IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI **SC 105/2024**

BETWEEN	**RASIER OPERATIONS BV**
	First appellant
	UBER PORTIER BV
	Second appellant
	UBER BV
	Third appellant
	PORTIER NEW ZEALAND LIMITED
	Fourth appellant
	RASIER NEW ZEALAND LIMITED
	Fifth appellant
AND	**E TŪ INCORPORATED**
	First respondent
	FIRST UNION INCORPORATED
	Second respondent

SUBMISSIONS FOR THE APPELLANTS
DATED 26 MARCH 2025

Russell McVeagh

Solicitors:
N L Walker | J A Tocher
Russell McVeagh
P +64 4 499 9555
F +64 4 499 9556
PO Box 10-214
DX SX11189
Wellington

Counsel:
P Wicks KC
City Chambers
Auckland

K Dunn
Smith Dunn
Auckland

CONTENTS

MAY IT PLEASE THE COURT:

1. OVERVIEW

1.1 The five appellants are companies within the Uber group. The two respondent unions brought a claim in the Employment Court alleging that four drivers[1] were employed by various of the appellants. The appellants deny that the drivers were / are its employees.[2]

1.2 The Employment Court found that the real nature of the relationship between the four drivers and the appellants was employment pursuant to s 6 of the Employment Relations Act 2000 ("**Act**"). The Court of Appeal found that the Employment Court had misdirected itself regarding s 6 but ultimately reached the same conclusion.

1.3 The appellants were granted leave to appeal on the question of whether the four drivers are employees in terms of s 6. This Court invited the parties to address the reasoning of the Employment Court and Court of Appeal, including the changing nature of work.[3]

1.4 The appellants advance three overarching submissions:

(a) This Court in *Bryson v Three Foot Six Ltd* ("***Bryson***")[4] correctly interpreted s 6. There is no need to depart from its framework.

(b) Application of the common law tests should reflect consideration of modern ways of working.

(c) The real nature of the relationship between the appellants and the four drivers is not one of employment because:

(i) the Services Agreements between the parties, each read as a whole, indicate that employment was not intended;

(ii) in practice, the drivers acted in a manner consistent with being self-employed;

---

1 Mr Julian Ang, Mr Praful Rama, Mr Mea'ole Keil and Mr Nureddin Abdurahman.

2 The drivers signed up to commercial terms which gave them access to the Uber platform (an app that enables individuals to provide transportation services or deliver food). The relevant legal test in the Employment Relations Act 2000 only empowers the Court to determine whether the four drivers were employees.

3 *Rasier Operations BV v E Tū Inc* [2024] NZSC 177 at [1] **[[05.0088]]**.

4 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 ("***Bryson***").

(iii) the appellants did not exercise relevant kinds of control over the drivers (ie subordination);

(iv) the drivers were not structurally or presentationally integrated into the appellants' businesses; and

(v) the drivers made business decisions about revenue and expenses, so were in business on their own account.

Relationship between the appellants and the drivers

1.5 Companies within the appellants' group offer a number of services including access to a technology platform available via downloadable mobile device applications (apps), which connect:[5]

(a) members of the public with drivers for the purpose of ridesharing (Rides platform);[6] and

(b) members of the public, restaurants, and drivers for the purpose of food (and other) delivery (Eats platform).[7]

1.6 The Rides and Eats businesses both involve matching buyers and sellers and facilitating their transactions, in exchange for a fee.[8] Each of the drivers entered into standard-form services agreements with (from 1 December 2018) Rasier New Zealand Ltd (third appellant) and Uber BV (fifth appellant) to access and use the Rides platform ("**Services Agreement**"),[9] under which:

(a) Uber BV provided a licence to the four drivers to use the driver app. Rasier New Zealand Ltd provided facilitation services to drivers using the platform, connecting drivers with riders (passengers).

---

5 For the purposes of this proceeding, there are customer and driver apps for each of the appellants' Rides and Eats businesses.

6 The Rides business is explained in Emma Jane Metson Foley's Evidence in Chief dated 20 June 2022 at [1.1]–[9.1] ("**Foley Evidence**") **[[202.0456]]**.

7 The Eats business, as it was organised prior to March 2021, is explained in Lucas Groeneveld's Evidence in Chief ("**Groeneveld Evidence**") dated 22 June 2022 at [3.1]–[10.8] **[[202.0703]]**.

8 Foley Evidence at [4.7] **[[202.0466]]** and Groeneveld Evidence at [6.3]–[6.4] **[[202.0706]]**.

9 See an example of a services agreement and addendum under this structure at **[[301.0232]]** and **[[301.0240]]**. The Uber group had different operating structures since it commenced business in New Zealand in 2014. Between 16 March 2016 and 30 November 2018, the drivers instead signed a services agreement with Rasier Operations BV (first appellant): see eg **[[301.0046]]** and **[[301.0061]]** and Foley Evidence at [7.5]–[7.13] **[[202.0471]]**.

(b) Drivers were free to log on and use the driver app to connect with riders wherever and whenever they wanted, for as long as they wanted (or not at all).[10]

(c) Uber BV facilitated payment of the fare from the rider. Rasier New Zealand Ltd received a percentage of the fare as a service fee with the balance paid to the driver.[11]

1.7 Mr Rama also used the Eats platform.[12] He signed a services agreement with Uber Portier BV (second appellant) and Portier New Zealand Ltd (fourth appellant).[13] Until March 2021, the Eats platform worked in a similar manner to the Rides platform, except there was an additional party, the restaurant, involved.

Decisions in the courts below

1.8 The Employment Court decided that the real nature of the relationships between the appellants and the four drivers was employment.[14] It arrived at that conclusion by an unorthodox application of s 6, stating that its task was "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".[15] This was said to reflect a statutory recognition of vulnerability based on, amongst other things, an inherent inequality of bargaining power.[16]

1.9 The Court of Appeal found that the Employment Court misdirected itself on s 6,[17] by placing unwarranted emphasis on vulnerability as a relevant factor, and erroneously articulating the relevant question as "whether s 6, construed purposively, was intended to apply to the relationship at issue when viewed realistically".[18]

---

10 Drivers were required to meet registration requirements (Foley Evidence at [8.9] **[[202.0478]]**), sign the relevant services agreement (Foley Evidence at [8.17] **[[202.0479]]**) and were responsible for purchasing and maintaining their own equipment, namely vehicle and phone (Foley Evidence at [8.69]–[8.70] **[[202.0492]]**).

11 The percentage split between Rasier New Zealand Ltd and the Driver is 72% to the Driver and 28% to Rasier New Zealand Ltd (paid as a service fee) **[[301.0240]]**.

12 Groeneveld Evidence at [4.1] **[[202.0704]]**.

13 An example of a services agreement and addendum under this structure at **[[302.0768]]** and **[[302.0778]]**.

14 *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192, (2022) 19 NZELR 475 ("**EC Judgment**") at [93] **[[05.0119]]**.

15 EC Judgment at [9] **[[05.0093]]**.

16 EC Judgment at [8] **[[05.0092]]**.

17 *Rasier Operations BV v E Tū Inc* [2024] NZCA 403 ("**CA Judgment**") at [137] **[[05.0042]]**.

18 EC Judgment at [17] **[[05.0096]]**.

1.10 It noted that the Employment Court's framing of s 6 "risks causing confusion and distracting attention from the established approach" and "could be understood as supporting an expansion of the reach of the ERA beyond workers properly classified as employees".[19]

1.11 The Court of Appeal, however, agreed that the drivers were employees but on different grounds.[20] It considered its task was to examine "the parties' common intention about the substance of their mutual rights and obligations", disregarding "their intention about how their agreement is to be classified".[21] On that basis, the Court of Appeal reached the view that there were not "any indications of the parties' intentions that provide material assistance".[22] Instead, the Court relied primarily on the other three common law tests (control, integration and fundamental), concluding in summary that:

(a) the appellants exercise "a high level of control" at times when a driver is logged in because a driver will be logged out if they repeatedly ignore requests for rides and because the appellants determine the payment for rides;[23]

(b) drivers are "the public face of the Uber brand" and "without them, Uber would have no service to offer to the public";[24] and

(c) "drivers are not in business on their own account",[25] because "while a driver is logged into the driver app that driver has no opportunity to establish any business goodwill of their own".[26]

2. BRYSON CORRECTLY INTERPRETS SECTION 6

2.1 The correct interpretation of s 6 has been settled since this Court's decision in *Bryson*. There is no need to revisit that framework. Developments in the nature of work can be accommodated in the way that the common law tests are applied.[27]

---

19 CA Judgment at [125] **[[05.0039]]**.
20 CA Judgment at [236] **[[05.0067]]**.
21 CA Judgment at [114] **[[05.0036]]**.
22 CA Judgment at [217] **[[05.0062]]**.
23 CA Judgment at [222] **[[05.0064]]**.
24 CA Judgment at [225] **[[05.0064]]**.
25 CA Judgment at [229] **[[05.0066]]**.
26 CA Judgment at [234] **[[05.0067]]**.
27 See Section 4 of these submissions below.

2.2 The meaning of s 6 must be ascertained from its text, in light of its purpose and context.[28] To illustrate that there is no reason to disturb the *Bryson* interpretation, these submissions briefly canvass the scheme, text and legislative background to s 6.

Role of s 6 in the Act

2.3 Section 6 is an interpretation provision that defines an "employee". Employment status is the gateway to minimum entitlements.[29] Its purpose is to ensure relationships are appropriately categorised. It should be interpreted in a neutral way.

2.4 There is nothing in the object of the Act touching on the gateway to the Act or the definition of an employee.[30] The object of the Act is to (among other things) build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. It is not a purpose of the Act to expand the categories of individuals to whom it applies.

2.5 That is where the Employment Court erred. It held s 6 was designed to be protective and reflect a statutory recognition of vulnerability, and that purpose guides the analysis.[31] This is incorrect. Its task was, as set out in s 6, to determine the real nature of the relationship.

2.6 The Court of Appeal agreed that approach was novel and departed from *Bryson*.[32] Substantial assistance cannot be obtained from s 3 when interpreting s 6.[33] The range of workers to whom the Act is intended to apply is employees, with the function of s 6 to clarify which workers are employees.[34] The Employment Court's approach improperly expanded the category of employees, by reference to vulnerability.[35] Vulnerability and employment status cannot be

---

28 Legislation Act 2019, s 10(1) and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] and [24] (decided under the Interpretation Act 1999).
29 EC Judgment at [4] **[[05.0091]]**; CA Judgment at [18] **[[05.0007]]**.
30 Employment Relations Act 2000, s 3. There is no additional express object section that applies to s 6.
31 EC Judgment at [8] **[[05.0092]]**.
32 CA Judgment at [11] **[[05.0006]]**.
33 CA Judgment at [117] **[[05.0037]]**.
34 CA Judgment at [123] **[[05.0038]]**.
35 CA Judgment at [136] **[[05.0042]]**.

equated, as employees are not necessarily vulnerable and non-employees can also be vulnerable.[36]

Legislative background

2.7 The status of "employee" has been a feature of the common law since the mid-19th century.[37] Prior to the Employment Contracts Act 1991, there was no statutory definition of employee, so the courts developed what have become known as the "common law tests": intention, control, integration and fundamental.[38] The common law tests remained relevant under the Employment Contracts Act, as the statutory definition merely defined an employee as a person "employed by an employer to do any work for hire or reward".[39]

2.8 As long ago as 1920, the courts considered intention by "look[ing] at the agreement as a whole for the purpose of ascertaining what was the real intention of the parties".[40] Then, in a leading decision under the Employment Contracts Act,[41] the Court of Appeal placed the contract at the forefront of the analysis, classifying as an independent contractor a courier who worked regular hours exclusively for one company while wearing a uniform and driving a branded vehicle. This decision served as an impetus for reform.

2.9 As the Select Committee noted, the underlying policy of s 6 was to "stop some employers labelling individuals as 'contractors' so as to avoid responsibility for employee rights such as holiday pay and minimum wages"[42] — ie to prevent form from trumping substance.[43]

2.10 But submitters were concerned that the new definition would "alter mutually beneficial relationships, overrule the intention of the parties, increase business costs (including compliance costs), affect

---

36 CA Judgment at [120]–[124] **[[05.0038]]**.

37 See Peter Kiely "Independent Contractor vs Employee" (2011) 36(3) NZJER 59 at 59, citing *Quarman v Burnett* (1840) 6 M & W 499, 151 ER 509. The concept of employee was first developed in the context of vicarious liability cases, and it was not until the subsequent advent of statutory protections and other statutory implications (eg tax and intellectual property) for employees that the distinction became more significant.

38 See eg *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (HC & CA) at 52, citing *Enterprise Cars Ltd v Commissioner of Inland Revenue* (1988) 11 TRNZ 768 (HC) at 772.

39 Employment Contracts Act 1991, s 2, definition of "employee".

40 *Simpson v Geary* [1921] NZLR 285 (Court of Arbitration) at 289.

41 *TNT Express Worldwide (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA).

42 Employment Relations Bill "Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee" (June 2000) at 21.

43 This was recognised by a full court of the Employment Court in *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 at [20].

the flexibility afforded to clients and contractors, and create uncertainty".[44] So the Select Committee amended the clause "to provide increased clarity regarding the policy intent" by ensuring that courts would "continue to be directed to look at all relevant factors, including the intention of the parties, in determining the employment status of individuals".[45] The final wording of s 6, therefore, represents a careful balance between policy objectives.

Section 6 framework as articulated in Bryson

2.11 Section 6 provides the following framework:

(a) It defines an employee as a person "employed by an employer to do any work for hire or reward under a contract of service".[46]

(b) In assessing this, the court "must determine the real nature of the relationship" between the parties[47] and in doing so:

(i) must consider all relevant matters, including any matters that indicate the intention of the persons;[48] and

(ii) is not to treat as determinative any statement by the parties describing the nature of their relationship.[49]

2.12 As above, the leading case on s 6 is this Court's decision in *Bryson*.[50] This Court held that "all relevant matters" include:[51]

---

44 Employment Relations Bill 2000 (8–2) at 5–6.
45 Employment Relations Bill 2000 (8–2) at 6.
46 Employment Relations Act 2000, s 6(1)(a).
47 Employment Relations Act 2000, s 6(2).
48 Employment Relations Act 2000, s 6(3)(a).
49 Employment Relations Act 2000, s 6(3)(b).
50 *Bryson* has been uniformly applied by the Employment Court: see eg *Ferguson v Sounds of Forest Ltd* [2006] ERNZ 343 (EmpC); *Downey v New Zealand Greyhound Racing Association Inc* (2006) 3 NZELR 501 (EmpC); *McLean v Buy West Realty Ltd* (2006) 4 NZELR 193 (EmpC); *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 (EmpC); *Kiwikiwi v Maori Television Service* (2007) 5 NZELR 6 (EmpC); *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1; *Chief of the Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232; *Brunton v Garden City Helicopters Ltd* [2011] NZEmpC 29, [2011] ERNZ 504; *Franix Construction Ltd v Tozer* [2014] NZEmpC 159, (2014) 12 NZELR 331; *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19, (2015) 12 NZELR 627; *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* [2015] NZEmpC 224; *Below v The Salvation Army New Zealand Trust* [2017] NZEmpC 87; *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178; *Horizon Concepts Ltd v Hayward* [2019] NZEmpC 75; *Noble v Ballooning Canterbury.com Ltd* [2019] NZEmpC 98, (2019) 16 NZELR 850; *Sexton v Lowe* [2020] NZEmpC 25; *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413; *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794; *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 69, (2021) 18 NZELR 14; *Barry v C I Builders Ltd* [2021] NZEmpC 82, (2021) 18 NZELR 249; and *Gestro v Relph* [2021] NZEmpC 93.
51 *Bryson* at [32].

(a) "the written and oral terms and conditions of the contract (which usually contain indications of common intention of the status of the relationship)";

(b) divergences from and supplementation of those terms that are apparent from the way the contract operates in practice;

(c) features of control, integration and whether the individual was working on their own account (the fundamental test);[52] and

(d) consideration of all other relevant matters.

2.13 This Court in *Bryson* noted that these matters should be considered in the above order, and that it is not usually possible to consider the common law tests until the court has examined the contract and the way it operated in practice.[53] These factors are all mandatory but not exclusive. All relevant matters must be considered.[54]

2.14 Neither court below applied the *Bryson* framework in this way.

Employment Court's approach

2.15 Instead,[55] the Employment Court looked at "whether s 6, construed purposively, was intended to apply to the relationship".[56] The Court identified and applied its own list of factors to assess the real nature of the relationship.[57] It said the factors in *Bryson* were "infused" in its new test.[58]

2.16 As the Court of Appeal explained, this approach differed from that required by s 6 and *Bryson*, as it:[59]

(a) failed to start with the contractual documents;[60] and

---

52 The Supreme Court noted that s 6 referred to work under a "contract of service". This was said to reflect the common law position, meaning the common law tests remained relevant to this assessment.

53 *Bryson* at [32].

54 Eg the courts in *Bryson* also considered industry practice.

55 Although the Employment Court acknowledged that it was bound by *Bryson*: EC Judgment at [20] **[[05.0097]]**.

56 EC Judgment at [17] **[[05.0096]]**. In effect, the Employment Court applied the UK Supreme Court's decision in *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209, a case under a different statutory framework about whether Uber drivers were workers (not employees).

57 EC Judgment at [25] **[[05.0099]]**. While the Employment Court purported to consider each of its factors in turn, it instead made subtle differences to what it was considering in the heading of each section. See for example, "who benefitted from the work undertaken by the plaintiff drivers" at [25(c)] **[[05.0099]]** became "in whose interests is the work done?" at [45]–[52] **[[05.0105]]**.

58 EC Judgment at [25] **[[05.0099]]**. The Employment Court referred to the *Bryson* factors as direction, control, and integration. The fundamental test was not mentioned.

59 CA Judgment at [8] **[[05.0005]]**.

60 CA Judgment at [120(b)] **[[05.0038]]**.

(b) erred by reframing the common law tests, as they should be applied explicitly, not infused into other enquiries.[61]

2.17 For example, rather than applying the fundamental test, the Employment Court considered "who was working for whose interests",[62] and "who benefited from the work undertaken".[63] As the Court of Appeal concluded, that question does not assist in distinguishing between employees and other workers, as it is often the case that an independent contractor does work that benefits their principal and is in the interests of both parties.[64]

Court of Appeal's two-stage inquiry

2.18 In this case, the Court of Appeal used a two-stage inquiry.[65] It:

(a) looked to the contract and practice to identify the substance of the parties' mutual rights and obligations as a matter of reality (identification of what is being classified); then

(b) determined whether those rights and obligations amounted to a contract of service (application of the criteria for classification).

2.19 This approach confuses the intention analysis. By dividing the analysis in this way, the Court of Appeal failed to look for indications of the parties' intention as to the status of their relationship.[66] Intention is (and has always been) a criterion of classification, not merely a tool of interpretation. In respect of the other common law tests (control, integration and fundamental), the appellants accept that a two-stage approach is implicit in the *Bryson* analysis. For those tests, courts have always determined the rights and obligations before deciding whether those features are consistent with an employment relationship.

---

61 CA Judgment at [120(c)] and [133] **[[05.0038]] [[05.0041]]**.
62 EC Judgment at [45] **[[05.0105]]**.
63 EC Judgment at [25(c)] **[[05.0099]]**.
64 CA Judgment at [120] and [133] **[[05.0038]] [[05.0041]]**.
65 CA Judgment at [97] and [98] **[[05.0030]]**.
66 See further at paragraphs 3.2–3.4 of these submissions below.

No reason to depart from Bryson

2.20 *Bryson* remains the correct approach to interpreting the definition of an employee in s 6. *Bryson* correctly identifies that Parliament's reference to a "contract of service" indicates that the common law tests continue to apply.[67] *Bryson* also reflects that s 6 directs a court to consider "all relevant matters" by noting that while intention and the common law tests are mandatory, all other relevant matters should be considered.

2.21 *Bryson* is thorough, well-reasoned and flexible. Where some of the common law tests may not be helpful in any particular case, they can be given less weight. Where additional factors are relevant, they can and must be included. The correct statutory interpretation of s 6, and the associated framework set out in *Bryson*, are timeless — as is intention. It is only the manner in which the other three common law tests are applied that may require consideration to ensure they appropriately deal with modern ways of working.

2.22 The Court of Appeal was essentially correct when it remarked that s 6 must be applied with a "realistic appreciation" of how new ways of work operate in practice, but the test remains the same, as the courts cannot (and should not) modify the test to respond to concerns about particular categories of workers.[68]

3. INTENTION REGARDING STATUS OF THE RELATIONSHIP

3.1 Section 6 requires the court to consider the intention of the parties.[69] It is the parties' common intention regarding the status of their relationship that is relevant, and this will usually be found in the written and oral terms of the contract between the parties.[70] Whether the parties call their arrangement an employment

---

67 *Bryson* at [31].

68 CA Judgment at [5] **[[05.0004]]**.

69 Employment Relations Act 2000, s 6(3).

70 *Bryson* at [9], [31], [32] and [35]. Note that in *Bryson*, there was no written documentation of the engagement at the outset, so no evidence of mutual intention at that stage (see *Bryson v Three Foot Six Ltd* [2003] NZEmpC 164, (2003) 2 NZELR 105 ("***Bryson* EC**") at [34]). See also *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69, (2021) 18 NZELR 14 at [63] and [77]; *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [39]; and *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395 at [36].

agreement in the relevant documentation is an indication of the common intention regarding status, but is not determinative.[71]

Court of Appeal assessed the wrong intention

3.2 It is submitted that the Court of Appeal erred in this regard. Rather than consider the parties' intention as to the status of their relationship, the Court considered the parties' "common intention about the substance of their mutual rights and obligations"[72] by applying "basic contract law principles".[73] That is a different inquiry that merely sets the stage for the common law tests of control, integration and fundamental, and leaves no role for the parties' intention as to status.

3.3 The Court consciously disclaimed any need to consider the parties' "intention about how their agreement is to be classified", suggesting that confused its two-stage inquiry.[74] The Court thus gave no analytical weight to intention, contrary to s 6(3)(a). As the legislative history set out in paragraph 2.10 above illustrates, Parliament deliberately maintained an analytical role for intention (as it had long played in the common law).[75]

3.4 The Court's error seems to have been influenced, in part, by a related misunderstanding that s 6 required it to determine "the real nature of the contract" between the parties.[76] The correct test in s 6 is "the real nature of the relationship". That is a critical distinction in an employment context. The focus for s 6 purposes is the relationship, not a strict contractual analysis.[77]

Labels should be given some weight

3.5 In considering intention, the courts below attached "little or no weight to labels",[78] with the Court of Appeal noting that Mr Bryson's written agreement had described him as an independent contractor but he

---

71 Employment Relations Act 2000, s 6(3)(b).
72 CA Judgment at [114] **[[05.0036]]** and [210] **[[05.0061]]**.
73 CA Judgment at [108] **[[05.0034]]**.
74 CA Judgment at [114] **[[05.0036]]**.
75 See eg *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (HC & CA) at 55–56.
76 CA Judgment at [108] **[[05.0034]]**.
77 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 at [17]–[20].
78 CA Judgment at [103] **[[05.0032]]**. See similarly EC Judgment at [78]–[79] **[[05.0115]]**.

was found to be an employee.[79] That is not entirely correct. Mr Bryson did not have a written agreement at the outset of the relationship[80] and so it was held not to be possible to determine the parties' common intention when entering into the relationship.[81]

3.6 While a label given to a relationship cannot be used to "contract out" of the Act, as the Court of Appeal put it,[82] that does not mean labels are irrelevant. They are the key indication of objective intention. If Parliament intended labels to be ignored entirely, s 6(3)(b) would state that (rather than that labels are not determinative). If an individual signs a contract that says they are not an employee, that is objective evidence of their intention regarding status. Where a label is consistent with the substantive terms of the contract, it may be strong evidence of a common intention.

3.7 Intention is a discrete, and prior, question that should be assessed independently of the court's conclusions on the other common law tests (contrary to the approaches in the courts below).[83]

Subjective evidence of intention should not be discounted

3.8 The Court of Appeal also erred in discounting the subjective evidence of the parties' common intention.[84] While what the parties thought is not conclusive proof on an objective consideration of intention, it remains compelling evidence that can assist the court in reaching an objective view.[85]

---

79 CA Judgment at [102] **[[05.0032]]**.

80 The written agreement in *Bryson* was not in place until several months into the relationship.

81 *Bryson* EC at [15] and [34].

82 CA Judgment at [112] **[[05.0035]]**.

83 EC Judgment at [79] **[[05.0115]]**. See also CA Judgment at [218] **[[05.0062]]**, where the Court of Appeal identified what it described as the two "most illuminating" indications of common intention: (i) the exclusion of drivers from meaningful decisions about the terms for providing services to riders; and (ii) the high degree of unilateral control reserved to the appellants. These matters may be relevant to the control test, but they do not shed light on the common intention.

84 CA Judgment at [108] **[[05.0034]]**.

85 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 at [57]. Note that the Employment Court also frequently uses subjective evidence of intention to determine whether a common intention has been vitiated (or, conversely, fully understood): see eg *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395 at [5]. Note also that the Evidence Act 2006 does not apply in the Employment Court, rather s 189(2) of the Employment Relations Act 2000 permits the Court to "accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not". See also *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at [85] where the UK Supreme Court noted that the conduct of the parties may show that the written terms were understood and agreed to be a record of the parties' rights and obligations.

4. THE COMMON LAW TESTS AND MODERN WORK

4.1 We set out below the three common law tests. The appellants' position is that this case can be decided on existing law, which is addressed in Section 5. In addition, given this case is the first reconsideration of s 6 in 20 years, we set out how the application of these tests could accommodate the modern working environment.

Control test

4.2 This test considers the degree of control or supervision exercised over the work performed by a person. A high level of control is more likely to indicate an employment relationship. In *Bryson*, a high degree of control was found given Mr Bryson's set hours of work and heavily stipulated duties, including how they must be performed.[86]

4.3 The modern work environment is more flexible than ever before, with flexible hours becoming more common, the advent of remote working and the introduction of automated systems to complete work. But true employees are still subject to control in traditional ways — leave must be approved; instructions must be followed when given; communicating whereabouts or work days and hours remains important.

4.4 In the modern work environment, control should be viewed in totality — the full extent and boundaries of obligations and expectations on the individual should be identified. The absence of certain controls is just as relevant as the presence of others. Both sides of the ledger must be considered.

4.5 The kind of control should also matter. Every business or contractual relationship has elements of control. Statutory and regulatory frameworks also require control to be exercised in some circumstances (for example, health and safety). To assist in identifying an employment relationship, the control must be of the kind exercised by an employer, ie subordination.[87]

---

[86] *Bryson* EC at [38]–[49] — findings not altered on appeal.

[87] See generally Adalberto Perulli *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects* (Study for the EU Commission, 2003) at 13–14, for a discussion on the central role played by the concept of subordination in identifying an employment relationship.

Integration test

4.6 The integration test assesses the extent to which the individual is "part and parcel" of, or integrated into, the organisation.[88] When considering the degree of integration, cases have tended to examine the minutiae of the relationship — the ongoing connection between the worker and the organisation via matters like rosters, uniforms, email addresses, attendance at Christmas parties and entitlement to bonuses. The focus is on the everyday things that suggest the binding of an employer and employee to work together.[89]

4.7 These traditional examples of integration may remain relevant in some industries,[90] but the Court should be mindful of the core concept of integration. At its heart, this test looks to the social connection that often exists between an employee and their employer. For example, while a casual employee is not under a legal obligation to accept a shift, they may feel under a social obligation to do so, and their decision will often have consequences for the relationship (eg declining a shift might result in less frequent offers of work). The relationship between a digital platform and its users does not give rise to that social bond, or loyalty. The platform is agnostic as to whether a particular individual performs work or not.

4.8 Considering this social dimension to employment relationships is consistent with the Act's object of "recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour".[91]

Fundamental test

4.9 The fundamental test requires consideration of whether the worker is in business on their own account. Relevant factors include

---

88 *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (HC & CA) at 54 per Holland J and 65 per Bisson J.

89 See eg *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69, (2021) 18 NZELR 14 at [259]–[263]; *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 at [78]; and *Tsoupakis v Fendalton Construction Ltd* EmpC Wellington WC 16/09, 18 June 2009 at [41]–[44].

90 There may be cases where traditional forms of integration remain an important feature (see eg *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 where employees and purported contractors worked side by side performing the same role in circumstances where third parties would not have been able to distinguish between employees and contractors).

91 Employment Relations Act 2000, s 3(a)(i).

whether the person can work for others, make a profit or loss, pays their own expenses or provides their own equipment.

4.10 The core question is whether the individual has control of business decisions. In a modern world with gig work and "side-hustles", that could look like an individual putting together their own portfolio of different opportunities to earn an income flexibly without the binds of traditional employment. As a consequence, the concept of "business" has expanded from its traditional association with professionals, tradespersons or small enterprises.

4.11 A unique feature of portfolio work is that an individual is still required to make business decisions even if they have less control over each income source than a traditional small business might. This may mean that features like price setting become less important in the overall scheme of an individual's business decisions. Decisions regarding business expenditure may influence profit more directly. Even in more traditional work, an inability to set prices may simply indicate an agreed efficient provision of services (eg a franchise).

5. DRIVERS USING UBER'S PLATFORM ARE NOT EMPLOYEES

Intention

5.1 The starting point under *Bryson* is to consider the parties' objective intention as to the status of the relationship.[92]

(a) Written indications of intention – the Services Agreement

5.2 First, the Court must consider the written expression of the parties' common intention in the Services Agreement.[93] In the Services Agreement, the parties expressly agreed that the status of their relationship is not one of employment.[94] That is a strong, albeit not conclusive, indication of the real nature of the relationship.[95]

---

92 *Bryson* at [32].

93 *Bryson* at [32], stating a "need to begin by looking at all the written terms and conditions which [have] been agreed to".

94 See eg Services Agreement dated 1 December 2018, cl 28.1**[[301.0237]]**.

95 Employment Relations Act 2000, s 6(3)(b); and *Bryson* at [31]–[32]. See also *Hutton v ProvencoCadmus Ltd (in rec)* [2012] NZEmpC 207, (2012) 10 NZELR 483 at [80]: a written agreement between the parties is generally "a good indicator of the parties' intention".

5.3 This is not a case where the description does not accurately reflect the broader terms of the contract.[96] As the Court of Appeal accepted, "the substantive rights and obligations described in the driver agreement do not on their face appear to give rise to an employment relationship".[97]

5.4 The Services Agreement, read as a whole, is consistent with the real nature of the relationship not being employment. For example, Uber agrees not to direct or control drivers.[98] Drivers have the complete ability to determine when and for how long they will provide transportation services, and when to accept, decline, or ignore a rider request.[99] Drivers are required to meet their own tax obligations,[100] and provide (at their own expense) all necessary equipment.[101] Drivers are not permitted to use Uber branding on their vehicles or clothing,[102] and can engage in other business or income generating activities.[103]

5.5 There are several provisions in the Services Agreement that set minimum standards for drivers relating to: (i) vehicle safety; (ii) exercising "due skill, care and diligence" when driving; and (iii) high standards of professionalism, service and courtesy. None of those terms indicate a mutual intention of employment. They are all terms designed to ensure the quality of the service provided and would be expected in any commercial agreement for the provision of services.

(b) The relationship in practice

5.6 Second, the Court must consider whether the way in which the relationship operated in practice indicates any contrary intention.[104] There is nothing in the evidence to suggest such a contrary intention.

---

96 Contrast *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395, where the contract provided that: Parcel Express would assign Mr Leota a daily run without consultation and directed when and where Mr Leota worked (at [22]); Mr Leota was required to perform his work according to Parcel Express' procedures, manuals or written or verbal instruction (at [23]); Parcel Express would control the amount of leave Mr Leota could take and before taking a certain amount, he had to seek approval (at [24]); and the agreement contained a restraint of trade clause (at [25]).

97 CA Judgment at [177] **[[05.0050]]**.

98 Services Agreement dated 1 December 2018, cl 4 **[[301.0232]]**.

99 Services Agreement dated 1 December 2018, cl 4 **[[301.0232]]**.

100 Services Agreement dated 1 December 2018, cl 12 **[[301.0234]]**.

101 Services Agreement dated 1 December 2018, cl 2 **[[301.0232]]**.

102 Services Agreement dated 1 December 2018, cl 4 **[[301.0232]]**.

103 Services Agreement dated 1 December 2018, cl 4 **[[301.0232]]**.

104 *Bryson* at [32].

In fact, the evidence shows that in practice the four drivers acted as though they were self-employed.[105] For example, Mr Ang was attracted to using the Uber platform by advertisements to the effect of "be your own boss, be flexible, be independent",[106] and "initially thought that [he] would be self-employed".[107]

5.7 The Court of Appeal's analysis on this question is of little assistance. Its erroneous approach to intention meant that it did not properly consider the extent to which the Services Agreement assisted in determining the common intention of the parties as to the status of their relationship. Much of its analysis regarding the Services Agreement was in fact about matters that related to the application of the common law tests. For example, the Court took issue with the term stating that the appellants will not direct or control drivers because it considered that Uber's systems of incentives amounted to control.[108] That issue and others like it are addressed below when considering the common law tests.[109]

5.8 Notably, however, the courts below both accepted that the flexibility provided by the Services Agreement as to "whether, when, and where" drivers can work was "genuine".[110] The Court of Appeal described that level of flexibility as "unusual in an employment relationship",[111] noting that "as a matter of reality, [drivers] have the ability to stop working at their option, without notice to Uber" because they "can simply log off the driver app".[112]

5.9 The "whole tenor" of the Services Agreement, and the way the relationship operated under it, points to a shared understanding that

---

[105] Mr Rama worked as a part time chef (as an employee) and could chose when to work based on employment as a chef, rugby training and custody of child. He could switch between Uber and Uber Eats depending on whether his child was in his care: Cross Examination of Praful Rama dated 15 June 2022 ("**Rama Cross**") at 277–283 **[[201.0279]]**. Mr Ang was self-employed as a masseuse and knew he was self-employed via Uber. He also worked around his massage business: Cross Examination of Julian Ang ("**Ang Cross**") at 191–196 **[[201.0191]]**. Mr Abdurahman ran his own import / export business, had previously worked as a taxi driver, and ran as a candidate in the most recent local body elections: Cross Examination of Nureddin Mohammed Abdurahman dated 17 June 2022 ("**Abdurahman Cross**") at 406–407 **[[201.0412]]**; 412 **[[201.0418]]**; and 428 **[[201.0434]]**. Mr Keil worked as a union organiser for 12 years: Evidence in Chief of Mea'ole Hans James Keil dated 15 June 2022 ("**Keil Evidence**") at [5] **[[201.0297]]**.

[106] Ang Cross at 181 **[[201.0181]]**.

[107] Ang Cross at 196 **[[201.0196]]**.

[108] CA Judgment at [192] **[[05.0054]]**.

[109] See paragraphs 5.19–5.30 of these submissions below.

[110] CA Judgment at [188] **[[05.0053]]**; and EC Judgment at [53] **[[05.0107]]**.

[111] CA Judgment at [188] **[[05.0053]]**.

[112] CA Judgment at [190] **[[05.0054]]**.

the status of the relationship would not be employment.[113] That common intention forms the baseline against which the other common law tests must be assessed.

Control test

5.10 The complete absence of control that the appellants have over the four drivers when they are logged out of the app, together with the minimal control they have when the drivers are logged in to the app, points strongly away from an employment relationship. In particular:

(a) the drivers lack any obligation to work;

(b) the drivers exercise a high degree of autonomy while logged in to the driver app, consistent with other independent contractors in the case law; and

(c) the structural features of the relationship that the Court of Appeal focussed on (service standards, app systems, and incentive schemes) are not indicators of employment.

(a) No obligation to work

5.11 The drivers accepted that they had complete flexibility and choice whether to provide transportation services.[114] There is no roster for work. They do not need to indicate when they will be available. They do not have to notify the appellants (let alone provide a reason, eg illness) if they do not work on a given day.[115] They do not even have to inform the appellants if they cease to use the platform permanently (ie if they "quit"). They have no obligation to perform services at all, even after a trip has commenced. By contrast, even casual employees must complete an engagement once agreed.[116]

---

[113] Like in *Downey v New Zealand Greyhound Racing Association Inc* (2006) 3 NZELR 501 (EmpC) at [23]–[24], citing *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 695 and 696.

[114] Ang Cross at 200 **[[201.0200]]**; Abdurahman Cross at 434–435 **[[201.0440]]**; Rama Cross at 281 **[[201.0283]]**; Cross Examination of Mea'ole Hans James Keil dated 15 June 2022 ("**Keil Cross**") at 337–340 **[[201.0342]]**; and Foley Evidence at [8.22]–[8.44] **[[202.0481]]**.

[115] Foley Evidence at [8.36] **[[202.0484]]**.

[116] See *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 103, (2011) 9 NZELR 159 at [40]: "if an employee nurse is offered work on a shift and accepts, the employer can expect that the nurse will work that shift and the nurse can expect to retain the remuneration and other benefits of it, that is the end of those expectations unless and until there is express agreement on a further engagement". See also *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 at [37]–[40].

5.12 The Court of Appeal rightly accepted that the absence of any control exercised by the appellants when drivers are logged out is inconsistent with employment at those times.[117] It is submitted that factor is also relevant to a consideration of control when a driver logs on. It is the driver – not the appellants – who has the sole decision as to whether to log on at any time and then what to do while logged on (whether to opt in and accept trips). This is different from casual employees, who can be compelled to work for the agreed period. The Court of Appeal failed to consider this.

5.13 The Court of Appeal instead relied on a partial quotation from *Uber BV v Aslam*.[118] But the full passage went on to qualify that:[119]

> … where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status…

5.14 As the English Court of Appeal explained in *Windle v Secretary of State for Justice*:[120]

> … it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense.

(b) High degree of autonomy

5.15 Drivers exercise a high level of autonomy over their provision of transportation services — they choose when, where, for whom, and for how long they work.

5.16 Drivers choose where they work,[121] and "whatever route they, or their Rider, want to take".[122] Drivers can, and do, freely accept,

---

[117] CA Judgment at [221] **[[05.0063]]**.

[118] CA Judgment at [189] **[[05.0054]]**, citing *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at [91].

[119] *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at [91], citing *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721 at [23].

[120] *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721 at [23]; and *Quashie v Stringfellows Restaurant Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99 at [12] and [14].

[121] Foley Evidence at [8.41] **[[202.0485]]**; and Abdurahman Cross at 421–422 **[[201.0427]]**.

[122] Foley Evidence at [8.29] **[[202.0482]]**; and Keil Cross at 347 **[[201.0352]]**.

ignore, or reject trip requests.[123] They can even cancel a trip request at any time — both before they pick up the rider and after the trip has commenced.[124] The appellants do not control the hours drivers work,[125] nor is there an expectation for drivers to work regular hours.[126] Drivers provide their own equipment, including vehicles[127] and smartphones. Drivers can, and do, work for competitors.[128] All "fundamentally inconsistent with … an employment relationship".[129]

5.17 The contractors in *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* and *Chief of Defence Force v Ross-Taylor* had similarly high degrees of autonomy. They had freedom to choose hours;[130] to engage in work elsewhere;[131] and to accept or decline work.[132] Neither was found to be an employee. There is nothing material to distinguish the drivers from the contractors in those cases. As the Employment Court recognised in *Arachchige v Rasier New Zealand Ltd*, Uber has "very little control over the way in which" drivers carry out their transportation services.[133]

5.18 This contrasts with the lack of autonomy in cases where employment relationships have been found. In *Prasad v LSG Sky Chefs New Zealand Ltd*, the employer determined when and how work was

---

123 See trip rejection / cancellation statistics for the four drivers in Foley Evidence at [11.2]–[11.3] **[[202.0497]]**: Keil 5.11% until November 2018 (at [12.16(g)]) **[[202.0509]]** and 13% from December 2018 (at [12.26(g)]) **[[202.0525]]**; Rama 44.9% (at [13.19(c)]) **[[202.0536]]**; Ang 21.52% (at [14.19(c)]) **[[202.0550]]**; Abdurahman 34.27% (at [15.16(c)]) **[[202.0560]]**.

124 Foley Evidence at [8.24]–[8.27] **[[202.0481]]**; Ang Cross at 178 **[[201.0178]]**; and Abdurahman Cross at 436 **[[201.0442]]** and 441 **[[201.0447]]**.

125 The only exception is that a maximum number of hours are permitted per day, which is required to comply with s 30ZC of the Land Transport Act 1998: Foley Evidence at [8.33] **[[202.0483]]**.

126 Foley Evidence at [8.35]–[8.37] **[[202.0484]]**; and Abdurahman Cross at 432 **[[201.0438]]**. Compare cases where the individuals (found to be employees) had rostered or regular hours and / or fixed work: *Bryson*; *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413; *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395; and *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178.

127 Keil Cross at 351–353 **[[201.0356]]**.

128 See eg Foley Evidence at [8.42]–[8.44] **[[202.0485]]**; Evidence in Chief of Nureddin Mohamed Abdurahman dated 17 June 2022 ("**Abdurahman Evidence**") at [18] **[[201.0395]]**; Keil Cross at 355 **[[201.0360]]**; and Ang Cross at 223 **[[201.0223]]**.

129 *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2023] UKSC 43, [2024] ICR 189 at [72].

130 *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* [2015] NZEmpC 224 at [42]–[43] and *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232 at [34].

131 *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* [2015] NZEmpC 224 at [43] and *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232 at [43].

132 *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* [2015] NZEmpC 224 at [42]–[43] and *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232 at [34].

133 *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [54]. This approach is consistent with overseas decisions involving platforms, including Uber: see eg *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2023] UKSC 43, [2024] ICR 189 at [71]–[73]; *Lam v Doordash Technologies Australia Pty Ltd* [2023] FWC 1683 at [70] and [73]; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 at [47] and [50]; *Nawaz v Rasier Pacific Pty Ltd* [2022] FWC 1189, (2022) 317 IR 134 at [194]–[196]; *Gupta Portier Pacific Pty Ltd* [2020] FWCFB 1698, (2020) 296 IR 246 at [69]–[70]; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 at [36]–[37]; and *Gupta v Portier Pacific Pty Ltd* [2019] FWC 5008 at [87].

carried out and permission was required before time off.[134] In *Leota v Parcel Express Ltd*, there was a significant degree of direction and control in terms of when, where and how work was performed.[135]

(c) Structural features of the relationship

5.19 Rather than the above, the Court of Appeal focused its control analysis on three features of the relationship, namely: (i) minimum service standards; (ii) automated app systems; and (iii) the appellants' incentive schemes.

Minimum service standards

5.20 Drivers must meet certain minimum requirements to provide transportation services using the Uber platform, including in relation to the driver's vehicle, driving and behaviour.[136] The imposition of minimum standards is a commonplace feature of commercial arrangements and is not a useful indicator of employment status.

5.21 Some minimum standards are legal requirements, such as health and safety. The established position in the employment jurisdiction is that such requirements do not indicate a relevant kind of control.[137] Anyone providing or facilitating the provision of transportation services must do so in accordance with the applicable regulatory framework. The requirements for driver and vehicles licensing,[138] Transport Services Licences or the use of a "Logmate app",[139] and limits on the number of hours a driver can perform transportation services,[140] all exist for compliance with regulations. Those requirements cannot therefore indicate employment status as opposed to another kind of relationship.

---

134 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 at [78]–[79].

135 *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395 at [40]–[44] and [50].

136 Foley Evidence at [8.60]–[8.65] and [8.69] **[[202.0489]] [[202.0492]]**.

137 See *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232 at [34]–[35], where ongoing training requirements imposed by the Medical Council did not make a civil medical practitioner an employee and *Downey v New Zealand Greyhound Racing Association Inc* (2006) 3 NZELR 501 (EmpC) at [31], where the Employment Court cautioned not to confuse onerous statutory and regulatory functions of the stipendiary stewards with control. See also *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745 at [37]; *Matthews v Commissioner for Her Majesty's Revenue and Customs* [2012] UKUT 229 at [18]; *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156, (2022) 317 IR 253 at [51]; and *Nawaz v Rasier Pacific Pty Ltd* [2022] FWC 1189, (2022) 317 IR 134 at [193].

138 Foley Evidence at [8.9] **[[202.0478]]**.

139 Foley Evidence at [8.12]–[8.15] **[[202.0478]]**.

140 Foley Evidence at [8.33] **[[202.0483]]**.

5.22 Drivers are also required to follow general standards of behaviour pursuant to the Services Agreement and Community Guidelines, including requirements to:[141]

(a) "provide the Transportation Services with due skill, care and diligence";

(b) "maintain high standards of professionalism, service and courtesy"; and

(c) use a vehicle that is "suitable to operate as a passenger transportation vehicle" and "maintained in good operating condition, consistent with industry safety and maintenance standards".

5.23 Terms of this kind were included in the Services Agreement to "maintain the experience Riders and Driver have when they interact with each other".[142] They are "an integral part of maintaining the attractiveness, reliability, and safety" of the Uber platforms,[143] and are "in the best interests of all the platform's users".[144] These minimum standards are commonsense commercial terms that would be expected in any contract for services.[145]

Automated app systems

5.24 The Court of Appeal placed too much significance on logistical features of the Uber platforms, particularly the fare-setting system.[146] Any business exercises a degree of control in its external contractual relationships. Care must be taken not to conflate the reasonable enforcement of contractual rights with control indicative of an employment relationship.[147] Context matters. In *TNT Worldwide Express (NZ) Ltd v Cunningham*, the Court of Appeal

---

141 Services Agreement dated 1 December 2018, cl 6 **[[301.0233]]**; and Foley Evidence [8.61]–[8.62] **[[202.0489]]**.

142 Foley Evidence at [8.60] **[[202.0489]]**.

143 Foley Evidence at [8.63] **[[202.0490]]**.

144 Foley Evidence at [8.65] **[[202.0490]]**.

145 See eg *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 (EmpC) at [18], [40], [43] and [44]. See also *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156, (2022) 317 IR 253 at [46] and [47]; *Gupta v Portier Pacific Pty Ltd* [2020] FWCFB 1698, (2020) 296 IR 246 at [66]; *Lam v Doordash Technologies Australia Pty Ltd* [2023] FWC 1683 at [72]; and *Johnson v Transopco UK Ltd* [2022] EAT 6, [2022] ICR 691 at [82]–[83].

146 See eg CA Judgment at [192]–[193] **[[05.0054]]**.

147 *Johnson v Armer Farms (NI) Ltd* [2024] NZERA 576 at [33], where the respondents' ability to "step in" to the applicant's business and manage issues that arose was not "indicative of control as relevant to determining whether an employment relationship existed" but rather was "consistent with the contractual rights" it had under the parties' agreement.

confirmed that a degree of control may be "inevitable" and voluntarily assumed by both parties for the cohesive and efficient running of a business.[148] Subsequent employment cases have, rightly, treated this as established principle.[149]

5.25 A limited degree of coordination is inherent in the operation of the Uber platforms. Fares are indicated to riders on the rides app,[150] and are adjusted using "dynamic pricing" to accommodate shifts in supply and demand.[151] This is the efficient operation of a functional digital platform, not a tool designed to subordinate drivers to the appellants' control. No weight should be attributed to such features. The Court of Appeal erred in dismissing this context as "irrelevant".[152]

5.26 In any event, the Court of Appeal's focus on pricing was misplaced. A lack of control over pricing is not exclusively associated with employment. It is not uncommon for an independent contractor to have little bargaining power to set their own pricing or hourly rate.[153] A high degree of autonomy nonetheless remains possible within such a set price framework. For example, drivers can influence payment amount by waiting at an airport or in a surge pricing area.

5.27 The Court of Appeal also focused on basic functionality features common to many digital apps. For example, the driver app automatically logs out drivers if they do not accept three trips in a row — ie if the driver is inactive. Since March 2017, drivers have been able to go immediately back online by pressing one button.[154] This feature exists to ensure "the reliability of the Rider app and that

---

148 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 697–698 per Casey J, at 698 per Hardie Boys J.

149 See eg *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69, (2021) 18 NZELR 14 at [251]; *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [56]; *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 (EmpC) at [35]; and *Gupta v Portier Pacific Pty Ltd* [2019] FWC 5008 at [89].

150 Foley Evidence at [8.7] **[[202.0477]]**.

151 Foley Evidence at [8.46] **[[202.0486]]**.

152 CA Judgment at [223] **[[05.0064]]**.

153 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 693 ("the applicant was paid a guaranteed minimum amount each month or a figure related to a price per item delivered – whichever was the greater"); and *Downey v New Zealand Greyhound Racing Association Inc* (2006) 3 NZELR 501 (EmpC) at [28] ("reimbursement by way of a flat fee for the number of meetings attended"). See also *Rauhihi v Construction Labour Hire Ltd* [2021] NZERA 386 at [9] and [26] (set hourly rate); *Armstrong v Signature Homes Hawke's Bay Ltd* ERA Wellington, WA 146/10, 10 September 2010 at [7] (set commission); and *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 at [24] (set rate at which earnings accrued).

154 Foley Evidence at [8.39]–[8.40] **[[202.0484]]**, [12.29(b)] **[[202.0527]]**, [13.22] **[[202.0537]]** and 557–558 **[[202.0563]]**.

Trip requests [are] sent to Drivers who [are] actively online" and is intended for situations where a driver is "not actively intending to take Trips".[155] This is not a penalty for failing to accept trips. The impact of this feature on drivers approaches de minimis levels.

5.28 Viewed together, these features are a "necessary component" for the efficient running of the platforms,[156] and would have existed irrespective of whether the drivers were employees.[157] These elements of control are not useful indicators of employment.

Uber's incentive schemes

5.29 The Court of Appeal also emphasised the appellants' "incentives structures", which involve optional promotions for drivers;[158] drivers and riders voluntarily rating each other following trips;[159] and drivers voluntarily participating in a loyalty programme where they unlock benefits by completing trips and receiving acceptable ratings and reviews.[160] These incentives schemes make the Uber platforms more attractive to drivers in a competitive market.[161]

5.30 These schemes are optional. They provide drivers with the means to increase their profitability, by accepting promotions or obtaining greater information about trips. Of course, the appellants wish to encourage drivers to log on during periods of high demand,[162] and not to decline or cancel trips,[163] but that does not convert these incentives into a form of control that is indicative of an employment relationship.[164] An employer has no need to encourage employees in this manner — they could simply instruct them.[165]

---

155 Foley Evidence at [8.40] **[[202.0485]]** and [12.29(b)] **[[202.0527]]**.

156 *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69, (2021) 18 NZELR 14 at [251].

157 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 697 per Casey J; *Noble v Ballooning Canterbury.com Ltd* [2019] NZEmpC 98, (2019) 16 NZELR 850 at [113]; *Brunton v Garden City Helicopters* [2011] NZEmpC 29, [2011] ERNZ 504 at [70]–[71]; and *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232 at [35].

158 CA Judgment at [199]–[200] **[[05.0058]]**; and Foley Evidence at [8.58]–[8.59] **[[202.0489]]**.

159 Foley Evidence at [8.31]–[8.32] **[[202.0483]]**.

160 CA Judgment at [199] **[[05.0058]]**; and Foley Evidence at [8.67] **[[202.0492]]**.

161 Foley Evidence at [14.22(c)] **[[202.0551]]**.

162 Foley Evidence at 564–565 **[[202.0570]]**.

163 Foley Evidence at [8.39] **[[202.0484]]**.

164 As recognised in *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [56]; *Lam v Doordash Technologies Australia Pty Ltd* [2023] FWC 1683 at [72]; and *Nawaz v Rasier Pacific Pty Ltd* [2022] FWC 1189, (2022) 317 IR 134 at [190] and [222].

165 Compare *Barry v CI Builders Ltd* [2021] NZEmpC 82, (2021) 18 NZELR 249 at [26] and *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395 at [44].

Integration test

5.31 On both a structural and a presentational level, drivers are distinct from the Uber enterprise, not "part and parcel" of it.[166]

(a) Structural integration

5.32 Structurally, drivers have complete freedom to engage in transportation services (and other work) for other businesses, including competitors. They can do so even while logged into the Uber app.[167] That is the opposite of an integrated worker.

5.33 Multi-apping (where drivers are logged in to several platforms at once) is an example. The Court of Appeal disregarded Ms Foley's unchallenged evidence that "'[m]ulti-apping is also a common practice",[168] questioning how a driver could safely use a competitor's app while driving with Uber.[169] But it is simple enough, with the use of a hands-free set, to accept the next trip while driving. Whether the four drivers multi-apped is not the point — the fact it is *permitted* under the Services Agreement sheds light on the nature of the relationship.[170]

5.34 Drivers have no social connection with Uber. There is no social expectation for drivers to log on and they are not penalised for doing so infrequently or at inconvenient times.

(b) Presentational integration

5.35 Drivers do not wear uniforms or display Uber branding on their vehicles.[171] Nor are they required to present or behave in a distinctive manner beyond complying with basic Community Guidelines, such as to "treat everyone with respect" and "follow the law".[172] There is no corporate culture that distinguishes an "Uber

---

166 *Challenge Realty v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (CA) at 65, citing Adrian Merritt *'Control' v 'Economic Reality': Defining the Contract of Employment* (1982) 10 ABLR 105 at 118 and *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101 (CA) at 111 per Denning LJ.

167 Foley Evidence at [8.42]–[8.44] **[[202.0485]]**.

168 Foley Evidence at [8.43] **[[202.0485]]**.

169 CA Judgment at [195]–[196] **[[05.0057]]**.

170 See by analogy *FedEx Home Delivery v NLRB* 563 F 3d 492 (DC Cir 2009) at 498.

171 Ang Cross at 221 **[[201.0221]]**. Compare *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178; *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395; and *Atkinson v Phoenix Commercial Cleaners* [2015] NZEmpC 19, (2015) 12 NZELR 627.

172 Community Guidelines dated 28 March 2022 **[[303.1363]]**.

driver" from any other ridesharing or taxi driver.[173] That reflects, in part, the absence of any "interview, selection criteria, or other verification process" — ie any discretionary hiring process that would be typical of an employment relationship.[174]

(c) Flaws in the Court of Appeal's reasoning

5.36 The Court of Appeal correctly accepted that some of the above contraindications of integration were present.[175] However, it concluded instead that drivers are "integral to" the appellants' business because "without them, Uber would have no service to offer to the public".[176] That conclusion is flawed for two reasons.

5.37 First, no *individual* driver is essential to the operation of the appellants' business — it is a misapplication of s 6 to focus on all drivers as a collective. This is unlike cases where individuals (found to be employees) undertook managerial duties and were the "face" of the business;[177] or were described as the "eyes and ears" of the business and performed no work for any other business.[178] There are thousands of drivers in New Zealand, and the barriers to become a driver are low.[179]

5.38 Individual drivers are closer to the pilot in *Noble v Ballooning Canterbury.com* who was not considered "part and parcel" of the business for providing temporary pilot services only "when he was available".[180] Drivers also work only when they choose, so cannot be relied upon by Uber as integral parts of the business.

5.39 Second, even if a driver were essential, that is not determinative if their services "could be performed equally well by a contractor or an employee".[181] In *Chief of the Defence Force v Ross-Taylor*, this meant that while the civilian medical officer's services were essential

---

173 Compare CA Judgment at [225] **[[05.0064]]**; and EC Judgment at [66], finding that riders refer to drivers as "Uber drivers" **[[05.0111]]**.
174 Foley Evidence at [8.19] **[[202.0480]]**; and Ang Cross at 213–214 **[[201.0213]]**.
175 CA Judgment at [224] **[[05.0064]]**.
176 CA Judgment at [225] **[[05.0064]]**.
177 *Kidd v Beaumont* [2016] NZEmpC 158 at [71].
178 *Ferguson v Sounds of Forest Ltd* [2006] 1 ERNZ 343 (EmpC) at [70].
179 Foley Evidence at [8.8]–[8.19] **[[202.0477]]**.
180 *Noble v Ballooning Canterbury.com Ltd* [2019] NZEmpC 98, (2019) 16 NZELR 850 at [116].
181 *Brunton v Garden City Helicopters* [2011] NZEmpC 29, [2011] ERNZ 504 at [72] and *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232 at [39].

to the proper running of the hospital, it did not follow that she was integrated into the Defence Force.[182]

5.40 Similarly, in *Head v Chief Executive of Inland Revenue Department*, it was considered necessary to look beyond the essential nature of the individual's work to factors such as "the duration of the work, training and reporting requirements, and the practical operation of the business relationship agreed to by the parties".[183]

Fundamental test

5.41 The Court of Appeal correctly identified several factors[184] that indicate drivers are "in business on their own account"[185] but erroneously went on to disregard them. The vital consideration in the fundamental test is whether the individual has control over the profitability of their business, including revenues and expenses.[186] Drivers have control over both.

5.42 A helpful contrast is provided by the employee drivers in *Southern Taxis Ltd v Labour Inspector*, who did not have the freedom to increase earnings by: (i) increasing their hours; (ii) working a more lucrative period (eg Saturday night); or (iii) by changing where they worked (eg near train stations or supermarkets).[187] They did not own their own vehicles, so they had no control over the associated costs, including tax-deductible costs.[188] Nor were they responsible for income tax or GST.[189] The courier in *Leota v Parcel Express Ltd* faced similar constraints, including a restraint of trade, a branded vehicle and a full work day (and was not registered for GST).[190]

---

182 *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232 at [39].

183 *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69, (2021) 18 NZELR 14 at [260]–[262].

184 CA Judgment at [228] **[[05.0065]]**.

185 *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 (QB) at 184–185, cited in *Bryson* at [10].

186 *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [52]; *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413 at [101]-[108]; *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178 at [85]; *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* [2015] NZEmpC 224 at [44]; and *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232 at [41]. See also *FedEx Home Delivery v NLRB* 563 F 3d 492 (DC Cir 2009) at 498, where the United States Court of Appeals placed primacy on whether FedEx delivery drivers had "entrepreneurial opportunity". The focus was on whether entrepreneurial potential was offered to drivers, even where that potential was not pursued.

187 *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413 at [66(e)].

188 *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413 at [105].

189 *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413 at [106].

190 *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395 at [64] and [67]–[68].

5.43 By contrast, drivers using the Uber platforms have choice and flexibility over key business decisions:[191]

(a) While fares are determined by the appellants, drivers can maximise revenue by choosing to drive at peak times and / or in busy areas,[192] or by participating in the appellants' incentive schemes. They are paid by trip instead of in wages, allowing them to increase revenue by heightening the intensity of their work if desired. They must pay a services fee for use of the app, which is inconsistent with an employment relationship.[193]

(b) Drivers have complete autonomy over their business expenses, and can reduce their costs and tax obligations, for example, by choosing what equipment and resources to use (vehicle,[194] smartphone, phone plan, insurance, fuel and power). Drivers can share their vehicle to reduce costs.[195]

(c) Drivers can choose to drive using the Uber platforms or by using a competitor platform to find the best prices and nearest trips available.[196] Drivers can also capitalise on other work opportunities during times of low demand.

5.44 Each driver in this proceeding gave evidence of the flexibility they enjoyed around these business decisions. They chose when and where to drive based on passenger demand;[197] used Zoomy or Ola in conjunction with Uber;[198] purchased more suitable vehicles;[199] chose more suitable phones, data plans or insurance;[200] and

---

191 See similar findings in *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [49] and [52].

192 Foley Evidence at [8.46] **[[202.0486]]**; and Abdurahman Evidence at [19] **[[201.0395]]**.

193 Foley Evidence at [8.53]–[8.57] **[[202.0488]]**; and Services Agreement dated 1 December 2018, cl 10 **[[301.0234]]**. See *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156, (2022) 317 IR 253 at [50] (an administration fee was charged as a percentage of total fares for access to software and other services).

194 In Eats, "vehicles" can include cars, motorbikes or bicycles: Groeneveld Evidence at [11.10] **[[202.0720]]**.

195 *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [52].

196 Foley Evidence at [4.5] **[[202.0465]]**.

197 Mr Ang chose to drive during big events instead of taking massage bookings: Ang Cross at 193 **[[201.0193]]**. Mr Keil chose when to work when it would be financially advantageous: Keil Cross at 337–339 **[[201.0342]]**.

198 Mr Ang used Zoomy in conjunction with Uber: Ang Cross at 223 **[[201.0223]]**; Mr Keil used the Ola app in conjunction with the Uber app: Keil Cross at 355 **[[201.0360]]**; and Mr Abdurahman also drove for Ola: Abdurahman Evidence at [18] **[[201.0395]]**.

199 Mr Ang changed to a bigger car for airport trips: Ang Cross at 182 **[[201.0182]]** and 199 **[[201.0199]]**; Mr Keil changed cars to reduce expenses and changed services offered: Keil Evidence at [72] **[[201.0318]]**; and Keil Cross at 351–352 **[[201.0356]]**.

200 Mr Ang made decisions regarding insurance, fuel, and smart phone: Ang Cross at 208-209 and 225 **[[201.0208]] [[201.0225]]**; Mr Keil made choices regarding his smart phone: Keil Cross at 353–354 **[[201.0358]]**; and Mr Abdurahman made choices around insurance, a smart phone, a data plan: Abdurahman Cross at 419–420 **[[201.0425]]**.

combined other work in their off time.[201] Mr Abdurahman even had another driver who used his transport services licence.[202] The drivers paid their own taxes.[203]

5.45 The drivers had complete discretion to structure their incomes with a portfolio of different earning opportunities and manage their expenses as they saw fit. This strongly indicates that drivers operate their own businesses.[204]

5.46 The courts below underappreciated the significance of vehicle and phone expenses.[205] That such assets are commonly owned for personal use does not detract from the need to manage the *additional* expenses incurred in their use when driving for income, or the decisions made about those assets for business (rather than personal) reasons.[206]

5.47 The Court of Appeal also erred in finding that drivers cannot "be said to be carrying on transport service businesses on their own account" because they cannot "establish any business goodwill of their own".[207] That is not the only indication of whether someone is not an employee.[208] Non-employees are a broad category, and limited ability to build a separate customer base does not make someone an employee.[209]

---

201 Mr Rama chose when to work based around employment as a chef and custody of his child: Rama Cross at 278–283 **[[201.0280]]**. Mr Ang chose to drive during big events instead of taking massage bookings: Ang Cross at 193 **[[201.0193]]**.

202 Abdurahman Cross at 410–411 **[[201.0416]]**.

203 Mr Ang did his own taxes for his massage and Uber work: Ang Cross at 202–203 **[[201.0202]]**. Mr Keil used an accountant for his taxes: Keil Cross at 380 **[[201.0385]]**.

204 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 697 per Casey J; and *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [52].

205 CA Judgment at [232] **[[05.0066]]**; and EC Judgment at [68]–[69] **[[05.0112]]**.

206 The significance of an individual providing equipment for the task was emphasised in *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 697 per Casey J and 700 per Hardie Boys J; *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, (2020) 17 NZELR 794 at [52]; *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395 at [69]: "the fact that the worker has provided expensive equipment such as a van has been held to be a significant indicator that the worker was in business on their own account". See also *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156, (2022) 317 IR 253 at [48]; and *Lam v Doordash Technologies Australia Pty Ltd* [2023] FWC 1683 at [81]–[83], citing *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, (2022) 275 CLR 254 at [88]. Mr Ang chose to provide a bigger car for airport trips: Ang Cross at 182 **[[201.0182]]** and 199 **[[201.0199]]**; and Mr Keil chose to provide a car that had low running costs: Keil Evidence at [72] **[[201.0318]]** and Keil Cross at 351–352 **[[201.0356]]**.

207 CA Judgment at [234] **[[05.0067]]**.

208 See *Nawaz v Rasier Pacific Pty Ltd* [2022] FWC 1189, (2022) 317 IR 134 at [51] ("The notion of the generation of goodwill by the worker is not necessarily relevant or decisive"), citing *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, (2022) 275 CLR 254 at [58].

209 See eg *Armstrong v Signature Homes Hawke's Bay Ltd* ERA Wellington, WA 146/10, 10 September 2010 at [30]; *Rauhihi v Construction Labour Hire Ltd* [2021] NZERA 386 at [85]–[89]; *Mishriki v Fono Trust* [2022] NZERA 444 at [48]; and *Jacobs v Fincare* [2022] NZERA 624 at [37].

5.48 Operators in some industries, by nature of the "niche in the market occupied by those (operators)", do not generate goodwill.[210] Modern passenger transport drivers can access the customer bases of several digital platforms at will, so have no need for their own customer bases. Imposing an artificial goodwill requirement to users of essentially anonymous transportation services platforms, as the Court of Appeal did, would effectively preclude non-employment relationships in this industry.

Stepping back

5.49 While the intention of the parties and the common law tests are essential considerations, the ultimate question for this Court is what is the "real nature of the relationship" between the four drivers and the appellants. Answering that question is assisted by a cross-check of looking globally at the relationship.

5.50 The drivers chose whether to work, and if they did, when, where and for how long. They provided all required equipment, including a vehicle. They were not paid in wages. They worked for competitors whenever they chose. The only significant thing the appellants determined was the pricing algorithm, but if drivers did not like a price, they could decide to not accept a trip, cancel a trip while it was underway, or log off altogether. That is not an employment relationship.

Dated 26 March 2025

P F Wicks KC | K M Dunn | N L Walker | J A Tocher
Counsel for the appellants

We certify that the submissions do not contain any information that is suppressed and the submissions are suitable for publication.

[210] *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, (2022) 275 CLR 254 at [58]. See also *Gupta v Portier Pacific Pty Ltd* [2020] FWCFB 1698, (2020) 296 IR 246 at [68]; *Nawaz v Rasier Pacific Pty Ltd* [2022] FWC 1189, (2022) 317 IR 134 at [51] and [207]; and *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 at [26]–[28] where, in the context of the Uber business, the drivers' lack of goodwill was not determinative.