligence, and to maintain high standards of professionalism, service and courtesy – all set and enforced by Uber.[49]

[52] In other words, the plaintiff drivers worked for Uber's business, not their own, transporting passengers (and food) for Uber. Uber does not simply connect individuals (the driver and the rider; the driver, the restaurant and the eater). It creates, dictates and manages the circumstances under which *its* business is carried out, and driver labour is deployed in order to grow that business. All of which points firmly towards an employment relationship.

Flexibility and choice

[53] On one level being an Uber driver provides flexibility and choice. Mr Rama, for example, could juggle driving with his job as a chef and caring for his young son; both Mr Ang and Mr Abdurahman had businesses which they operated in combination with their driving; and Mr Keil had various community and family responsibilities which he attended to while not driving. None of the plaintiff drivers were required to log onto the App at any particular time and could work as long or as little as they liked. In this sense there was no obligation to offer and accept work (mutuality of obligation). The defendants submitted that these factors pointed away from an employment relationship.

[54] I do not regard the concepts of "flexibility" and "choice" as particularly helpful in a case such as this. First, flexibility is a feature of modern employment relationships. Casual employees, for example, can exercise flexibility and choice

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[49] At cl 6.

about when they work (there being no legal obligation to accept work offered). The fact that they can choose to work at times that suit their personal commitments does not mean that their worker status changes. And any employee, casual or otherwise, is entitled to request flexible working hours and such requests can only be denied on a limited number of grounds.[50] In short, flexible working arrangements are now commonplace, including among employees,[51] so the fact that they exist in any particular case is not necessarily an indicator that the real nature of the relationship is not one of employment, as I understood the defendants to argue.

[55] Second, the evidence disclosed that the degree of "flexibility" and "choice" said to be enjoyed by each of the plaintiff drivers under the Uber operating model was largely illusory. The reality is that the way in which the model works in practice effectively increases the level of control (by Uber over the drivers) and the degree of subordination (of the drivers to Uber), including in terms of psychological impact on them. This was particularly reflected in the way in which Uber sought to incentivize the plaintiff drivers, and the negative consequences imposed (or threatened) if there was a failure to maintain a high volume of rides and ratings.

[56] Again, it was submitted that the degree of control exercised by Uber over matters such as fare setting, fare reviews, standards of behaviour and the like was simply symptomatic of its intermediary role in balancing competing interests. Any control exercised by Uber was said to be "necessary and beneficial" for both drivers and riders and the Uber business, facilitating an easy transactional experience. TradeMe was referred to by way of example. I do not regard TradeMe as a particularly analogous comparison. Little evidence was presented about the operations of TradeMe, but there appear to be clear differences. TradeMe does not set the price for services provided by an individual. It does not play a material role in the way in which the transactions are performed or in what is transacted. Buyers on TradeMe are able to view all sellers on TradeMe and freely select the one that they prefer. All of this means sellers make their own decisions regarding pricing and marketing in order to collect a larger share of the market.

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50 Employment Relations Act 2000, pt 6AA. See in particular s 69AAF.

51 StatsNZ "Over half of employees in New Zealand have flexible work hours" (3 July 2019) <www.stats.govt.nz>.

[57] That aside, I do not see the facilitator argument as persuasive when applying the analysis required by s 6, as it says more about business motivations than relationship reality. To put it another way, while it is possible to be merely a facilitator, it is also possible to be a facilitator and an employer; being a facilitator does not necessarily affect the application of the s 6 test. If it were otherwise the social purpose of the legislation would be undermined.

[58] More broadly, I do not consider that the control test only points to an employment relationship if the control over a worker is exerted for no good reason. The fact that there is a reason for control to be exerted, whether it is for the benefit of the worker, the putative employer, the consumer, or all of them, is largely neither here nor there. Ms Service suggested otherwise, citing *Cunningham v TNT Express Worldwide (New Zealand) Ltd* and *Ready Mixed Concrete (South East) Ltd v Minister of Pensions*.[52] I read those cases as confirming that the control test is not, by itself, determinative. Insofar as these cases may be interpreted as authority for the proposition that the control test is not relevant when the control is exerted for the purposes of business efficiency, I consider them to have been overtaken by developments in more recent appellate judgments and the way in which s 6 is now formulated. I see the focus of the control test as being on whether or not control is exerted and able to be exerted, not *why* it is exerted.[53] The UK Supreme Court in *Uber* made a similar observation.[54]

[59] I return to the defendants' submission that there was no obligation to offer and accept work. While it is true that ultimately the plaintiff drivers could decline or accept work offered by Uber at will, each decision was not truly free; it came with consequences unilaterally imposed by Uber that, among other things, limited the driver's pay. And, taken to its logical conclusion, the point might be made that any employee has a "choice", for example, to be absent from work and face disciplinary consequences from their employer. The degree of weight that can sensibly be placed on the existence of worker choice depends on the circumstances. In the circumstances

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52 *Cunningham v TNT Express Worldwide (New Zealand) Ltd*, above n 34; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 2 QB 497 at 526.

53 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [82]-[84]. Leave to appeal this was declined: *LSG Sky Chefs New Zealand Ltd v Prasad* [2018] NZCA 256. See also *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [48]-[49].

54 *Aslam*, above n 23, at [97].

of this case to place any real weight on it would be inconsistent with the realities and undermine the applicable protective statutory purposes.[55]

[60] The following responses to questions in cross-examination are revealing.

[61] Mr Abdurahman was born in Sudan, has a university degree and came to New Zealand as a refugee. He could not find work in the area he had trained in, was obliged to pay the bills and ultimately worked as an Uber driver. He said the following:

> A. Again, what I'm saying is, they can – so you have a choice that comes with consequences. If you don't use it, example for a very long time, your rating will go down… If you haven't been driving for a while, you're gonna be blue tier that means you have lost some privileges that you're gonna get, you know, if you're diamond you're gonna get more jobs, that means there is consequences for it, for not driving for a while. So that's the kind of power imbalance they use to control you as well. They always push you to work every time, drive every day, increase your rating and behave nicely.

Mr Keil said:

> Q. When you're driving with the passenger in the car and another trip comes up on the phone you don't have to accept it do you?
>
> A. Yes. You don't have to accept it, but why are you do not accept it because if you don't accept it then you go up on strike 1, you know, more or less strike 2, you know, sort of thing by the Uber app for not accepting. Then if you got to run to the loo and that and you've got the thing and you haven't switched it off, you know you're caught between or something's happened or your thing. Yeah, you don't have to accept but that's not really putting into account the circumstances on why – it's not as simple as you don't have to accept it, if you're on the job it's okay, but if something else, you're stuck in traffic. So yeah, that's a, it's quite a, you think oi, while I've got it, those, no don't turn off your app and that, so when you're on those three, those promotion things, you know, for three rides you get a bonus and that, and that happens a lot. When you're running and you're on the fare trip and you have to check and that, and then you've got the call of nature or the car is delayed and that, so you cannot. But if you want the bonus of course you accept it, you know, these are circumstances. You know to answer your question a whole lot of dynamics that fall into it. Of course we want the business but then there are other factors, so it's not as simple as one plus one…

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[55] For a discussion of the dangers of recognising the mutuality of obligation as a touchstone of employment relationships, as cutting across a purposive approach, see Joe Atkinson and Hitesh Dhorajiwala "The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber*" (2022) 85 MLR 787 at 793.

[62] No Uber driver gave evidence on behalf of the defendants.

[63] In summary, the evidence reflected that each of the plaintiff drivers was in a relationship with Uber characterised by a significant degree of subordination and dependency. Uber exerted strict control, and effectively managed the way in which and when work was done, through various performance management processes and techniques, and via the tight restrictions placed on communications drivers can have with riders. Every aspect of the plaintiff drivers' movements was closely monitored by Uber via the App and its rating system, in terms of what they were doing, where they were doing it, how fast they were doing it and how well they were doing it.

[64] The short point is that the way in which an employer exerts "authority" and "control" over an employee (classic hallmarks of an employment relationship) has acquired less direct, but equally effective, characteristics due to developments in technology. That makes them no less potent, or relevant, to the s 6 analysis.

Integration into the Uber business

[65] It is fair to say that the evidence lacked the indicia of integration seen in some of the more traditional employment relationships, such as uniforms, vehicle signage, or business cards. Nor did the plaintiff drivers work in an office with other workers. Nonetheless, each of the plaintiff drivers identified themselves as being drivers for Uber, and part of the Uber business, when they logged onto the App and when picking up and delivering riders (and, in Mr Rama's case, meals). Indeed, an audio recording of a call to the Uber helpdesk expressly refers to "Uber drivers".

[66] I accept the plaintiff drivers' evidence that riders they interacted with identified them as Uber drivers, and that they saw themselves in the same way. In this regard, Mr Ang gave evidence that:

> A. Yes, so as far as I'm concerned I did not have any logos displayed on my car. I mean there was no uniform to speak of so there was no uniform…when somebody uses the app, and when they hail the driver when a driver arrives, quite often the language used is, are you my Uber driver…So there is an association between the driver being a representative of the brand despite not having any logos, wearing a uniform, because it's through the app that they see the association.

Q. But you're not a representative of the brand?

A. Well as a, well as a former driver I saw myself as a representative of the platform though there's nothing in this document that says that I'm a representative but I'm, as far as I was concerned, I was offering services on behalf of Uber.

Q. That's not what the agreement does is it because –

A. So that's not, that's not what the agreement says, that is right, but what I'm trying to get at is if we go out there, we have all these community standards and guidelines to adhere with and a lot of that is to make the experience good for both the rider and the driver and these guidance materials are all stipulated by Uber and part of it is to protect the brand because if we go out there and we behave poorly and through the app riders associate us with being representatives of Uber then that could cause reputational damage for the brand so in a way I saw myself like an unknown through the app in the way I was a brand ambassador because if they have a good experience with an Uber driver, they can get a good experience with an Uber driver there's a higher propensity for the riders to show a preference of using Uber over a competitor, yeah.

[67] In this case, each of the plaintiff drivers provided their own vehicle which they undertook their work in. They paid their own running costs, including insurance, warrants of fitness and petrol. They were also required to have access to a smartphone with mobile internet data, which they needed to provide, to use the App.

[68] In some cases the provision of capital equipment and the tools of a trade by the worker, rather than the enterprise, may point away from an employment relationship. This is because, in some cases, capital equipment represents a significant investment on behalf of the worker, which may indicate that they are running their own business.[56] But the point, as it applies in this case, needs to be kept in perspective. The reality is that many adults in New Zealand have access to a car and a smartphone, reflecting the utility of such assets in situations outside of providing professional transportation services.

[69] In this case I am not satisfied that the evidence as to the provision of a vehicle is other than neutral. I do not consider that the fact that each of the plaintiff drivers provided their own vehicle and smartphone reflects the sort of investment which might

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[56] As was the case, for example, in *Ready Mixed Concrete*, above n 52, where the worker had to supply his own truck.

otherwise indicate that they were running their own business. Indeed it is notable that all four drivers owned the required vehicle prior to considering applying to work for Uber.

[70] The plaintiff drivers were not engaged for a one-off project, a fixed term or for a determinate period. Rather, they signed up and worked for Uber for an extended, indeterminate, period of time. In this regard, Mr Ang did 6,250 of rides in a 25 month period; Mr Rama did 4,333 rides in a 37 month period and 35 Eats rides in a seven month period; Mr Keil did 19,991 rides in a five year period and Mr Abdurahman did 1,885 rides in a 20 month period.

[71] The work each of the plaintiff drivers carried out did not require special expertise or skills; it did not require managerial capacity or capital investment (other than a car and a smartphone, which I have already referred to); it did not involve financial risk and offered no opportunity to increase profit by any means beyond working longer hours. While the defendants sought to argue that certain actions, like providing water or reading materials, might result in increased tips from customers, reliance on the voluntary generosity of riders is not something generally associated with running one's own business. Rather, it underlines the lack of ability for drivers to elect to increase their own prices in exchange for superior service. In totality, the relationship each of the plaintiff drivers had with Uber was very much one of economic dependency.

[72] I have already considered the fact that the plaintiff drivers were able to work varied hours and concluded that this is of limited relevance to the s 6 inquiry.[57] And I have not overlooked the fact that the workers were not solely engaged in work as Uber drivers. Some signed up on Ola, one worked part-time as a chef and another did part-time masseuse work. It will already be apparent that I do not consider that the mere fact that the plaintiffs were not working full-time as Uber drivers materially assists the analysis. Many workers now work for multiple employers juggling professional jobs, personal and other commitments.[58]

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[57] See above at [28].

[58] See, for example, Stats NZ "Kiwis work hard at multiple jobs" (10 September 2019) <www.stats.govt.nz>.

[73] I accept that each of the four plaintiff drivers was integrated into the Uber business during those times they were driving. When driving for Uber they were dependent on Uber and Uber was dependent on them. In other words, it was a relationship of co-dependency. If Uber sold its App to drivers, rather than receiving a percentage of fares set at its own discretion, the argument that it is simply a technology company providing a platform for drivers to connect with people looking for a ride (rather than a transportation company) might be stronger.

The documentation

[74] Section 6(3)(a) requires the Court to consider any indications of the intention of the parties, which may include the written and/or oral terms of any contract or agreement, and any statement by the parties describing the nature of their relationship (s 6(3)(b)).[59]

[75] Intention of the parties is to be viewed objectively.[60] It is perfectly clear that none of the Uber defendants subjectively intended to enter into an employment relationship with any of the plaintiffs in this case. But it is not uncommon in employment cases for one or other or both parties to have no idea what sort of relationship they are entering into,[61] or for the drafting party to hope that by characterising the relationship in a particular way the result will follow.

[76] The documentation was prepared by Uber without any input or negotiation from any of the plaintiff drivers. It was effectively presented on a take-it-or-leave-it basis. The contracts are dense, long, riddled with legalese and typed in small font. The plaintiff drivers were given the documentation to sign in the context of a process which was rushed. They were not advised or encouraged to get legal advice. None of the plaintiff drivers read the documentation before signing it and it appeared unlikely that reading it would have made any difference. The documentation was amended from time to time by Uber. Amended contracts were communicated to each of the four

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59 *Bryson*, above n 21, at [32].
60 *Bryson*, above n 21, at [20].
61 See for example *Cowan v Kidd* [2020] NZEmpC 110, [2020] ERNZ 319; *Humphreys v Humphreys* [2021] NZEmpC 217, (2021) 18 NZELR 668; *Fleming v Attorney-General* [2021] NZEmpC 77, [2021] ERNZ 279.

plaintiff drivers via the App. That meant that the amendments arrived on their smart phones on a small screen. Each plaintiff driver was required to press an "Accept" button if they wanted to carry on using the App, often within tight time constraints. Ms Service submitted that all of this simply reflected the commercial nature of the arrangement between the drivers and Uber and was immaterial.

[77] I pause to note that it would be material if the relationship, properly characterised, was one of employment. That is because the Employment Relations Act specifies the minimum steps that must be taken by an employer when bargaining for an individual employment agreement or individual terms and conditions, including providing a copy of the intended agreement under discussion, advising them that they are entitled to seek independent legal advice about the intended agreement, giving them a reasonable opportunity to seek advice and consider and respond to any issues raised.[62] The Act also expressly requires agreements to be in writing and to include a plain English explanation of a worker's rights and ability to pursue a claim against their employer, including the process by which this is done.[63]

[78] It is not uncommon in the labour market for contractual documents to be drafted by, and for the benefit of, the engaging party, who is generally (not always) in a dominant position. Nor is it uncommon for such documentation to be presented to workers (particularly subordinate vulnerable workers) on a take-it-or-leave-it basis. Highly skilled workers (barristers for example) are generally in a different position in terms of the ability to actively negotiate their terms of engagement – again, there is a need for realism. The documentation in this case, the way it is drafted and the way in which it was presented to the plaintiff drivers as a fait accompli with no realistic opportunity to negotiate the terms and conditions under which they were expected to work, graphically reinforces the imbalance of bargaining power between the parties, and the subordinate position of the plaintiff drivers.

[79] Section 6 does not accord primacy to party documentation, or the way in which they have described their relationship, and it would undermine the purpose of the provision to read it in this way. So, while I agree that the documentation describes the

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62 Employment Relations Act 2000, s 63(2)(a)-(d).
63 Employment Relations Act 2000, s 65.

relationship in the way contended for by the defendants, I do not agree that the way it is labelled accurately describes the relationship. Rather, it has been constructed in a way that suits Uber's business interests. The context of the relationship and how it operated in practice paint a different picture.

[80] I return to the observations made by Gordon Anderson and Dawn Duncan at [5] above, namely as to platform entrepreneurs going to considerable lengths to create structures to allow them to assert that they are not the employers of those performing the work, and that the workers are not employees.[64] As I have said, Uber's structural complexity is a matter for it. But the applicable employment laws in New Zealand do not allow it to have its cake and eat it too. If it did the strong social purpose imbedded in the Employment Relations Act would be seriously undermined.

Was s 6, construed purposively, intended to apply to the relationships at issue when viewed realistically?

[81] Answer: yes.

[82] A close examination of the evidence given in this case, which was extensive, leads me to the firm conclusion that the plaintiff drivers were employees. Each of the plaintiff drivers was in an employment relationship when driving for the benefit of the Uber businesses.

Employer identity

[83] The defendants helpfully put before the Court, in diagrammatic form, the periods of time that each of the drivers worked for each of the Uber entities. As the defendants point out, however, with the exception of Mr Ang, the drivers were contracted to work for two or more incorporated companies, each of which controlled different aspects of the Uber service.

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64 Anderson and Duncan, above n 17, at 83-84.

[84] Following an invitation from the Court, both parties filed further submissions on the true identity of the employer and the question of whether it would be appropriate to make a finding of joint employment.

[85] The defendants submitted that, in the New Zealand context, joint employment has only been considered in limited circumstances, those being either labour hire arrangements or where there are a number of related companies and the employing company is unable to meet its employment obligations. I understood the submission to be that, while it was conceptually possible to have joint employers, such a finding would be rare, reserved for instances where it would resolve the mischief of a company seeking to evade its employment obligations – to apply joint employment more broadly would, it was said, create uncertainty. Ms Service emphasised that any of the Uber entities would be capable of meeting any employment obligations; so (I infer) no mischief arises which needs to be dealt with by way of a finding of joint employment in this case.

[86] As long ago as 1988 the Courts (albeit overseas) were recognising that:[65]

> The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, …

[87] While s 5 of the Employment Relations Act uses the singular rather than plural to define "employer" ("*a person* employing any employee or employees"), the Interpretation Act provides that words in the singular include words in the plural, unless the context provides otherwise.[66] I can detect nothing in the Act which tells against joint, or multiple, employers employing an employee; nor can I detect anything which suggests that such a finding should only be made in confined circumstances. To approach the issue in a narrow way would, in my view, cut across the underlying purpose of the legislation. As observed in *Downtown Eatery*:[67]

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65 *Sinclair v Dover Engineering Services Ltd* (1988) 49 DLR (4th) 297 (BCSC), cited in *Downtown Eatery (1993) Ltd v Ontario* (2001) 200 DLR (4th) 289 (Ont CA) – both judgments cited with approval in *Orakei Group (2007) Ltd v Doherty* [2008] ERNZ 245 (EmpC) at [56]-[57]. For the Canadian approach, see generally Judy Fudge and Kate Zavitz "Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario" (2007) 13 CLELJ 107.

66 As noted by Judge Shaw in *Orakei Group*, above n 65, at [51]-[52].

67 *Downtown Eatery (1993)*, above n 65, at [36].

> although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate structures does not work as an injustice in the realm of employment law.

[88] I agree with Mr Cranney that the cases establish that a finding of joint employment may arise in a broader set of circumstances, including where a number of entities are sufficiently connected and exercise common control over an employee.[68] The sufficient connection/common control category of case was explained by Judge Shaw in the following way in *Orakei Group (2007) Ltd v Doherty*:[69]

> [56] There are a number of authorities from other jurisdictions which have adopted the concept of joint employer. These cases establish that joint employment is possible but what is required is more than two unrelated employers. There must be a sufficient degree of a relationship between the legal entities. In judging that relationship the Court will look for the element of common control.

[89] While I would not necessarily exclude the possibility of joint employment being found to exist in other circumstances, the point does not need to be decided in this case. As Mr Cranney pointed out, it is clear that the various Uber Group entities are sufficiently connected and exercised a common element of control over each of the plaintiff drivers. In relation to passenger services, control over drivers was, in view of the evidence and the wording of the agreement, divided between Uber BV and Rasier New Zealand Ltd. The same can be said of the control exercised over food delivery services by Uber Portier BV and Portier New Zealand Ltd.

[90] I return to s 6, which is the touchstone for assessing whether a person is an employee and if so who the employer is. It requires the Court to consider the real nature of the relationship. The real nature of the relationship in this case is joint employment. It would, in my view, be arbitrary to select only one of the entities for a given period when it is clear that it is only taking on a portion of the employer's obligations. Uber BV retains significant control, including in respect of information flows and compliance with various requirements. It operates the App, the rating and

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68 *Muollo v Rotaru* [1995] ERNZ 414 (EmpC) at 419; *NZ Federated Labourers etc IUOW v Tyndall* [1964] NZLR 408 (HC); *Inspector of Awards & Agreements v Pacific Helmets (NZ) Ltd* [1988] NZIRL 411 at 417.

69 *Orakei Group (2007) Ltd*, above n 65.

promotions systems. Rasier New Zealand can suspend a driver for harm caused to Uber BV, is named as a party (along with Uber BV) to the Service Fee Addendum and may (along with Uber BV) alter the contractual arrangements at will. The position of Uber BV and Uber Portier BV is, as Mr Cranney points out, materially identical.

[91] For completeness, the Employment Relations (Triangular Employment) Amendment Act 2019 was not touched on by counsel. The question of the extent of its significance in a case such as this, if any, does not need to be resolved given the findings made.

[92] I make the following findings:

- Mr Abdurahman was jointly employed by Uber BV and Rasier New Zealand Ltd between June 2020 and 16 February 2022.

- Mr Ang was employed by Rasier Operations BV between August 2016 and September 2018.

- Mr Keil was employed by Rasier Operations BV between February 2017 and December 2018.

- Mr Keil was jointly employed by Uber BV and Rasier New Zealand Ltd between December 2018 and 27 January 2022.

- Mr Rama was jointly employed by Uber BV and Rasier New Zealand Ltd between April 2019 and May 2022.

- Mr Rama was jointly employed by Portier New Zealand Ltd and Uber Portier BV between 22 May 2020 and 14 December 2020.

Conclusion

[93] Each of the plaintiff drivers was in an employment relationship when carrying out driving work for Uber and is entitled to a declaration of status accordingly. Their employers for each of the relevant periods are as identified at [92] above.

A final comment about the implications of this judgment

[94] It may be helpful to clarify one final point as to the importance or otherwise of a declaration of status, as the issue assumed some focus in closing submissions.

[95] It is true, as Ms Service says, that any formal declaration made is in respect of the individual drivers in this case. That is because the Court has only been asked to make declarations of employment status in relation to named individuals. The Court does not have jurisdiction to make broader declarations of employment status to include, for example, all Uber drivers. It follows that there is no immediate legal impact in relation to other Uber drivers. In other words, they do not, as a result of this judgment, instantly become employees. The same point was made in *Leota*, but should not be misunderstood. While a declaration attaches to the individual applicant worker it may well have broader impact, particularly where, as here, there is apparent uniformity in the way in which the companies operate, and the framework under which drivers are engaged.[70]

[96] The plaintiffs are entitled to costs, the quantum of which is reserved.

Christina Inglis
Chief Judge

Judgment signed at 10.50 am on 25 October 2022

[70] See *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA) at [112]-[117].