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

RESPONDENTS' WRITTEN SYNOPSIS
16 April 2025

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May it please the Court

I SUMMARY OF ARGUMENT

1. The driver terms describe the relationship in manner consistent with Uber's preferred view.

2. The terms do not however reflect the real nature of the relationship.

3. When all relevant matters are considered (including statements of the persons that describe the nature of the relationship; matters that indicate the intention of the persons; and divergences from and supplementation of the terms and conditions apparent from the way in which the relationship works in practice), the conclusion is clear.

4. The drivers are employees because they are controlled by Uber; and integrated into Uber; and are not in business on their own account.

5. The Employment Court was right to conclude that s6 has a broader role than that identified by Uber.

II NARRATIVE OF FACTS

6. Uber uses unique language to describe facts but using more conventional descriptors the facts are as follows.

7. Mr Ang registered with Uber on 23 July 2016 and commenced work on 25 August 2016. He completed 6,250 trips[1] and ceased Uber work on 17 November 2018.

8. Mr Keil registered with Uber on 12 February 2017 and commenced work on 27 February 2017. He completed 19,991 trips[2] and ceased Uber work on 27 January 2022 (after a stroke).

9. Mr Rama registered with Uber on 22 December 2018 and commenced work on 18 July 2019. He completed before 20 May 2022 3,226 trips[3]. He also completed 35 Uber Eats deliveries[4] during the Covid shutdown. He is still an Uber driver.

10. Mr Abdurahman registered with Uber on 14 June 2020 and commenced work on 8 October 2020. He completed 1,885 trips[5] and ceased Uber work on 17 February 2022.

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[1] The detail of each trip is recorded in a worker-specific spreadsheet. This is explained at para 142-144 below [[302.0915]]
[2] See above [[301.0013]]
[3] See above [[302.0612]]
[4] See above [[302.0612]]
[5] See above [[303.1189]]

11. All clicked or signed the various documents which Uber required.

12. All are part of a proceeding seeking minimum entitlements current underway in the Employment Relations Authority (involving more than 1,000 Uber drivers who are members of the second respondent). The second respondent has also initiated collective bargaining with Uber but that has not progressed pending this proceeding being resolved

III SECTION 6

13. Section 6 is not a complex provision. It requires that the Court, in deciding whether a person is employed by another person under a contract of service, must determine the real nature of the relationship between them (s6(2)).

14. The Court must consider all relevant matters, including any matters that indicate the intention of the persons (s6(3)(a)). The Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship (s6(3)(b)).

15. The consideration required by s6(3)(a) and (b) is undertaken "for the purposes of subsection (2)", that is, to "determine the real nature of the relationship".

IV *BRYSON v THREE FOOT SIX LIMITED* [6]

16. The Employment Court in *Bryson v Three Foot Six Limited*[7] (at [19]) set out a list summarising the principles followed by that Court in earlier cases. applying s6. This Court expressly endorsed the list subsequently when the matter reached the Supreme Court ([32] line 37), calling it "an accurate statement of what the Court must do, [which] lists the matters which are relevant": see [32] line 37.

17. One item on the list was the statement that "The intention of the parties is still relevant but no longer decisive".

18. The Supreme Court at [32] concluded that all relevant matters must be considered including (i) the written and oral terms of the contract; (ii) any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice; (iii) the way in which the parties have actually behaved in implementing their contract and (iv) equally, the features of control and integration and the

[6] [2005] 3 NZLR 721
[7] *Bryson v Three Foot Six* (2003) 2 NZELR 105.

fundamental test, that is, the "important determinants of the relationship at common law".

19. The Supreme Court emphasised that how the persons' relationship operates in practice is "crucial" to a determination of its real nature.

20. The Supreme Court stated ([32] line 33):

> It is not until the Court or authority has examined the terms and conditions of the contract, and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests.

21. This approach was followed by the Court of Appeal in this case, which sets out the same separation between what is classified (the agreement between the parties) and the criteria for classification (the common law tests).[8]

22. The *Bryson* Court also referred to *TNT Worldwide Express (NZ) Ltd v Cunningham,*[9] emphasising that "the importance, stressed in *TNT*, of analysing the contractual rights and obligations".

23. In *TNT* the Court of Appeal had stated (emphasis added):

> The proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates, and not by the label the parties put on it …In the end it is the effect of the contract as a whole which must determine its proper classification. (per McKay J at 699 line 48).
>
> I set out here clause 7, although being a mere label it is in itself of little or no importance (see Ferguson v John Dawson & Partners (Contractors) Limited [1976] 3 All E R 817… (per Cooke P at 684 line 28).
>
> The fact that in the written contract they declared that Mr Cunningham was an independent contractor and not an employee is not determinative (per Robertson J at 701 line 13).

24. These passages are in turn reflected at [99] of the Court of Appeal's judgment here (last sentence).

V INTENTION AND LABELS

25. The meaning of the phrase "the intention of the persons" in s6(3)(a) is "the persons' intention" (that is, common intention). This is to be ascertained objectively. [10]

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[8] CA [98].

[9] [1993] 3 NZLR 681 (CA).

[10] *Bryson* [20] line 35. In the Court of Appeal, Uber accepted that "the focus should be on the parties' common intention" (see [74]).

26. Since *Bryson*, it is clear that the phrase "statement by the persons" in s6(3)(b) includes terms in their contract.

27. Such statements by the persons could include any agreement by the parties to mislabel the relationship; or any agreement by them to apply or attempt to apply an accurate label. In either or any such case, the statement cannot be treated as "a determining matter". This approach also reflects the common law.[11]

28. Mis-labelling terms could be consensual or accidental; or could simply reflect the method by which any document is concluded or the power relationship.[12]

29. One example of the latter is evident in an Uber declaration issued on 1 March 2021 (after Mr Rama has ceased to do Uber Eats work). An Uber communication to hundreds of Uber Eats workers stated ([[302.0821]]):

> Previously you were engaged by the restaurant to undertake deliveries. Under the new agreement, you will be engaging directly with Portier New Zealand Limited (an Uber entity) to provide delivery services to customers under a subcontract with Uber Eats. Access to the app will still be provided by Uber Portier BV

30. Another labelling scenario possibility is referred to in *Uber BV v Aslam*[13]. The Court referred to "parties … bind[ing] themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue".

31. In such cases, signing parties can subsequently be estopped from asserting a different relationship to that contained in the label. Such arrangements are legally ineffective under employment law in most jurisdictions.[14]

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[11] See *TNT* (CA)– passages referred to above at paragraph [23].
Enterprise Cars Limited v CIR [1988] 11 TRNZ 768 at 774 line 47
Simpson v Geary (1921) NZLR 285 at p289 (followed in *Enterprise Cars* at 774).
Massey v Crown Life Insurance Co [1978] 2 All ER 576; 1 WLR 676 at 679
Narich Pty Ltd v Commissioner of Pay-roll Tax (1983) 2 NSWLR 597 at 601
Re Securitibank Ltd (No 2) [1978] 2 NZLR 136 at 167
Challenge Realty v CIR [1990] 3 NZLR 42 at 59 (HC) at 55 line 20 – 56 line 7.
Challenge Realty v CIR [1990] 3 NZLR 58 at 59 (CA) at 60.
Autoclenz v Belcher [2011] 4 All ER 745 at [21] et seq
See also *Aslam*; and the other cases decided in real nature jurisdictions listed at footnote 17

[12] See judgment CA at [103] and [104]; also *Aslam* at [76] and *Autoclenz* at [34]

[13] [2021] 4 All ER 209 at [82].

[14] See Employment Relations Act s238 "The provisions of this Act have effect despite any provision to the contrary in any contract or agreement". The consensus does not include Australia: see paras 171 - 176 below.

32. In *Aslam*, the Court referred to *Autoclenz Limited v Belcher*[15], in which the Unite Kingdom Supreme Court had stated that the ordinary rules of contract (such as the parol evidence rule and the signature rule[16]) did not apply to determining the real nature of the relationship in employment cases.

33. In this case Uber expressly accepted in the Court of Appeal that "the labels in the agreements between Uber and the drivers do not determine the case" and that "those labels can be put to one side" (CA [71])

34. Uber argued that the correct approach was to "take as a starting point the agreements between Uber and the drivers, and the substantive rights and obligations for which those agreements provided" (CA [72]).

35. Uber argued that "the Court should identify the parties' mutual rights and obligations as a matter of reality and ask whether those rights and obligations are consistent with the rights and obligations that are characteristic of a contract of service" (CA [72]).

36. Uber emphasised that the purpose of s 6(2) is to prevent form from trumping substance by stopping employers from labelling individuals as contractors, so as to avoid responsibility for employee rights such as holiday pay and minimum wages. Section 9(2) was said by Uber to be an anti-avoidance provision which underscored the need to focus on the parties' mutual rights and obligations as a matter of reality (CA [73]).

37. Uber accepted that "common intention should be inferred from objectively ascertained facts known to both parties" (CA [74]).

38. Uber "accepted that the provisions in the agreements to the effect that the drivers are not employees should be put to one side" (CA [127]).

39. Uber also made submission about a core pillar of the driver terms, namely their assertion that drivers provide services only to riders. This theory had been rejected by the United Kingdom Supreme Court in *Aslam*, and by many other Courts.[17] Uber made the same submissions in those cases as were made and rejected in the Employment Court here.

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[15] [2011] UKSC 41

[16] This refers to the rule that parties are ordinarily bound by written terms even if they are not read (*L'Estrange v F Graucob Ltd* [1934] 2 KB 393; see *Autoclenz* at 20-28.

[17] *Federatie Nederlandse Vakbeweging (FNV) v Uber BV* [2021] Court of Amsterdam No 8937120 CV EXPL 20-22882 at [19]–[20];

40. The matter is dealt with directly *Uber France and Uber BV (Cours de Cassation)* the Court referred to the asserted status of the drivers as independent workers as "fictitious" (at paragraph 15). The same conclusions were made in other Courts (see footnote 17 below).

41. In the Court of Appeal here, Uber disclaimed the argument it had made in the Employment Court that drivers provide no services to Uber and instead "accepted that drivers provide services to Uber" (CA [180] and [185] last sentence). This particular concession was an acceptance that many of the written terms were not real.

42. These concessions (rightly made) are a significant part of the context of this appeal.

43. As the Court stated in *FNV* at paragraph 34 (emphasis added):[18]

> … parties have only agreed 'on paper' that the drivers will work as independent entrepreneurs. It is possible that (some of) the drivers actually intended to do so. Given the circumstances, however, this intention must - to a great extent - be put into perspective now that it will be mainly motivated by the desire to work for Uber, the significantly stronger party in economic terms. As discussed above, the configurations of the system construed by Uber means that the actual performance contains all the features of an employment contract. In that case, 'reality' has precedence over 'semblance', and in view of the mandatory nature of Dutch labour law, and to protect the weaker position of the worker, it is necessary to look beyond the phrasing chosen in the contract.

VI EMPLOYMENT COURT

44. The Employment Court and the Court of Appeal came to a common conclusion but by different routes.

45. The Employment Court reached the same broad conclusions as the Supreme Court in *Aslam*[19] and the various other Courts mentioned at footnote 17.

Uber Switzerland GmbH v Office Cantonal de l'Emploi du canton de Genève [2022] Federal Supreme Court 2C_575/2020 at [6.7];

Uber Switzerland GmbH v Service de police du commerce et de lutte contre le travail au noir [2022] Federal Supreme Court 2C_34/2021 at [10.1]–[10.9];

Cour de Cassation, Ruling no. 374 of 4 March 2020 (Appeal no. 19-13.316) — *Uber France and Uber BV* at [15];

Case C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain* SL [2017] ECLI:EU:C:2017:981 at [40] (European Court of Justice).

[18] Footnote 17 above.

[19] [2021] 4 All ER 209

46. In the Employment Court, Uber had submitted that the drivers did not provide any services to Uber. As mentioned Uber changed its position on this point in the Court of Appeal, accepting that drivers *did* provide services to Uber.[20]

47. The Employment Court (i) accepted that the contractual documents bore the meanings contended for by Uber and (ii) concluded that how the relationship operated in practice painted a different picture. These conclusions were also reached by the Court of Appeal.

48. The Employment Court used the term "vulnerable". However most of the discussion of that topic (EC [7] to [17]) was a response to an Uber submission recorded at paragraph EC [6], to the effect that s6:

> "… was simply designed to ensure that traditional employees are not deliberately mis-categorised as independent contractors…".

49. The Employment Court's comments were directed to that jurisdictional argument, not to whether the drivers were employees.

50. Importantly the Employment Court also addressed changing work. It considered that the absence of traditional hallmarks of employment do not negate the existence of employment relationships. The Court also considered s6 had a broader function than that identified by Uber, and should be applied to new types of work arrangements.

VII THE COURT OF APPEAL

(a) Summary of judgment

51. After identifying a number of errors made by the Employment Court (CA [13] to [136]), the Court of Appeal proceeded to determine the matter itself (CA [138] to [235]).

52. The Court considered the driver terms at [143] – [177]. Like the Employment Court, the Court of Appeal concluded the terms reflected Uber's preferred view as to Uber/driver/rider relationships (that is that the drivers worked for the riders and Uber was merely a facilitator).

53. The Court of Appeal then considered the way in which the agreements operated in practice.

54. Like the Employment Court, the Court of Appeal concluded the written terms did not reflect the realities of the relationship (CA [178] – [204]). The Court stated (at [204]) (emphasis added):

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[20] See [180]; [183] last sentence [185] last sentence.

> although the driver agreement has been crafted to avoid the appearance of an employment relationship, many of the provisions designed to point away from employee status are window-dressing

55. The phrase "window-dressing" was also used by the United Kingdom Supreme Court in *Autoclenz v Belcher.*[21]

56. The Court of Appeal referred to high levels of Uber control over all aspects of the drivers' work (CA [204] and [218](a) and (b)).

57. The Court considered industry practice at CA [205] to [208] and found it did not assist. Each platform must be examined separately with "careful attention to the relevant contractual arrangements and how those arrangement operate in reality" (CA [208] last sentence).

58. The Court then considered all relevant matters that indicate the intention of the parties (at CA [209] – [219]). The relevant intention was objective common intention, as Uber itself had accepted in argument.[22].

59. The Court of Appeal then applied the control, integration and fundamental tests, and concluded the drivers were employees.

60. These matters are now described in more detail below.

(b) Written Terms

61. The Court of Appeal first considered the written terms, focusing on the driver agreement (CA [143] -[177]). There was no particular controversy between the parties about the meaning of most of those terms, which the Court summarised correctly at CA [175] – [177].

62. The Court of Appeal concluded that the terms reflect Uber's preferred view:

    a. Uber provides services to drivers (a licence to use the app, lead generation services and payment handling services);

    b. the drivers pay Uber for the services;

    c. drivers do not provide transportation services to Uber;

    d. drivers are not paid by Uber;

    e. drivers provide transportation services to riders;

    f. riders pay the driver (through Uber as an intermediary);

[21] [2011] 4 All ER 745.
[22] See CA [74].

g. these is a contract between the driver and a rider, formed when a ride is accepted by the driver;

h. under the contract the driver provides services to the rider, and the rider agrees to pay the driver for the services;

i. no work is done for Uber for "hire or reward";

j. a driver has no obligation to provide services to Uber; or to provide services at any particular place or time;

k. a driver decides whether to accept ride requests and whether to cancel rides (subject to "Community Guidelines");

l. rides can be cancelled even after acceptance.

63. The Court then posed this question:

> [178] … can these aspects of the driver agreement be taken at face value? Or are they to a significant extent window-dressing, and inconsistent with the realities of the relationship, as the four drivers contend?

(c) How the terms work in practice – divergences or supplementation

64. The Court of Appeal then dealt with how the terms operate in practice. The Court was obliged (following *Bryson* at [32]) to examine "any divergences from or supplementation of [written and oral] terms and conditions which are apparent from the way in which the relationship has worked in practice".

65. The Court did this at [179] – [205], noting at the commencement of its discussion that Uber had now conceded that the drivers provide services to Uber. As the Court stated, the concession was realistic and consistent with findings made by the Chief Judge, and British, Dutch, Swiss, French and European Courts (see footnote 17 above).

66. The Court of Appeal concluded (i) the drivers contract with Uber to provide transportation services to Uber[23] (ii) the flexibility of fares in the driver terms is "fiction" and fares are in reality determined solely by Uber[24] (iii) all adjustments to fares are determined by Uber (to reflect matters such as departure from the Uber route or a vehicle soiling)[25] (iv) Uber determines the fees charged to the driver, and (v) Uber unilaterally determines the portion of the rider fee ultimately received by the driver.[26]

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[23] CA [184]
[24] CA [184]
[25] CA [184]
[26] CA [184]

67. The Court of Appeal concluded that the suggestion in the driver terms that Uber is merely a payment intermediary (rider to driver) is "... not consistent with the realities of the relationship" (CA [185]). Further, Uber does make payments to drivers directly including for providing services pursuant to promotions. The Court stated these:[27]

> "…reflect the reality (acknowledged by Mr Wicks) that drivers contract with Uber to provide transportation services to riders".

68. The Court concluded that the driver term which states "Uber shall not be deemed to control or direct" is window-dressing, and that s6 required that the facts be examined as a matter of reality (and "cannot be altered by a deeming provision of this kind").[28] Every aspect of the driver/rider relationship is determined by Uber; and if there is a driver/rider "contract", it is Uber which sets and can vary every term. Uber also solely determines how any driver/rider "agreement" applies in practice in the event of differences or arguments including about routes.[29]

69. The Court then tested the driver terms' claim of "flexibility" against the reality. It is genuine flexibility. The Court noted however that flexible arrangements are common-place, and their existence does not negate employment status. The Court referred to *Aslam* at [91], with approval, which had concluded that even if a worker is entirely free to work or not, that does "not preclude a finding that the person is … an employee, at the times he or she is working".[30]

70. The driver terms suggest that a logged-on driver has freedom to accept or reject rides (or to cancel a ride after commencement). The reality of the relationship "differs materially from what the driver agreement provides" as a result of a "system of incentives and sanctions applied by Uber".[31] The system is described in detail at CA [192].

71. The driver terms refer to drivers being free to choose a route and determine other facets of the service to riders. The Court of Appeal considered the reality is different. There are express standards as to vehicles as well as "skill, care and diligence" obligations; and express obligations of

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[27] CA [185]
[28] CA [186]
[29] CA [187]
[30] CA [189]
[31] CA [192]

"professionalism, service and courtesy".[32] Uber determines the pickup point, and the number of (unpaid) waiting minutes after arrival. Uber fixes the fare based on a route "recommended" by Uber. Uber records each driver's location at all times and uses that information when reviewing a route taken. The fare can be adjusted at Uber's discretion for "significant" route variations from the estimated route (decided by Uber). Uber controls all fare reviews; determines fare variations for "surge pricing"; determines calculation of fees, wait times, cleaning fees and fees for returning lost items. [33]

72. The Court concluded the "right" to multi-apping in the driver terms was a theoretical one not a reality. It does not and cannot happen in practice.[34]

73. The Court concluded Uber's "rating" system is used to exercise control over drivers and is "an internal tool for managing performance". It adopted the views of the *Aslam* Court, namely that such monitoring of performance in this way was "a classic form of subordination that is characteristic of employment relationships" (per Lord Leggat at [88]).

74. The Court also referred with approval to the *Aslam* Court's conclusion that Uber's service is:[35]

> "…very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill"

75. The Court examined the incentive schemes, through which Uber exercises control.[36] It referred back to its description of the schemes at [37] of its judgment. The Court concluded that "control is exercised through a contractual framework of variable entitlements that materially affect the remuneration received by the worker".[37]

76. The Court concluded this section by endorsing the Employment Court's views, stating that flexibility and choice portrayed by the driver terms is "largely illusory". The Court endorsed the conclusion that the model works

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[32] CA [193](b) – breaches can lead to termination.
[33] CA [193]
[34] CA [194]-[196]
[35] *Aslam* [100]
[36] CA [199][37]
[37] CA [202].

by effectively increasing control and subordination, including psychological impact.[38]

77. The Court stated the real nature of the relationship is such that although the driver terms had been crafted to avoid the appearance of an employment relationship, many of the provisions pointing away from such a relationship are window-dressing. The Court concluded the provisions do not reflect the reality of the relationship ("any more than that labels Mr Wicks agreed we should disregard").[39] Uber structures the overall relationship and has reserved to itself powers of unilateral control over (i) various documents with contractual force and (ii) day-to-day operations "in a manner and to an extent that render ineffective many of the rights that appear to be reserved to drivers on the face of the agreement".[40]

(d) The parties' intention

78. After considering driver agreement and how the relationship works in practice, the Court of Appeal looked at "the parties' intention" (CA [209] to [219]). The Court did not find evidence of subjective intention helpful. It considered that the exclusion of employment status at clause 28 of the driver terms was not determinative "as section 6(3)(b) confirms". The Court noted that "Mr Wicks did not seek to argue otherwise".[41]

79. The Court examined the driver terms for indications of intention. It commented that the clauses excluding employment status are not determinative and can be put to one side (as Uber suggested).

80. The Court did however find assistance as to indications of common intention in numerous *other* provisions of the driver terms, identified at CA [218](a) and (b).

81. Those were the provisions that (i) preclude drivers from making any meaningful decisions about the terms on which they provide services to riders (ii) preclude them from differentiating their services in a way that influences rider decisions; (iii) from establishing any form of direct relationship with riders, and thus from building up any form of personal business goodwill while driving for Uber.

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[38] CA [203]
[39] CA [204] line 5.
[40] CA [204]
[41] CA [213]

82. The Court also found assistance in the provisions that reserve a high level of unilateral control to Uber over (i) the terms on which Uber deals with drivers; (ii) the terms on which drivers provide services to riders; and (iii) over the actual terms of the driver agreement itself.

83. The Court referred to Uber's control over supplementary agreements and addenda (which it can simply promulgate and which override contrary agreement terms); over fares; over fees debited to drivers by way of deductions from fares; over policies including the Community Guidelines with which drivers are required to comply when providing services; and over what information is provided to drivers about the rides offered to them before the ride begins.

(e) Common Law Tests

84. The Court stated that the above indications of common intention provided by the written terms were "very relevant" to the application of the common law tests - control, integration and fundamental tests – to which it turned.

(f) Control

85. The Court concluded that Uber has "some control" over when and where drivers log in, through various incentive structures; but a driver has a high level of control over whether to drive and when and where.

86. However Uber has a high level of control once a driver is logged in. Uber controls every facet of the manner in which the driver provides services to the rider, and all matters relating to payment for those services (CA [222] – [223]).

(g) Integration

87. The Court of Appeal considered some standard indicia of integration are absent – uniforms, signage and a common workplace. Equipment is provided by the driver, not Uber. There is no obligation to work at any particular time and place.

88. However the Court commented that the core of Uber's business is to make available to riders a "substantially homogenous passenger transport service".[42] The only persons who work for Uber in New Zealand are the 6,000 drivers, apart from one part-time publicist. As far as the public are

[42] See also *Aslam* [101].

concerned the drivers are "the only tangible manifestation" of Uber in New Zealand.

(h) Fundamental Test

89. The Court considered the most illuminating test is the fundamental test, which supported a finding of employment. Focusing on realities and not form, the drivers are not in business on their own account. Uber determines all terms, addenda and policies (and modifies them unilaterally). Uber has full control of the terms on which the service is provided including performance standards and pricing and complaints. The driver terms are personal and non-transferable.

90. The Court of Appeal commented that the drivers cannot establish goodwill; cannot influence the quantity of work they receive; cannot influence revenue except as determined by Uber; and have no opportunity or ability to bargain with Uber. The Court concluded that the drivers cannot in reality be said to be in carrying on a transport business on their own account while providing services to persons referred to them by Uber for remuneration determined by Uber, and while subject to control and direction by Uber.

VIII THE CATEGORISATION TERM – CLAUSE 28

91. In this Court, Uber seeks to reverse the positions it conceded in the Court of Appeal as to labels. It is therefore appropriate to address the main label (clause 28).

92. The Court of Appeal concluded that the clause 28 label did not reflect the realities.[43]

93. Uber has now submitted clause 28 is "an express agreement that the status of their relationship is not one of employment" – submission 5.2.

94. However the clause can only be construed objectively having regard to its context, some of which is referred to by the Court of Appeal. This includes (i) unilateral drafting and a take it or leave approach (ii) an online contract (iii) superior Uber bargaining power (iv) a standard form agreement (v) an agreement accepted without bargaining (vi) an agreement signed un-read and (vi) a complex and sophisticated self-serving legal format.

95. Clause 28 contains about 10 words denying the existence of an employment relationship, and about 370 words which spell out dire consequences for a

[43] CA [204]

driver if he or she seeks to exercise employment rights or is held to be an employee or a worker.

96. The best interpretation of the clause seems to be that it is an agreement to protect Uber from the consequences of an employment relationship being found by a third party, and to impose severe economic consequences on drivers in that circumstance. Another interpretation is that the clause is a mislabelling of the type referred to in *Aslam*.

97. The clause is not an accurate description of "real nature" at all and is not objectively intended to be. Indeed the clause seems to anticipate that there is or may well be an employment or worker relationship, and in that circumstance it is necessary to make provision for the consequences in a way which shifts liability to the driver.

98. This interpretation is supported by a reading of the contract as a whole, including and in particular the matters referred to at [218] of the Court of Appeal's judgment (see paragraphs 80 - 83 above).

99. Such clauses have no legal effect in the employment law setting (see *Aslam* at [82] and paragraphs 30 and 31 above). When clause 28 is construed "for the purposes of [s6(2)]" as the statute requires, it can never be a reliable indicator of either intention or real nature.

100. In circumstances where one party has the contractual right to change even the characterisation at will and has done so (see paragraph 29 above), the best interpretation of clause 28 read with clause 31 may well be that a driver is what Uber decides he or she is.

101. Against the above background, the respondents will now address Uber's written submission.

102. To assist the Court the respondents identify various issues and the location of some relevant evidence. In each case core documents are readily accessible by hyperlink, linked to the transcript of oral evidence.

Terms and conditions	[[201.0008]]
Behaviour and work	[[201.0008]] – [[201.0011]]
Allocation of work	[[201-0011]] – [[201.0012]]
Fares and fees	[[201.0012]] – [[201.0018]]
Earnings and promotions	[[201.0018]] – [[201.0024]]
Method of payment	[[201.0024]]
Work methods	[[201.0024]] – [[201.0028]]
Performance management	[[201.0028]] – [[201.0037]]
Employment indications	[[201.0037]] – [[201.0044]]
Integration of rides/eats	[[201.0044]] – [[201.0053]]
Standardisation	[[201.0056]]

103. The core documents include binding detailed policies and procedures described in evidence dealing with lost items (see [[201.0009]] – [[201.0010]]); face coverings ([[201.0010]]); airport access ([[201.0011]]); job allocation ([[202.0011]] – [[201.0012]]); fares and fees ([[201.0012]][- [[201.0022]]); setting of fee component in time and distance ([[304.1548]]); upfront fares ([[302.065]]); the disciplinary system (see [[201.0030]] line 27 - [[201.0033]]), the passenger rating system (Community Guidelines [[303.1094]]; and [[201.0029]] – [[201.0030]]), the three-strikes warning system ([[201.0032]] line 4 – 22 (passenger) and [[201.0034]] line 26 – 32 (food), post-termination reinstatement processes ([[201.0034]] – [[201.0035]]), various incentives schemes ([[201.0023]] and [[201.0043]], [[302.0788]]; [[302.0854]]), and many more.

IX UBER'S SUBMISSIONS IN THIS COURT

104. The submissions made are that the Court of Appeal (i) assessed the "wrong intention" and should have given more weight to labels (ii) wrongly discounted subjective evidence of intention and (iii) took the wrong approach to the control, integration and the fundamental test.

105. The <u>first submission</u> is that the Court of Appeal assessed the "wrong intention" by not focussing on the parties' intention about how their agreement was to be classified. There is nothing in this point.

106. As stated Uber conceded that the driver terms do not reflect the real nature of the relationship. The terms are based on a view that drivers provide no services to Uber. This is incorrect, as many Courts have stated. Mr Wicks accepted this in the Court of Appeal and his concession was entirely "realistic".

107. The submission now made however is based on the view that the drivers *do not* provide services to Uber. Clause 28 is consistent with this theory; but it provides no reliable "indication of the intention of the persons".

108. The same can be said about the assertion that the Court should have given greater weight to labels as "statements by the persons" that describe the nature of their relationship.

109. Clause 28 however does not provide any such description. The clause is an attempt to exclude all tenable relationships and it makes no effort to describe the nature of the one which exists.

110. The assertion now made is that clause 28 here is a "key indication of objective intention" (submission 3.6). This is not a tenable argument. In any event even if the clause is a statement by the persons that describes the nature of their relationship (which it is not), it cannot be treated as a determining matter.

111. The second submission is that "subjective evidence of the parties' common intention" should not have been discounted (submission 3.8). It is difficult to appreciate what evidence is actually referred to here. The notion of subjective evidence about common intention simply confuses concepts.

112. At footnote 105, Uber's submission has stated Mr Ang (one of the drivers) "knew he was self-employed via Uber". The evidence was quite different ([[201.0195]] – [[201.0197]]). Mr Ang told the Court he thought he would be self-employed, but he then found Uber controlled his work; allocated the work; performance-managed him in terms of rating; and micro-managed him when working. Mr Ang referred to the risk of being "booted off the platform" if he didn't hit certain ratings or if he exceeded certain cancellation rates.

113. Mr Ang said "it fe[lt] to me much like any standard employment arrangement between an employer and employee".

114. Mr Ang said he felt very strongly that he wasn't actually self-employed and that there were all these rules he had to follow. He said "there's all these performance management parameters put on me, and there was no room for discussion, negotiation".

115. Mr Ang's evidence was "we are not partner drivers, they call us partner drivers, but we have no input into anything and when we tried to sort of engage with Uber, we'd just get mothballed, or we'd just get generic responses where they don't really want to engage".

116. Mr Ang again stated he initially thought that he would be self-employed, but after a period of time, because of all those things that he had just mentioned, he realised "I'm not self-employed". He contrasted his genuine self-employment in his massage business with what occurred at Uber. He said difference was night and day.

117. The third submission is that the Court was wrong to find control because (i) the drivers lack any obligation to work (ii) the drivers had a high degree of autonomy at work and (iii) that the service standards, app systems and incentives schemes do not indicate employment.

118. Uber submits (submission 5.10(a)) that there is no control because there is no obligation to work. This argument is correctly dealt with by the Court of Appeal,[44] the Employment Court,[45] and *Aslam*.[46]

119. A common feature of labour markets (especially in hard times) has always been the engagement of employees who seek given work but without an obligation to do so. This occurs because of a collapse or diminution of secure employment arrangements. The Uber system is a modern manifestation of these day-labourer type systems. There is nothing modern about this; it is history repeating itself in a different form.

120. The respondents accept that that intermittent work arrangements can in some circumstances be an indicator of independence or lack of subordination "while at work", but that "depend[s] on the facts".[47] Labourers queueing outside of the waterfront during the depression would beg to differ. So would legions of Uber drivers driving at their own cost waiting for Uber to allocate them work and income. There is a world of difference between an immigrant Uber driver and plumber or barrister.

121. Uber's next point (submission 5.11) is that drivers once logged on have no obligation to perform services at all and can even abort a commenced trip. This is contrary to the facts: see CA [192] (b) to (d); EC [42].

122. Uber has also stated that casual employees in general "can be compelled to work for the agreed period" (in Uber's view, unlike its drivers – submission 5.12).

123. In fact many impoverished casual workers *do* have a right of refusal; and whether there is an obligation to work identified hours and days or at all is matter of contract, not principle.

124. The correct position on the "obligation to work" issue is identified in *Aslam* at [91], and in a passage from *James v Redcats (Brands) Ltd* [2007] ICR 1006 at [84] referred to by that Court at [91].

> "Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella

[44] CA [189]
[45] EC [54]
[46] At [91]
[47] *Aslam* at [91]

> contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work."

125. See also *Uber France and Uber BV (Cour de Cassation)*[48] paragraph 11:… the fact of being able to choose one's working days and working hours does not exclude per se a subordinated working relationship, insofar as whenever a driver connects to the Uber platform… (endorsed by the Cour de Cassation at 15).

126. Uber submits (submission 5.10(b)) that its drivers exercise a high degree of autonomy while logged in, "consistent" with "other independent contractors" (emphasis added).

127. This submission has no factual foundation. In any event the claim that the drivers are independent contractors is contrary to clause 28 of the driver terms. Uber made the same submission in the Court of Appeal and withdrew it as a "mistake" - but now repeats it.

128. Paragraphs 5.15 – to 5.18 of Uber's submission also make claims that the drivers have a high degree of autonomy. However the paragraphs contain a version of the facts that Uber supports and would prefer but which has been rejected by the Employment Court, the Court of Appeal and many other Courts (including the United Kingdom Supreme Court and the Cour de Cassation). It is unhelpful.

129. Uber submits that licensing requirements and limits on driving hours do not of themselves indicate employment (submission 5.21). This is accepted. What does indicate control here is that these matters are policed by Uber as the responsible engager of the labour; and the conclusion of the United Kingdom Supreme Court, followed by the Court of Appeal here, that Uber "very tightly" defines and controls all aspects of the service.

130. Uber also submits (at 5.22) that its requirement of strict compliance with contractually enforceable employment-type behaviours (on pain of dismissal) do not indicate employment. These requirements and their enforceability are in fact a hallmark of employment.

131. Uber goes on to submit that these types of Uber requirements are "common sense commercial terms that would be expected in any contract for services" (submission 5.23). This again indicates that Uber has forgotten the nature of its own case – namely that the drivers do not have a contract for services and are not its independent contractors.

[48] Above - footnote 17.

132. Uber then continues its theme at submission 5.24 to 5.28. At paragraph 5.24 to 5.26, the submission deals with the unilateral setting of fares and fees by Uber, said to be a benign arrangement "not uncommon for an independent contractor".

133. In fact the fare and fee systems are unknown in any independent contractor environment. They are Uber-specific; and it is again odd that Uber seeks to assert independent contractor status when its driver terms contradict that.

134. Clause 31 of the driver terms allows Uber to *unilaterally add* supplemental terms and addenda to the driver terms. These then "prevail over this Agreement in the event of a conflict".

135. Uber used clause 31 to reduce fees by 20% on 19 April 2016 (see [[201.0158]] line 10 – Ang evidence and [[303.1091]]); and then on 2 February 2017 Uber promulgated an "upfront fares" addendum ([[301.0127]] which set passenger fares on an "upfront" fare basis. Under this system which continues, a rider contacts Uber and is given a price by Uber. When the rider accepts the price in its deal with Uber, Uber sends one of its drivers who does not know the destination until the passenger has entered the car.

136. As to the issues relating to ratings, *Aslam* correctly stated the Uber rating systems were "a classic form of subordination characteristic of an employment relationship" (see *Aslam* [99], CA [168] and [197]).

137. As to the incentive schemes, these were dealt with correctly by the Courts below.

138. Uber's claims that it would not need incentives if the drivers were employees (saying it "could simply instruct them" – submission 5.30). This is a trivial and unrealistic submission. Incentive schemes are common in many employment relationships because they are a very useful form of control. Schemes such as those operated by Uber are classic features of employment relationships.[49] Uber's schemes are simply a harsh example, which are also used to increase control. Incentive schemes apply to many tens if not hundreds of thousands of New Zealand workers (meat workers, crop harvesters, shift workers, sales staff and many others). They range from piece work arrangements or remuneration that mixes wages and piece work payments, to bonuses or advantages for working at certain times of the

[49] Bank workers required to sell debt; meatworkers required to meet targets; employees required to be assessed positively by customers; supermarket workers having their scan rates monitored and so on.

day or week, to extra holidays for long service or for working shifts, or bonuses for desired behaviours. Such schemes are obvious methods of control, especially when imposed unilaterally rather than by negotiation.[50]

139. There is also ample additional evidence of Uber control. Reinstatement of dismissed drivers is "at Uber's discretion" after a training programme at the driver's expense (and then with an obligation to maintain appropriate passenger ratings for a period determined by Uber).[51] There is also a "three strike" warning system, a classic indication of employment.[52]

140. As to reward schemes,[53] the Employment Court considered the deleterious psychological effects of the systems and heard tape recordings of drivers raising issues with the call centres in the Philippines.[54]

141. Control includes the fact that a logged-on driver's precise latitude and longitude position is carefully tracked by Uber, which also records the time of logging on and (contrary to Uber's submission) logging off. A driver is expected to respond as soon as a trip is assigned to him or her by Uber and to immediately travel to the pick-up point unpaid. Uber records both the time and driver location for each such assignment (these records can be viewed in the electronic casebook).

142. For example, the exhibit at [[301.0013]] records the details of each one of the 23,893 trips completed by Mr Keil. For each trip Uber recorded Mr Keil's id, the passenger id, the trip id, whether Mr Keil accepted or rejected the trip, the time Uber offered Mr Keil the trip, the (subsequent) time he accepted it, the pickup time, the drop-off time, and whether the trip was "rides" or "eats". The precise locater of both pick up and drop off is recorded in latitude and longitude form.

143. The exhibit at [[301.0014]] records the fare for each trip and also every comment over the years made by any passenger rating of Mr Keil (e.g. "So much charisma!" in cell N19) as well as the rating itself (e.g. cell L19). The exhibit at [[301.0016]] records the time of each trip and the distance in miles; and the exhibit at [[301.0017]] contains the latitude and longitude of the beginning and end of each trip. The exhibit at [[301.0018]] records the number of hours spent each week *on line*; *en route* and *on trip*. The

[50] For the schemes in practice, see tape recordings Abdurahman/Uber [[303.1248]]; and [[303.1289]].
[51] EC [41] and [43].CA [222]
[52] EC [41].
[53] EC [42] – [44]. CA [199] – [203]
[54] EC [43].

materials for Mr Rama show the Eats trips and the Rides trips are recorded sequentially in the same documents.

144. After arriving to collect a passenger a driver is required to wait for a certain minimum number of (unpaid) minutes[55]. At that point, the trip then begins after the passenger enters the car and it is only at that point the driver is told of the destination (by Uber).[56] The trip then proceeds along a route required by Uber and provided to the driver. Uber records the actual route taken on mini-maps[57] and the record and route for each trip can be obtained and used by Uber (including years later).

145. The control and direction also extends well beyond driving. The Community Guidelines (beginning at [[303.1094]]) apply to all interactions with Uber employees and contractors - thereby capturing post work-dealings such as calls to a call centre or mandatory work returning lost property. The Guidelines also apply to "conduct outside the Uber Marketplace Platform that we become aware of"[58]. Breach can result in dismissal. Under the heading "How Uber Enforces Our Guidelines" Uber refers to numerous punishable extra-work activities as a result of "certain actions you may take outside of the Uber platforms". [59]

146. Uber's fourth submission is that the drivers are not integrated.

147. The first reason given is that drivers can work for other businesses including competitors. The respondents adopt the Court of Appeal's conclusions at CA [233] on this point.

148. Uber has also claimed that the drivers can work for competitors "while logged into the Uber app". The evidence established clearly this did not occur and was not practical. There is some evidence that drivers worked for other platforms on occasions when locked out by Uber, but this happened rarely and very early in the relationship and never occurred at the time the driver was logged into and working for Uber.

149. Uber has claimed that the drivers are not socially connected to it. The Uber drivers here were in fact very intensely "socially connected" with Uber, often

[55] See Uber cancellation fee policy [[304.1467]] requiring a minimum (unpaid) wait time of 5 minutes at the pick-up point and not running behind Uber's estimated time of arrival ([[304.1473]]) before a driver can receive a fee (set by Uber) for a cancelled trip; see the policy in practice: Keil [[301.0456]], [[301.0133]], and [[301.0135]]

[56] Subject to Diamond-status type exceptions.

[57] Rama [[302.0619]]; Keil [[301.0017]]

[58] Line 6 – 7 of first paragraph of Community Guidelines [[303.1094]]

[59] [[303.1111]] – [[303.1112]]

dealing with it minute by minute, hour by hour, week by week and year by year. The same occurs in relation to millions of other drivers throughout the world. This includes multiple direct person-to-person communications including many personal telephone conversations which are recorded and are before the Court. Indeed in its published propaganda Uber repeatedly emphasises its social connection to each driver and even calls them "driver partners" who are part of a "community" with Community Guidelines written by solely by Uber and which are contractual terms.

150. Uber has stated that its drivers do not have "presentational integration". The Court of Appeal dealt with this issue correctly. The public identifies these workers as Uber drivers and can recognise an Uber when they see one. At any given time of the day, hundreds of members of the public are ordering, tracking or sitting in Ubers (and many Uber drivers are known personally to multiple users and to each-other)[60].

151. Uber has stated that no individual Uber driver is essential to its operation and therefore none of them is integrated into it. This reasoning is of course flawed. If it were right, no bus driver, train driver, flight attendant, pilot, meat worker or any other worker is integrated. The argument that because as no individual worker is essential, none are integrated is fallacious.

152. Uber's submission that the Uber driver is comparable to the balloon pilot in *Noble v Balloon Canterbury.com Limited*[61] is again puzzling (submission 5.38). Mr Noble was an independent contractor who did five balloon trips (three as a solo pilot). Here the drivers did many thousands of trips over years (see EC [70]), under an agreement which stated they were not independent contractors and would face very serious consequences if they even suggested that possibility.

153. If the 6,000 Uber drivers are not integral parts of Uber's business as claimed by Uber, Uber has no human presence in the country at all (except for Mr Mills, the Uber part time publicist).[62]

154. Uber's fifth submission is that the drivers do not meet the fundamental test because they are in business on their own account.

[60] Including in excess of 1,000 who are union members and part of an action in the Employment Relations Authority awaiting this judgment.
[61] (2019) 16 NZELR 850.
[62] Who has apparently resigned now.

155. The Court of Appeal in addressing the fundamental test included as a factor the high level of control (CA [230]). As to this and the other factors set out by the Court of Appeal, the respondents adopt the reasoning of the Court.

156. The issue of multi-apping and working for other employers (submission 5.32 and 5.32) has been dealt with correctly by the lower Courts.

157. The Court of Appeal dealt correctly with the fundamental test and concluded that the drivers are not in business on their own account. All or most of the normal considerations pointed towards employment status, with Uber as the employer and the drivers as the employees.

158. The drivers did not make the type of decisions a business person would normally make and do not bear the risks and enjoy the returns of those choices.

159. All aspects of the asserted driver/passenger agreement are determined by Uber and Uber has complete control and the right to modify and add unilaterally. All performance standards and pricing are determined by Uber as all other aspects of its service. The respondents adopt and support the conclusions of the Court of Appeal.

X CROSS-CHECK

160. All of the Court of Appeal's above conclusions are consistent with *Aslam*, which can be referred to as a cross-check. The same conclusions have been reached in other real nature jurisdictions, also allowing a cross-check process.

161. By way of example the *Aslam* Court concluded:

(a) the fact that work could occur intermittently was not a barrier to a "worker" finding (see paragraphs *Aslam* [90]-[91] and [94]);

(b) a particularly important consideration was that Uber fixed the price of the fares (*Aslam* [92]);

(c) the right to charge a lower fare was "notional" (*Aslam* [94]);

(d) the delivery of the services was organised so at to "prevent a driver from establishing a relationship with a passenger that might generate future income" (*Aslam* [93]);

(e) Uber set its own "service fee" to be deducted from the drivers' earnings (*Aslam* [94]);

(f) Uber had sole discretion as to whether to make a full or partial refund to a complaining passenger (*Aslam* [94]);

(g) the terms of contract are "dictated by Uber" and are "imposed by Uber" (*Aslam* [95]);

(h) the drivers have no say in those terms (*Aslam* [95]);

(i) Uber was responsible for defining and delivering the service provided to passengers (*Aslam* [92])

(j) there is no arrangement to afford potential to drivers to market their own services and develop their own independent businesses (*Aslam* [92]);.

(k) once a driver is logged on, a drivers' choice about whether to accept requests for rides is "constrained by Uber": *Aslam* [96];

(l) Uber itself exercises control over the acceptance of the request for a ride by knowing and not releasing to the driver the destination (*Aslam* [96]);

(m) Uber monitors the driver's rate of cancellation and takes action against the drivers which indicates the drivers "are in a position of subordination to Uber (*Aslam* [97]);

(n) Uber "exercises a significant degree of control" over the way in which drivers deliver their services (see *Aslam* [96] and [97]);

(o) Unlike taxi drivers, Uber drivers are not required by regulation to accept requests for rides but Uber itself "retains an absolute discretion" to accept or decline any request for a ride (*Aslam* [96]);

(p) Uber also controls the acceptance of the requests by monitoring the driver's rate of acceptance with an escalating warning system that can lead to termination (thereby putting the driver in a subordinate position (see *Aslam* [97]);

(q) Uber vets the types of cars that may be used (*Aslam* [98]);

(r) Uber wholly owns and controls the technology which is integral to the service (*Aslam* [98]);

(s) the technology "is used as a means of exercising control over drivers" by directing the driver to the pick-up and then the destination (*Aslam* [98]);

(t) if there is route variation "the driver bears the financial risk of any deviation from the route indicated by the app" (*Aslam* last sentence [98]);

(u) a "potent method of control is the use of a ratings system whereby passengers are asked to rate the driver" which can lead to warnings and "ultimately termination" (*Aslam* [99]);

(v) the way in which Uber makes use of ratings is "materially different" to normal internet ratings, in that the ratings are not disclosed to passengers to enable passenger choice of driver (so as to perhaps attract a higher fare but is instead "used by Uber as a purely internal tool for managing performance and as a basis for making termination decisions where customer feedback shows that drivers are not meeting the performance levels set by Uber" (*Aslam* [99]);

(w) this was a "classic form of subordination that is characteristic of employment relationships" (*Aslam* [99]);

(x) Uber restricts communication between passenger and driver to the minimum necessary to perform the particular trip (the *Aslam* Court said this was "a significant factor") (*Aslam* [99]);

(y) Uber takes "active steps" to prevent drivers from establishing any relationship with passengers "capable of existing beyond an individual ride" (*Aslam* [100]);

(z) collection of fares, payment of drivers and handling of complaints are all managed by Uber "in a way designed to avoid any direct interaction between passenger and driver" (*Aslam* [100]);

(aa) drivers are specifically prohibited by Uber from exchanging details with a passenger or contacting a passenger after the trip ends other than to return lost property (*Aslam* [12] and [100]).

162. The *Aslam* Court also stated "the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber" (*Aslam* [101]).

163. Confirming integration, the *Aslam* Court stated that the system was it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill.

164. The *Aslam* Court went on (relevant to the fundamental test) to observe that from the drivers' point of view (at [101]):

> …. the same factors - in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers - mean that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.

165. These conclusions are identical to those referred to by the Court of Appeal here.

166. At [103] and [104] the *Aslam* Court rejected Uber's comparisons with other platforms and genuine booking agents (as the Employment Court did here at EC [56] (referring inter alia to Trade Me)).

167. In *Aslam* Uber also relied on what could be called in New Zealand the "Ola argument". As the *Aslam* Court recognised at paragraph 128, a driver while logged on "was required to be generally willing and available to take trips, and a repeated failure by a driver to accept trip requests was treated as a breach of that requirement". The *Aslam* Court addressed the argument again at 135, preferring to leave any issue about wage calculation in such circumstance until it arose.

168. Although the six judges did not have to decide if the drivers were employees (as the claim was only for "worker" status), it is reasonably clear from the Court's conclusions that the drivers were in fact also employees (as commentators have noted).

169. The conclusions of the Court of Appeal and of the Supreme Court in *Aslam* are also consistent with those reached by overseas "real nature" jurisdictions (see footnote 17). See *Uber France and Uber BV (Cour de Cassation)*[63] at paragraphs 11 and 12 (fares and pricing); 9 and 11 (terms and conditions "an indication of subordination"); sanction and discipline (paragraph 14); control over information provided about each trip (paragraph 13); control over route and ability to adjust fare (paragraphs 12-14).

170. The two Swiss judgements at footnote 17 come to the same conclusions dealing with both Uber's rides customers and its Uber Eats customers – see

[63] Footnote 17 above.

analysis of these cases at [[101.0357]].[64] As to *FNV*, see paragraphs 19 – 33 of that judgement.

171. The outlier in these matters are the Australian cases.

172. In *CFMMEU v Personnel Contracting Pty Ltd*[65] [2022] HCA 1 and in a different context, the High Court of Australia split 3:2 against a real nature approach. See also *ZG Operations Australia PTY Ltd v Jamsek*.[66]

173. All judges in *Personnel Contracting* agreed that the worker should succeed on a "contractual terms" approach, but the High Court majority took a position directly contrary to that required by New Zealand's s6 (and indeed took a position that s6 would prohibit).

174. The Fair Work Commission is currently bound by the doctrine *Personnel Contracting.* It is not a Court, and the Commissioners are not required to be lawyers[67]. They are in fact political appointees.

175. *Personnel Contracting* has influenced the Australian Uber cases and (closer to home) *Arachchige v Rasier New Zealand Limited*.[68] Even the *Arachchige* Court however rejected Uber's claim that it was not a provider of transportation services (see [53]).

176. The "real nature" approach was followed in *Personnel Contracting* at the Federal Court level: *CFMMEU v Personnel Contracting Pty Limited* [2020] FCAFC 122. Paragraphs 61-117 of that case contains a lucid and valuable description of the real nature approach (sometimes called the "multifactorial approach").

[64] The Court in the rider judgment stated the Court "agrees with that of other jurisdictions, Swiss or foreign, having regard foreign, having had to decide on similar contractual clauses and concrete conditions, as well as with that of part of the Swiss doctrine".
[65] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1.
[66] (2022) 275 CLR 254.
[67] Section 627 Fair Work Act 2009
[68] (2020) 17 NZELR 794 at [53].

XI DISPOSITION

177. The appeal should be dismissed and costs awarded to the respondents.

Peter Cranney/Grace Liu/Emily Griffin
Counsel for respondents
16 April 2025

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 Respondents

FIRST UNION INCORPORATED
Second Respondents

MEMORANDUM TO REGISTRAR - RESPONDENTS' CERTIFICATION UNDER PRACTICE NOTE 5 JULY 2023 - SUBMISSION SUITABLE FOR PUBLICATION
1 May 2025

PRESENTED FOR FILING BY:

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Person Acting: Peter Cranney

To: Registrar Supreme Court

Counsel certifies pursuant to clause 6(2) of the Practice Note dated 5 July 2023 that, having made appropriate enquiries to ascertain whether the submission filed by the respondent on 30 January 2025 contains any suppressed information, to the best of Counsel's knowledge the submission is suitable for publication.

Peter Cranney
Counsel for respondents
1 May 2025

Cc appellant