IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 105/2024
[2025] NZSC Trans 10

BETWEEN **RASIER OPERATIONS BV**
UBER PORTIER BV
UBER BV
PORTIER NEW ZEALAND LIMITED
RASIER NEW ZEALAND LIMITED
Appellants

AND **E TŪ INCORPORATED**
FIRST UNION INCORPORATED
Respondents

Hearing:	8–9 July 2025
Court:	Winkelmann CJ Glazebrook J Ellen France J Williams J Miller J
Counsel:	P F Wicks KC, K M Dunn, N L Walker and J A Tocher for the Appellants P Cranney, G Liu and E Griffin for the Respondents

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CIVIL APPEAL

MR WICKS KC:

May it please the Court. Counsel's name is Wicks. I appear with Ms Dunn, Mr Walker and Mr Tocher.

WINKELMANN CJ:

Tēnā koutou.

MR CRANNEY:

If the Court pleases my name is Cranney and I appear with Ms Liu and Ms Emily Griffin.

WINKELMANN CJ:

Tēnā koutou. Well, good morning counsel. We have, we are proposing to follow the process that we have adopted of giving you 15 minutes quiet time so you can outline and overview the case, and Mr Wicks, I wonder if you could clarify for us, it was noted that there were some non-publication orders in place. Whether they have all expired or if there are any that the Court needs to be mindful of?

MR WICKS KC:

They're still extant, as I understand it your Honour, and counsel will raise those if the particular documents are to be referred to. I understand it is unlikely they will be, but there are still extant orders which I think Mr Cranney is across better than I am.

WINKELMANN CJ:

So these proceedings are being livestreamed with no downtime so everybody needs to be aware of that.

MR WICKS KC:

Yes, of course, it may be sensible then, your Honour, to endeavour to deal with those upfront for want of a better description. I don't have the –

WINKELMANN CJ:

So I just wonder if it is being currently livestreamed, and we need to stop it for a moment so we can discuss this issue.

REGISTRAR:

Certainly Ma'am. It is being livestreamed currently but I can see that it's paused momentarily.

WINKELMANN CJ:

Yes, because otherwise if we discuss it and it's being livestreamed…

MR WICKS KC:

Indeed, yes.

MR CRANNEY:

I can assist Ma'am and my friend. There are some. I intend to refer to two pieces of evidence which are covered by the suppression orders. The nature of the evidence is simply commercial numbers of some kind.

WINKELMANN CJ:

Well it might just be useful for the Court to know what it is so we don't refer to it during the livestreaming. I'll just get the Registrar to confirm that it's turned off for a moment.

MR CRANNEY:

So I intend to refer to it, Ma'am, in a way which doesn't disclose the numbers, but by referring your Honours to two page numbers, and it will be done in a way which is not in breach of any order.

WINKELMANN CJ:

Okay.

MR CRANNEY:

And I think in terms of the future, we can I think by consent come up with something for your Honours which your Honours will find perfectly acceptable.

WINKELMANN CJ:

Yes, you might have it on paper.

MR CRANNEY:

Yes.

WINKELMANN CJ:

So there's no need to turn it off Mr Registrar, it seems to be quite complicated, or have you already turned it off, no?

REGISTRAR:

I've passed on a message but have not received a response.

WINKELMANN CJ:

Just send them a message saying don't do it.

REGISTRAR:

Absolutely. Thank you Ma'am.

WINKELMANN CJ:

If you hand it up, we can have it copied.

MR WICKS KC:

Yes, I've now been seized of a list which deals with, I think, 18 documents there. There are 16 that are described as being subject to a brief interim non-publication order which might suggest that those orders were interim and, by the look of it, brief, so they would, I would expect, to have expired by now. I'll need to get some instructions on what the position is on those. Presently there is two that were subject to a permanent non-publication order made by the Court. So if I can hand this list up.

WINKELMANN CJ:

And we can have someone come in and make a copy and make it available to the Court.

MR WICKS KC:

Yes, thank you your Honour. We'll make arrangements, your Honour, for that to be emailed, if we can, to Mr Registrar. I'm not seeing, there's a note on it that isn't for the Court, so if I can just have that dealt with forthwith.

WINKELMANN CJ:

All right, cleaned up, yes, but if either counsel are dealing with the documents that are subject to non-publication orders, or query subject to non-publication orders, if they can just identify that at that point, and I understand that they will not refer to them in a way which breaches the non-publication orders, and we will attempt to not discuss any details of commercial documentation so as not to do so ourselves.

MR WICKS KC:

Thank you Ma'am.

WINKELMANN CJ:

But it would definitely help to know what the documents are.

MR WICKS KC:

Indeed, of course. We'll get that to the Court as soon as possible.

MILLER J:

Can I just add to that, Mr Wicks, there are confidentiality provisions in Uber's agreements. Obviously we need to refer to the terms of those. Can I take it that none of these confidentiality obligations extend to any of the contents of the agreements between Uber and the drivers, or the agreements between Uber and passengers and so on?

MR WICKS KC:

That's correct, they don't. May it please your Honours, it will be submitted on behalf of the appellants that both the Employment Court and the Court of Appeal erred in law when interpreting section 6, and when applying section 6 to the facts. Whilst the question as to the status of the four drivers' relationship

with the appellants arise in the context of the economy for reasons your Honours will be taken through that has, or should have, limited influence on the section 6 framework or its application. *Bryson* has settled the law in this area and that has not really been disputed by the respondents. In this introduction which should take me about 10 minutes I will outline the appellants' arguments which we will then expand on in the remainder of our submissions.

I will start with a brief high level explanation of Uber's business, then give a brief overview of the legal position, including a short summary of the errors of law we say were made by the Courts below. I will conclude with a summary overview of the principal reasons why the appellants submit the drivers are not employees.

Uber is a globally recognised organisation as introducing a new way for passenger transportation to occur. Uber provides a platform for connecting passengers with drivers. The result has been a total shift in how passenger transportation operates in this country and around the globe. Affordable on-demand passenger transportation accessible through a smartphone. Uber offers the opportunity for drivers to earn an income any time, anywhere. It offers an opportunity to anyone who wants it.

There are some regulatory requirements for drivers to comply with, but essentially the offer is on the table for any fit and proper person with a driver's licence, a car, and a smartphone. There is no interview and no selection process. In short, if you meet the entry criteria, and sign up to the terms, you can use the Uber platform if and when you want to, in the same way as riders do.

A driver using the Uber platform can choose whether to work and, if they do, when, where, and for how long. Market tools like surge pricing and Uber incentives encourage drivers to log on and drive at times when there are the most riders. Addressing this in real time through an app is one of the innovations that Uber introduced to the passenger transportation market to smooth out supply and demand. All the drivers involved in this case made use

of their freedom of choice whether to work, when, and for how long. Some of it used it as a second income. Others used it to make a little extra money on the side and one driver used it to fit around his family commitments, but all benefited from the flexibility that Uber offers.

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Ms Dunn will shortly cover the legal position in more detail but in brief the starting point is section 6 of the Employment Relations Act 2000.

In *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 this Court interpreted the broad words of section 6 and set out the framework for determining employment status. This is a framework that has now been settled for 20 years or so and has been applied by the Employment Court to a wide variety of working scenarios.

Paragraph 32 of *Bryson* sets out the test for applying section 6. The following must be considered as part of "all relevant matters": "... the written and oral terms of the contract ... which will usually contain indications of common intention [regarding] the status of their relationship ... divergences from [and] supplementation of those terms ... that are apparent [from the way the contract operates] in practice ... [the] features of control and integration and whether the [individual was] working on [their] own account ([known as] the fundamental test) ..." and also all other relevant matters.

In *Bryson*, this Court 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.

In the decision granting leave to appeal to this Court, the parties were invited to make submissions on the changing nature of work to the extent relevant and we will touch on this as we go through the submissions.

At a high level, the appellants' view is that the *Bryson* test is sufficiently broad and flexible such that it does not require amendment to address new ways of

working. That is particularly given that both *Bryson* and section 6 direct the Court to look at all relevant matters, but it will be submitted that what constitutes a relevant matter and how the integration, control and fundamental tests are considered in practice may change over time, as they have always done, to identify and consider the particular work in question.

I will now briefly address what the appellants say are the errors of law made by the Court of Appeal in the Employment Court.

The Court of Appeal failed to apply *Bryson* correctly. It conflated intention with the other three common law tests: control, integration and fundamental. Section 6 and *Bryson* require a consideration of the parties' common intention as to the status of their relationship. In other words, what kind of relationship did the parties bargain for? That is primarily determined by the written terms, given they are objective evidence of the parties' common intention at the outset of the relationship.

The Court of Appeal did not do this. Instead, it considered the parties' common intention about the substance of their relationship by applying basic contract law principles. The Court determined what the contractual rights and obligations were so it could assess the nature of the relationship. But that exercise is really the application of the three common law tests and it leaves no role for the parties' common intention as to the status of their relationship.

The Court of Appeal, as will be submitted, also made material legal errors in its reasoning on each of the common law tests. Dealing with those: on the control test, it did not consider the purpose and context for the features of control that it identified; on the integration test it made a leap from the fact –

WINKELMANN CJ:

Well, can you just slow down, because these are your core points, and it's quite helpful, sorry, Mr Wicks, it's just –

MR WICKS KC:

Yes, thank you, your Honour, yes.

WINKELMANN CJ:

So on the control?

MR WICKS KC:

I will go back to the control test, thank you, your Honours – on the control test, the Court of Appeal did not consider the purpose and context for the features of control that it identified; on the integration test, it made a leap from the fact that there need to be some drivers using the platform to a conclusion that those drivers are integrated into a collective enterprise; and on the fundamental test, it made the mistake of assuming that an ability to generate goodwill is necessary to be in business, and I will explain each of those errors later in my submissions.

Fundamentally the Employment Court made the same error that the Court of Appeal later did by not ascertaining the parties' common intention about the kind of relationship they considered they were signing up to. The Employment Court made an additional error by using vulnerability as a purpose of the Act to expand the section 6 gateway and Ms Dunn will address this in her section of the oral submissions.

Why the drivers are not employees. The appellants do not say that this is an obvious case with an obvious answer. It will be apparent from the decisions in the courts below that there are factors that can be seen as pointing each way.

The case for the appellants is that when the relationship is viewed in the round in accordance with *Bryson* the correct answer is that this was not employment. With regard to intention, the common intention of the parties in this case can be ascertained from the services agreement. Neither party intended to sign up to an employment relationship, nor do any of the common law tests, we say, conclusively indicate employment.

With regard to control, the drivers control if they log on, there is no roster. If a driver does choose to log on, they decide for how long and when, where and even whether to accept any particular ride, if a ride is accepted it may be cancelled by the driver. While there are incentives to encourage drivers to log on at a particular time, and the pricing is set upfront in accordance with supply and demand, these factors do not indicate control in an employment context.

The purpose and context of control is relevant. Control exists in the relationship between the drivers and the appellants to facilitate the platform for ride-sharing from both an efficiency perspective and a consumer protection perspective.

With regard to integration, drivers are loosely associated with the appellants' business in that they make use of Uber's platform. The way the drivers operate is independent of Uber. They drive their own vehicles and work for competitors as they see fit.

With regard to the fundamental test, the drivers make business decisions such that they are in business on their own account. They can maximise revenue by choosing to drive at particular times or choosing to pursue other income generating activities which might include competitor ride-share platforms. They can choose whether to maximise the incentives offered by the appellants. They have control over their expenses, control over making choices about vehicle, fuel and insurance and the Court should properly consider profit when assessing this test, not just that the appellants control the price charged to riders.

Stepping back, we say the real nature of the relationship between the four drivers and the appellants is not employment. The parties agreed a relationship that was not employment and while there are features of the control, integration and fundamental tests that could be said to point both ways, the overall balance favours a conclusion that the relationship was not one of employment.

That concludes the brief overview of the appellants case and I will now hand over to Ms Dunn. She will address the text of section 6, the relevant legislative

background to the Employment Relations Act, *Bryson* and the divergence from *Bryson* in the Employment Court's decision.

Following that, Mr Walker will cover the relevant agreements and the business model and I will then work through each of the four tests, common intention, control, integration and the fundamental test, before concluding with an overall assessment of the nature of the relationship. Thank you.

MILLER J:
Sorry, before you do that.

MR WICKS KC:
Yes.

MILLER J:
Can I ask what do you say is the nature of the relationship between the drivers and Uber? Initially, Uber's position seemed to be that there is no relationship at all, no contractual relationship, but you appeared to accept in the Court of Appeal that there was. Mr Cranney is now suggesting that you're backsliding, and I just wanted to be clear what, is there a contract at all between the drivers and Uber?
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MR WICKS KC:
The services agreement forms a contractual relationship between the drivers and Uber.

MILLER J:
Right, okay.

MR WICKS KC:
But it's not, we will say, a contractual relationship whereby the drivers are providing transport services to Uber.

MILLER J:

Yes, understood.

MR WICKS KC:

Does that clarify the position for your Honour?

MILLER J:

Yes it does.

MS DUNN:

Good morning your Honours. In my section of the submissions I will take you through the law which has been settled since *Bryson v Three Foot Six*, a 2005 decision of this Court. It is the appellants' position, and not contested by the respondents, that the law remains settled and as set out in *Bryson*. I'll briefly cover five topics. First, the legislative background to section 6. Second, the text of section 6 itself. Third, the correct interpretation of section 6 as articulated by this Court in *Bryson*. Fourth, I will very briefly cover how *Bryson* has been applied by the Employment Court in the 20 years since *Bryson*. Finally, I will address the Employment Court's comments in this matter around the purpose of section 6.

Turning first to the legislative background. The section 6 real nature of the relationship test was introduced in legislation in the year 2000 with the enactment of the Employment Relations Act. A statutory definition of "employee" had been enacted for the first time in 1991 in the Employment Contracts Act 1991, but that definition was effectively only section 6(1) that an employee was any person employed by an employer to do any work for hire or reward. This meant there was little guidance from the legislation as to the substance of the distinction between an employment relationship and other relationships.

MILLER J:

Sorry, did the former Act say "do any work for hire or reward under a contract of service" so it was exactly the same or…

MS DUNN:

I can check that your Honour.

WILLIAMS J:

It just says it means a contract of service.

MS DUNN:

Yes, the definition of "… employee means any person of any age employed by an employer to do any work for hire or reward…". The Employment Contracts Act definition, yes.

Employment status was effectively governed by the common law tests, which had long preceded the Employment Contracts Act, and had been developed to distinguish the contract of service from other arrangements. This Employment Contracts Act definition came to be interpreted by the Courts as giving primacy to the contract. If the parties agreed to be in a relationship other than employment, then the Courts would not look past that and the agreement would be enforced, and this is best exemplified by the Court of Appeal's decision in *TNT Express Worldwide (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) where the Court found that when the terms of a contract are fully set out in writing, and are not a sham, the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined.

The enactment of the Employment Relations Act and section 6 changed the legal test for determining status by introducing the real nature of the relationship test. But the legislative history of section 6 demonstrates that this was intended to be an adjustment and not a wholesale change. As set out in the Department of Labour's report on the Bill, concern was held by some that the *TNT* decision and the Employment Contracts Act approach allowed employers to impose independent contractor relationships on workers who were, in fact, employees.

On the other hand, there was concern by some that the real nature test would impact on existing relationships and overall the intention of the parties. Effectively that genuine contactor relationships would not be upheld. The select

committee report deals with this by outlining the policy intent of clause 6, and in particular that the policy intent had been to stop some employers labelling individuals as contractors to avoid responsibilities for employee rights such as holiday pay and minimum wages.

Then over the page on page 6, the intention is that the amendment will ensure that the employment institutions will continue to be directed to look at all relevant factors including the intention of the parties in determining the employment status of individuals.

But it is submitted that the final version of section 6, the version we're looking at today, was aimed at ensuring the Court would be directed to look at all relevant factors including the parties' common intention so that genuine contractor relationships would not be disturbed. It is submitted that it was intended by Parliament that the parties' common intention would have an important role in the section 6 analysis.

With that legislative background in mind, I'll turn now to the text of section 6, which Mr Tocher will bring up. That starts with section (1)(a) an employee "means any person of any age employed by an employer to do any work for hire or reward under a contract of service." It is not in contest here that the four drivers performed work for hire or reward. They drove and they got paid for it. The issue is whether they did so under a contract of service as an employee –

MILLER J:

So they drove and they got paid for it by whom?

MS DUNN:

It's our contention they got paid for it by the riders.

MILLER J:

Not by Uber?

MS DUNN:

Not by Uber. In a contract of service, or employment, can be distinguished from a contract for services, usually a contractor or consultant, and from other contractual relationships.

Turning to subsection (2): "In deciding… whether a person is employed by another person under a contract of service, the court or the Authority… must determine the real nature of the relationship between them."

The focus on section 6 is whether someone is an employee or not. If it is not an employment relationship it is not necessary to identify the type of relationship it is, and the Employment Courts jurisdiction is relevant here. The Employment Court is a creature of statute. It only has that jurisdiction granted to it by the Employment Relations Act, and its role under section 6 is to determine whether an individual falls within the definition of an employee.

MILLER J:

If this were only a contract between parties, and we weren't concerned with the interpretation of a statute, the Court would not be focused on determining the real nature of the relationship. It would be looking at what were the terms of the contract. Do you accept that the reason why the legislation directs the Court in this way is because of the premises in section 3, that is to acknowledge and address the "inherent inequality of power in employment relationships". In other words, to what extent does this statutory recognition of inequality determine the way in which the Court ought to approach the analysis under section 6?

MS DUNN:

Well your Honour, the objects in section 3 are focused on an employment relationship that exists rather than the identification of an employment relationship. So it refers to recognising that employment relationships are built on mutual obligations of trust and confidence, and the legislative requirement for good faith and promotes collective bargaining, protecting the integrity of individual choice, whether to join the union or not, those matters. There's nothing in, in my submission, in section 3 that deals with who should be an

employee, and the gateway is both the Employment Court and the Court of Appeal have referred to section 6 as. There are no objects of the Act that are aimed at expanding the category of employees.

WINKELMANN CJ:

So you're saying that section 3 only kicks in once it's determined it's an employment relationship?

MS DUNN:

Yes your Honour.

WILLIAMS J:

What about the requirement of section 6 to the real nature of the relationship. Doesn't that invite reference to section 3? So that you don't get stuck on form and miss substance, and therefore the inequality between the parties in a particular case.

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MS DUNN:

Certainly, your Honour, we are looking at the real nature of the relationship, not just what the parties say they are, but the real nature of the relationship is determined by looking at the four tests that Mr Wicks has mentioned. The fact that there may be inequality of bargaining power in some employment relationships doesn't necessarily assist the Court to identify an employment relationship. There are employment relationships without an inequality of bargaining power and there are many relationships where there is an inequality of bargaining power but not an employment relationship, so –

MILLER J:

And that points, takes us though, to some features of the Uber contracts which can be seen as evidence of an inequality of power in employment relationships. So we take one that's reasonably neutral, for example, the drivers don't have access to any court, they are required to undergo a mediation process, the terms of which are dictated by Uber. So, how is – if there are provisions in this

contract that point to inequality of bargaining power, should not that bear on our assessment of what is the real nature of the relationship?

MS DUNN:

Perhaps, your Honour, if it goes to, say for example, control, which the provision you have identified may, but in and of itself identifying matters where there is an inequality of bargaining power, in my submission, doesn't go directly to section 6.

WINKELMANN CJ:

May I just take you back to section 3. So this is obviously legislation which has a social objective, which is set out in 3(a). That social objective, securing it is suggestive of not giving legislation a narrow reading. Section 3(a) is the: "Object of this Act," that is the heading, 3(a): "to build productive employment relationships," so that's in the building, including in bargaining, would that – isn't it an artificially narrow reading of section 3 to eliminate it from being material to section 3, to put it to one side – section 6, rather? It just seems a narrow reading.

MS DUNN:

Well, your Honour, it does then go on to say in all aspects of the employment environment and of the employment relationship, so it's my submission that it presupposes that relationship exists and then regulates that relationship.

And the Court of Appeal in its judgment did say it didn't consider that substantial assistance could be obtained from section 3 given there was an obvious risk of circularity in doing that, in the sense of it coming back to that reference to an employment relationship.

WINKELMANN CJ:

Are you dealing with the weight to be given to the written document, in terms of what the parties' common intention was, or is that Mr Wicks?

MS DUNN:

That's Mr Wicks and Mr Walker.

WINKELMANN CJ:

Thank you.

MS DUNN:

Sorry, your Honour, I am just finding my place. So section 6 is used to determine the question of what is the relationship in different contexts. In some contexts, the alternative is another type of paid relationship, in other contexts it's a volunteer and the *Below v Salvation Army New Zealand Trust* [2017] NZEmpC 87, (2017) 14 NZELR 692 case in your materials is an example of that, and section 6 is also the test for the identification of the correct employer and *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69, (2021) 18 NZELR 14 is an example in your materials for that.

Then turning to section 6(3), we have already covered that but the only additional matter I point out is that section 6 only specifies one mandatory relevant matter and that is intention, noting of course that how the parties describe their relationship is not determinative of the real nature of that relationship. That language, however, leaves labels and descriptions as relevant to the real nature of the relationship and Mr Wicks will return to this shortly when addressing intention.

MILLER J:

What label would you attach to the drivers as between themselves and Uber? They're not volunteers, obviously, we understand there's a contract. Are they independent contractors to Uber?

MS DUNN:

No, your Honour, I would not say they are independent contractors to Uber. In my submission, there is a contractual relationship and I probably wouldn't take it further than that. The term "independent contractor" doesn't have a sort of defined or one accepted meaning in employment law. It, in a particular part

of the Act for limited purposes it is simply: "... a person engaged to perform work under an agreement that is not an employment agreement."

WINKELMANN CJ:

Well, can you describe the contents of the – what is the contractual relationship?

MS DUNN:

Mr Walker is going to take you through the contract, but I –

WINKELMANN CJ:

No, no, but not the terms of the contract, but describe in a broad brush way what is the nature of the contract? I mean, is it that Uber is providing the drivers with a service?

MS DUNN:

In some respects, yes, your Honour. Principally, drivers are provided with access to the Uber platform and with that access – in exchange for a fee – and with that access drivers are then able to provide transportation services to riders.

MILLER J:

So I was asking this because, although it is perhaps not very well defined, the concept of an independent contractor does have real meaning. It ordinarily connotes that that person is in business on their own account, accounting for tax themselves, for instance, and it does seem important to understand what actually is their relationship to Uber. I would have thought you – it puzzles me, frankly, that you resist the idea of an independent contractor because there are provisions in these agreements that say "you do have to account for your own tax", so tax is a concern of Uber's, it's wanting to make clear that all of those obligations sit with the driver, so why resist the idea that they're an independent contractor? Is it because you say Uber doesn't pay them at all?

MS DUNN:

Your Honour, clause 28 of the services agreement which Mr Walker will take you through says they are not an independent – they are not independent contractors, that's why I have resisted that.

MILLER J:

Yes, but why?

MS DUNN:

Look, I would accept it is a flexible term. The features of an independent contractor relationship you have pointed to do exist in this case, including matters such as the payment of tax.

MILLER J:

All right.

WINKELMANN CJ:

But your characterisation, as I understand it, is that really the drivers aren't doing anything for Uber, Uber's doing something for the drivers?

MS DUNN:

Yes, your Honour.

WINKELMANN CJ:

Which I take it is why they resist the independent contractor?

MS DUNN:

Yes, your Honour. I will now leave section 6 and turn to my third topic which is the interpretation of section 6 by this Court in *Bryson*. The interpretation of section 6 has been settled since this Court's decision in *Bryson* and there is no challenge to that interpretation by the respondents.

Mr Tocher has put up paragraph 32 on your screens and that summarises the correct approach to section 6, in my submission.

So at the top of the paragraph: "'All relevant matters' certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship." Mr Wicks will pick up this point shortly, but it is important to note that it is the parties' common intention regarding the status of their relationship that is to be assessed. The Court's consideration: "... will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice." And then: "'All relevant matters'..." includes regard to control, integration and the fundamental test which is whether the person is: "... effectively working on [their] own account ... "

In this analysis, the common law test does not occur until after the terms of the contract and how the relationship operated in practice have been considered.

It is submitted that this framework is broad and flexible. The framework itself does not need to be revisited. It is an intensely fact-specific enquiry and the framework is able to address different working relationships and environments including work in the gig economy.

WINKELMANN CJ:

Do you accept that when you look at the terms of the contract, you do so – would you start with also the circumstances of the contract being formed, that written contract, or does that come later, and is there really any magic in the order?

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MS DUNN:

First, I would accept that the circumstances around the formation of the contract can be relevant to the assessment of the contract in common intention. Second, I do think, there might not be magic in the order, but I do think it's important to be deliberate in the order. It's difficult to see how you could properly assess control, integration, in a fundamental test without first

understanding what the parties intended the relationship to look like, and then whether that was, in fact, how the relationship operated in practice.

ELLEN FRANCE J:

The Court in *Bryson* says it's only if you follow that order that it will *usually* be possible, which does indicate that there might be circumstances in which you could do it without. Do you accept that?

MS DUNN:

I do your Honour, and in particular *Bryson* was a case where there wasn't a written contract at the outset of the relationship.

ELLEN FRANCE J:

Yes.

WINKELMANN CJ:

Are you addressing how – oh no I think we've gone through that. Mr Wicks is addressing how significant the terms are.

MS DUNN:

Yes your Honour.

WILLIAMS J:

When you said that you have to start with the intentions of the parties, I think that's how you said it, there was an assumption there that the written document is an accurate reflection of that.

MS DUNN:

Yes your Honour.

WILLIAMS J:

Well isn't that an assumption that can't be made under section 6, that's its point?

MS DUNN:

I accept that your Honour. I would say, though it is the starting point. It may well be that there's evidence that in a particular case the written document is not good evidence of common intention, and *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395 would be a good example of that. That isn't, as Mr Wicks will take you through the situation here, you don't have evidence from the drivers saying "that wasn't what I intended when I signed up to that contract".

WILLIAMS J:

What wasn't what I intended?

MS DUNN:

The relationship on the basis of the contract. You don't have evidence from drivers saying "I thought I signed up to be an employee" or "I didn't know there was a difference between what I signed up to and an employment relationship" which is effectively the evidence in *Leota*.

WILLIAMS J:

This is this category point that's made in the submissions that somehow the label is going to be an important diviner of intention. Why is that? Because I thought of the ERA and section 6 is that the label, while it is relevant, is not the point at all. It's the real substance of the relationship, and then you figure out what label applies to that substantive relationship once you've figured out what it is. An aspect of which is reading the contract of course, a very important aspect.

MS DUNN:

I would accept that your Honour, but I would put slightly more emphasis on labels in the context of what is it that the two parties intended when they signed up to a particular contract.

WILLIAMS J:

Yes, but if you asked a driver: “Did you intend to be an employee?” The driver might say: “I don’t know.” “Did you intend to be an independent contractor. I don’t know.”

MS DUNN:

They might say that your Honour, but that isn't the evidence before this Court. There’s no evidence –

WILLIAMS J:

I thought it was the evidence before the Court, apart from the contract itself, which makes explicit what’s being chosen. The evidence itself is less clear on that.

MS DUNN:

I think there’s an absence of evidence on that your Honour.

WILLIAMS J:

Well quite but of course you’re not going to get a witness saying “I didn’t intend to be an employee”. That might say “I didn’t wish to be controlled in this way”, or “I am being controlled in this way” and that fits the employee category. That’s a course of analysis that’s open on this Act, in fact it’s invited, isn't it? If it’s true.

MS DUNN:

Yes your Honour, but I think it is quite an assumption to say a driver wouldn’t say “I never intended to be an employee”, or “I didn’t know I was signing up to be an employee”. I would have expected the evidence to be the evidence if it was the case. I guess your Honour in answer to your original question, I accept that the enquiry is to determine the real nature of the relationship, and so the label should come at the end assigned by the Court, but what the parties said it was, or said it wasn’t, is important in assessing what they intended when they entered the relationship.

MILLER J:

To pick up on the point made by Justice Williams, and if one of the other counsel is better placed to answer it, just let me know. You can see the Courts below grappling with what evidence is admissible as to intention, and of course were this a contract between them independently of the statutory context they would be saying their subjective views about this were actually inadmissible unless it was a rectification argument or something like that. Do you accept that there's subjective evidence about what sort of relationship they thought they were intending is relevant here?

MS DUNN:

Mr Wicks is going to deal with that in detail, but the short answer is yes, in some circumstances. I appreciate the Court's general approach in a contract sense, but in an employment context, in an assessment of intention context, subjective intention can be relevant in limited circumstances, and in section 6 cases it tends to be relevant to effectively vitiate what would otherwise look like a common intention, and *Leota* is a common example of that there. Even though a contract was signed, the evidence that was accepted by the Employment Court was that Mr Leota didn't know what kind of contract he was signing up to.

WINKELMANN CJ:

So may I just ask you this question. The issue is not really in this case as I understand it, and correct me if I'm wrong, that the contracts don't really set out the way that the relationship operated. It is the labels are not correct. So some cases will be, this is what the written contract says, but in reality the whole thing operated entirely differently, in terms of the day-to-day operational relationship. That's not the issue here. The issue here is sure, it's set out how it was going to operate, but labels assigned are not accurate. Is that right? Or is there more, is there argument about how it operated, or whether it accurately records it?

MS DUNN:

No the appellants' position is that the contract accurately represents how the relationship worked in practice, and it is also the appellants' submission that the labels in the contract are accurate.

WINKELMANN CJ:

Well, I know the latter part but is it the respondents' position that the terms of the contract do not adequately describe the working of the relationships?

MS DUNN:

That's my understanding your Honour.

WINKELMANN CJ:

The terms, not the labels.

MS DUNN:

Both your Honour. That's my understanding.

WINKELMANN CJ:

Right.

ELLEN FRANCE J:

So there is some evidence about what drivers thought.

MS DUNN:

There's limited evidence about what one particular driver thought at the time he signed up, which was that he did not think he was signing up to an employment relationship.

ELLEN FRANCE J:

He didn't think he was self-employed. Is that the, you say that's the only evidence about…

MS DUNN:

That's the only evidence from the drivers.

ELLEN FRANCE J:

Intention at the initial point.

MS DUNN:

Yes, yes your Honour. Turning to my fourth topic, that is that a feature of the law in this area has been a reasonably consistent application of *Bryson* by the Employment Court since 2005. Footnote 50 in paragraph 2.12 of the appellants' written submissions includes a list of the Employment Court cases that have followed the *Bryson* structure that I've outlined, and with a few outliers the Employment Court has applied *Bryson* uniformly to a wide range of work and workers, obviously with different conclusions, but the framework itself has been broadly applied. What those cases show is that the Employment Court adopts the same formula in each case. It cites section 6 and quotes from paragraph 32 in *Bryson* as interpreting section 6, and then the Court considers intention, and then the three common law tests, and the following points can be drawn from that analysis. What is considered – the relevance of the factors being assessed can be dialled up or down depending on the factual context, and what is relevant to a particular factor could change over time.

So, for example, looking at what constitutes control in an employment setting, an office-based worker being able to work from anywhere maybe more consistent with an employment relationship now than it was prior to the COVID lockdown, so again demonstrating the flexibility of the test. None of the tests are conclusive although respective weight can be placed on the various tests depending on the overall factual matrix. Again these cases demonstrate that the Supreme Court's interpretation of section 6 in *Bryson* is flexible and able to meet the challenges of the changing nature of work.

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My final topic was the reasoning of the Employment Court with regard to its starting point and purpose. I do think we've already covered that with the discussion with regard to section 3 but I'm happy to answer any additional questions your Honours might have on that.

MILLER J:

It seems to me that we are looking at quite a different situation from *Bryson* and it's not surprising, of course, that lower courts have faithfully applied it, the question is whether it perhaps needs modification to reflect the circumstances of a platform such as Uber? And I have to say, for me, the labels to which you attach so much importance suggest a take it or leave it arrangement. They're not the sort of provisions one might naturally expect to see in a freely negotiated contract between a highly skilled computer programmer or something who wants to live in Columbia or some place, or Portugal, and work for a number of employers whom we're not at all concerned because that's a freely negotiated arrangement. The take it or leave it nature of this and the insistence that it takes a form dictated by Uber, to me, is problematic. It suggests, rather contrary to your submissions, if you like, that the real nature of the relationship is not as these documents suggest. So I'm not – I simply wanted to make clear that the labels thing doesn't necessarily – it's not necessarily neutral, as the Court of Appeal would have it, but potentially points against Uber.

MS DUNN:

Your Honour, it is right that the services agreement is non-negotiable, obviously I would accept that, in that sense I guess it's take it or leave it, but it's sort of take it or don't take it and take it at another time if you'd like to. You're not declining an offer that will then never be on the table for you again and so I guess in that sense –

WILLIAMS J:

That's kind of "take it or take it later".

MS DUNN:

Yes, take it or take it later.

WINKELMANN CJ:

Now that doesn't help you.

MS DUNN:

But yes, I take your point, your Honour, that it's a non-negotiable contract.

MILLER J:

Right.

WINKELMANN CJ:

And you say that doesn't stop it being – that this is Uber's offering, Uber is offering these services, it's not receiving services, it's offering these services and therefore –

MS DUNN:

Yes, I'm saying – I'm sorry, ma'am.

WINKELMANN CJ:

It's all right.

MS DUNN:

That the non-negotiable nature doesn't make this is an employment relationship, albeit I accept that's in the mix of factors in the overall assessment.

WILLIAMS J:

I guess the way you're painting that is the question is whether Uber is just a neutral platform for marshalling drivers or whether it's, in fact, controlling a fleet.

MS DUNN:

Yes, your Honour.

WILLIAMS J:

So the problem with the neutral platform point is all the ways in which Uber goes about controlling a fleet so that at the very least it's somewhere in the middle, don't you think?

MS DUNN:

Well, providing a platform means you also have to regulate that platform, so there needs to be some form of rules for both drivers and riders.

WILLIAMS J:

To participate in that platform.

MS DUNN:

Yes.

WILLIAMS J:

Absolutely.

WINKELMANN CJ:

Who's going to take us through the detail of this? Because that's really what we need to get into it, isn't it?

MS DUNN:

Yes.

WINKELMANN CJ:

Is that you, or?

MS DUNN:

No, that's Mr Walker, who I can hand over to right now.

MR WALKER:

Tēnā e Te Kōti. So in my section of the oral presentation, your Honours, I will be taking you through the relevant contracts which establish the business model at issue. So it's a reasonably confined scope, it's just focusing on the contractual documentation and the community guidelines. That will then set the scene for Mr Wicks to stand up and work his way through each of the four tests, being intention, control, integration and fundamental.

The reason for addressing the contracts as a standalone section is because of the critical role of the contracts, we submit, in any section 6 analysis and this will be picked up by Mr Wicks in greater detail in each of the tests. But we say, in a nutshell, the contract has two key roles. First –

WINKELMANN CJ:
Well, can you just clarify, when you go through it, will you be contrasting to what the Court of Appeal says about it or is that also Mr Wicks?

MR WALKER:
That will largely be Mr Wicks, your Honour. A couple of points of detail in the Court of Appeal judgment that I will pick up, particularly on the nature of services provided –

WINKELMANN CJ:
Right.

MR WALKER:
– and on the unmatched payments issue, but otherwise it will largely be Mr Wicks.

WINKELMANN CJ:
So all the control going back the other way from Uber to the drivers will be Mr Wicks?

MR WALKER:
Correct, correct, your Honour.

WINKELMANN CJ:
Right.

MR WALKER:
So in terms of the role of the contract then, in a nutshell and as I said Mr Wicks will pick this up in greater detail, first, in terms of intention the contract, we submit, will usually contain quite strong and meaningful indications of the

parties' common intention. Even where it is a non-negotiable contract, this is a contract to which two parties or many parties have agreed. The relevant intention will be the parties' intention as to the status of their relationship, so which status did they intend, what bargain did they strike and the best evidence of that, we submit, will be in the contract itself.

WINKELMANN CJ:

And so what do we make of the fact it's a large document, dense type, people aren't reading it, people maybe English is a second language, it's not negotiable, they know they've got no hope of renegotiating it, what do we make of that when we look at this?

MR WALKER:

Our submission, your Honour, will be that the contract is signed, the terms to which I'll be referring are reasonably clear and there is an indication of intention in there. Now, I would accept it would be open to the Court to say "well, look, in those circumstances we take less of indication of intention from the contract because of those circumstances", but our submission is that the contract is one to which the parties have agreed and it is meaningful in the section 6 analysis.

So in addition to the role of the contract in intention, the contract sets the base for undertaking each of the other three common law tests, so control, integration and the fundamental test. Now, of course, your Honours will need to go well beyond the terms of the written contract in undertaking those tests to determine the real nature of the relationship, but the contract is the base, we submit, upon which that occurs.

So in my submissions I'll cover six topics: an overview of the business structure, the services agreement between Uber and drivers, the agreement with riders, I'll explain briefly what all of those terms mean for the case, I'll take a look at the community guidelines and then I'll finish off by covering the regulatory framework within which Uber and drivers operate.

MILLER J:

It seems to have been agreed in the courts below that the Uber Eats stuff we can essentially ignore because the driver, the rides agreements tell us everything we need to know about the relationship, is that the case?

MR WALKER:

That's certainly the position for Uber and I believe there's one driver that did Eats rides, I believe he did 35 rides, your Honour, so 35 Eats deliveries rather, and so rides has been the focus.

Starting then with rides and I'll talk to the current rides agreement, if I may, that's been in place since 1 December 2018. And so somewhat obviously for any platform to operate –

WINKELMANN CJ:

What document number is that?

MR WALKER:

It is 301.0232 but I'll first take your Honours to a diagram which is at 304.2422. So this was a diagram that was in evidence in the Employment Court and Mr Tocher will bring it up shortly. Do your Honours have that? So somewhat obviously for any platform like Uber to operate, you're going to need three parties: you'll need the entity offering the platform and associated services, you'll need a rider and you'll need a driver. Now, here there were actually two Uber entities involved doing different things.

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So talking to this diagram, in the top left corner you have Rasier NZ. It contracts with riders – sorry with drivers who are represented by the car in the bottom left of this, to facilitate the ride-sharing platform, and I'll come to the terms of that contract shortly, and actually the word "facilitation" in greater detail. So that's Rasier NZ. It provides matching and facilitation services. Top right you have a Dutch company, that's Uber BV, and it provides a licence for drivers to use the Uber app, it's provided free of charge, and Uber BV also processes payments

on behalf of drivers that are received from riders. Bottom left we have drivers, Uber's position is they provide transportation services to riders, and are paid the fare. There is then a per trip service fee that is paid to Rasier NZ for the matching and facilitation service. Then just to complete the picture, bottom right, we have the riders. They use the app pursuant to a licence from Uber BV and Uber BV is the one that provides the matching and facilitation services to riders.

WINKELMANN CJ:

So those payments are rider – driver to Rasier. How are they organised?

MR WALKER:

So this is covered in the terms of the services agreement, clause 8.2, which I can go to now perhaps, if that's useful.

MILLER J:

I'm just thinking, that document is not accurate, right? The rider pays Uber. The money actually goes to Uber's bank account, not the driver's, and then Uber weekly pays the driver less the service fee, right. That's the flow of money?

MR WALKER:

That is the flow of money.

MILLER J:

When you say the…

WINKELMANN CJ:

So that diagram is not accurate.

MILLER J:

The rider is paying the driver, you're talking about what you say is the effect of these arrangements, rather than what actually happens?

MR WALKER:

Yes, so Uber is, so I've got clause 8.2 up on the screen, your Honour, of the services agreement. So Uber accepts the initial payment for a user, and they're authorised to do so, and the drivers agree that the user's payment to Uber is considered the same as a payment made directly to them. So your Honour is exactly right, what happens is Uber collects the payment on behalf of the driver, it deducts a services fee, and then it passes that on to the driver.

WINKELMANN CJ:

And that's covered in 8.2 is it?

MR WALKER:

Yes.

GLAZEBROOK J:

Who does the rider think is providing the service?

MR WALKER:

There's no evidence from riders before the Court your Honour.

GLAZEBROOK J:

Well just common sense, what would…

MR WALKER:

Well if it was me, I would think it was the Uber driver.

WINKELMANN CJ:

Well of course you would. But in any case, what's the derivation of that diagram, because it does create a misleading impression.

MR WALKER:

So that was in evidence in the Employment Court, I believe it was attached to one of –

WINKELMANN CJ:

I know that, but who generated it?

MR WALKER:

It was generated by Uber, it's attached to one of the Uber briefs in the Employment Court, and my submission would be, your Honour, that it isn't misleading. It accurately reflects the contractual arrangements in place albeit that it is Uber –

WINKELMANN CJ:

Not the money flow.

MR WALKER:

Not the money flow, but it's quite, it's not –

WINKELMANN CJ:

But actually does it, because contractual arrangements oblige Uber to disgorge money to the riders, and that's not depicted there.

MR WALKER:

Well there's a, Rasier NZ, and the arrow going up to it, refers to the per trip service fee payment to Rasier NZ.

WINKELMANN CJ:

Yes, suggesting that that's going from the driver to Rasier but in fact it's coming, the money is not flowing that way, is it?

MR WALKER:

Well in my submission your Honour, and in the world of commerce, and again there isn't evidence on this, but it's not completely artificial to have money handled by different parties on behalf of others, and here when there's, you know, thousands of Uber drivers in New Zealand, thousands of driver partners in New Zealand –

WINKELMANN CJ:

So can I ask you, is there a diagram which shows the money flows?

MR WALKER:

I don't believe so your Honour, and the point I was going to make is the complexity, the accounting complexity in having driver partners collecting money from individual riders, and remitting those, or a portion of that, to an Uber entity would be astonishing, and so my submission would be, having a collection process provided for in the services agreement, is actually a necessary pre-condition to this platform working.

WINKELMANN CJ:

So Uber collects the money, so Uber, is that Uber BV in that diagram?

MR WALKER:

Correct your Honour.

WINKELMANN CJ:

And the money, does any of that money flow from Uber to Rasier, as actually a matter of money flow, or from the rider to – from the driver to Rasier?

MR WALKER:

So my understanding based on the contractual arrangement is the services fee, perhaps Mr Tocher can take us to that, it's in clause 10 of the contract. So this is the contractual basis for the services fee. So the driver agrees to pay Rasier NZ a service fee on a per transportation services transaction basis.

WINKELMANN CJ:

And as a matter of mechanics, payment mechanics, how does that occur?

MR WALKER:

I'm not sure if there's evidence of that your Honour, of whether the money that is collected by Uber BV on behalf of drivers, whether there is a formal payment made to Rasier NZ, or whether it's done by way of accounting treatment, I'm

simply not sure of the payment flows. I don't believe that there is money that would actually be transferred, in the sense of going from one account to another, from Uber BV to Rasier NZ. I suspect it's rather dealt with, you know, internally by way of accounting, but I'm not sure.

WINKELMANN CJ:

So it's not the course that Uber BV pays the drivers, then the driver pay Rasier?

MR WALKER:

Correct your Honour.

WINKELMANN CJ:

It's not the case?

MR WALKER:

It's not the case, no.

MILLER J:

No, I mean isn't there something about this, there'll be tax advantages to Uber BV being paid to – receiving the money as an overseas entity. It may be that Rasier is nothing more than a New Zealand postbox which effectively pays no tax here. That's one possibility for instance. But do you think it's quite important to know, because the Courts below, we've all just spoken of Uber and the Courts below seemed happy to do that. But you're essentially telling us that the relationship, the real relationship between the drivers is between Uber BV, because it provides them with the intellectual property, access to this platform, and it takes the money for their work, and then gives them the amount less the service fee. This is BV that's doing it, rather than the local entity.

MR WALKER:

Yes, that's correct your Honour, but the, Rasier NZ does have an important role in this contractual. It's a tripartite contract, the services agreement between Rasier NZ, Uber BV, and the drivers, and it is Rasier NZ that provides the actual matching and facilitation services, makes the technology work for the purposes

of drivers, driver partners, accessing trips. So if your Honour had taken me as saying it's only Uber BV that we need to focus on, that's certainly not my intent. It is both of the entities in this version of the Rides model that we need to focus on.

WINKELMANN CJ:

Can you just assist me where the evidence is about the money flows?

ELLEN FRANCE J:

Ms Foley, I was just looking at her paragraph 7.10, which is 202.0473.

MR WALKER:

I'll just wait for Mr Tocher to bring that up if I may. What was the reference again your Honour?

ELLEN FRANCE J:

Paragraph 7.10. I haven't compared with, this is just her evidence-in-chief.

MR WALKER:

Yes, so this is recording the tripartite services agreement, to which I've just been talking your Honour.

ELLEN FRANCE J:

Then I didn't quite understand, so she says at 7.11: "Payments are only ever made to Rasier NZ for the services it provides to Drivers not Uber BV."

MR WALKER:

So that's correct your Honour. So the payments by drivers to Rasier NZ are in exchange for the services Rasier NZ provides, the matching and facilitation services. So that is the contractual payment flows. As a matter of collecting the payment from riders, Uber BV does that, but it doesn't collect it in its own ride, it collects it on behalf of drivers, and on behalf of Rasier NZ.

WINKELMANN CJ:

So where's the evidence about the payment flows?

MR WALKER:

I don't believe there was a significant focus in the Courts below your Honour.

WINKELMANN CJ:

So do you think it's a set-off. Do they just basically take off the payment that's due to Rasier before they pay it to the drivers, Uber BV, you don't know?

MR WALKER:

Yes, that's precisely what happens your Honour. So there's a services fee deducted from the fare of an agreed amount.

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WINKELMANN CJ:

By Uber BV, before it's paid to the driver?

MR WALKER:

Ah…

WINKELMANN CJ:

Well if Uber BV is collecting the money from the rider.

MR WALKER:

Yes.

WINKELMANN CJ:

Then it's the one who's paying the money out?

MR WALKER:

It's the one who's doing the processing of the payment out, correct.

WINKELMANN CJ:

So one assumes it doesn't pay the driver the fee that the driver's obliged to pay Rasier?

MR WALKER:

Correct your Honour. So it does not pay the services fee to drivers. It deducts the services fee and remits the rest to the driver, that's correct.

MILLER J:

The services fee covers the matching functionality that Rasier provides the drivers, so they're matching?

MR WALKER:

Correct your Honour, correct.

WILLIAMS J:

You said this was a necessary form of flow of cash for the platform to work. Why is that?

MR WALKER:

The point I was trying to make your Honour was if individual drivers were responsible for collecting the fare into their own bank account, then remitting a services fee to Rasier NZ, matters would get exceedingly complex exceedingly quickly, there's –

WILLIAMS J:

That's how taxis work.

GLAZEBROOK J:

But the point is that this is a new business model.

MR WALKER:

Quite your Honour.

GLAZEBROOK J:

Whereby the person who wants to take an Uber, which is why I say, I don't think I'm taking an individual driver car, I'm taking an Uber, and I don't care who the individual driver is, and in fact the individual driver doesn't care who I am.

WILLIAMS J:

The point, but your point is the, somehow commercial reality required it to be done this way, and it can be done a different way fairly easily, which would make Uber look more like a completely neutral platform and not a controlling platform. You see, a choice has been made here, probably for good commercial reasons, but it has control effects, which are going to be relevant under section 6. Perhaps not decisive, but unquestionably relevant.

MR WALKER:

And my submission would be your Honour that the choice of structure is in everyone's interest, because it makes the platform work in a quick and efficient manner, and that's in everyone's interest, I wouldn't accept –

WINKELMANN CJ:

And it has very significant cashflow advantages for Uber BV, undoubtedly taxation advantages.

WILLIAMS J:

When I use Combined Taxis I just swipe my card somewhere near some little machine, it's pretty efficient, and I say thank you and step out.

MR WALKER:

I haven't spent as much time in taxis your Honour.

WINKELMANN CJ:

Well, okay.

MR WALKER:

So we've covered some of what I wanted to say.

WINKELMANN CJ:

We've probably covered quite a bit actually.

MR WALKER:

Yes, quite a bit. So to establish the business structure represented in that diagram there are, we submit, three contractual arrangements that are necessary. So there's the services agreement, to which we've just been referring, between Rasier NZ, Uber BV, and drivers.

WINKELMANN CJ:

And that's the document you call the services agreement 301.0232?

MR WALKER:

Yes, correct. And that's because in clause 1 of the recitals it calls itself a services agreement. The second are the terms and conditions between Uber and riders, and I'll come to those very briefly in a little bit, but the bundle reference, if your Honours would like it now, is 303.1345. I will come to that in due course.

WINKELMANN CJ:

What do you call this, is this the…

MR WALKER:

This is the rider agreement.

WINKELMANN CJ:

And that's between…

MR WALKER:

Uber BV and riders. So Rasier –

MILLER J:

This is the document that purports to establish a contract between the rider and the driver?

MR WALKER:

Correct your Honour. So both of those contracts, which I've just been referring, those written contracts, the services agreement on the one hand, and the driver

terms and conditions, contemplate a relationship being established between drivers and riders. So the third leg of the triangle if you will. Now there's no written agreement between drivers and riders, and we obviously accept that, but the appellants' submit there's nothing particularly controversial about that, that passenger transportation is typically not subject to a written agreement, as his Honour Justice Williams just referred to, people do just hop in a taxi, tell the driver where they would like to go, and a submission for Uber is that this is no different, and in fact much of commerce actually occurs without written contracts. If you think of any exchange of consideration –

MILLER J:

Isn't it fanciful to suggest that an Uber passenger is going to think they're entering into this arrangement under contract with the driver, and Uber itself has nothing at all to do with it except that it put the two of you in contact? Who would think of that?

MR WALKER:

The terms and conditions that the rider has agreed to provide for exactly that type of arrangement your Honour, and so I would –

MILLER J:

Is there any evidence that any passenger anywhere has ever read those terms and conditions?

MR WALKER:

There certainly isn't any evidence in this case of that, I couldn't speak for the world.

WINKELMANN CJ:

I suppose there's evidence that you have.

MR WALKER:

I certainly have your Honour, and I'm sure you're all very careful when you read everything before you click through.

WILLIAMS J:

We're reading it right now.

MR WALKER:

But in all seriousness the submission for Uber is that riders have agreed to these terms, which say, look, Uber BV is going to do certain things, they're going to provide me with a platform, and then if I want to do that, if I want to access transportation services, it is the drivers that are the providers of those transportation services. So in terms of the services agreement we've largely –

GLAZEBROOK J:

I just have real trouble with the submissions. So if something happens on that ride, and I don't get that ride, who do I complain to? Because doesn't Uber have the right to decide whether I get a refund or not if something happens on the ride? So do I really have a contract with the driver if that's the case?

MILLER J:

Can I just add to that, the driver whose name you do not know.

MR WALKER:

Your right your Honour, that Uber would manage the complaints process, and it does have the right to make those sorts of determinations. But our strong submission is that this is the relationship contemplated by the contract, and that is certainly the one –

GLAZEBROOK J:

Well it might be but it's just nuts, isn't it.

WINKELMANN CJ:

So can I just ask, is this the contract, is the rider contract the one that's up on the screen?

MR WALKER:

This is the services agreement your Honour.

WINKELMANN CJ:

Can we put the rider contract up on screen.

MR WALKER:

Yes, I mean I've done most of my points about the services agreement. Shall I finish the services agreement and then move to the rider…

WINKELMANN CJ:

Oh I thought we had moved to the rider agreement.

MR WALKER:

No.

WINKELMANN CJ:

Okay, well let's go

WILLIAMS J:

We had.

MR WALKER:

You had perhaps your Honour.

WINKELMANN CJ:

Well I hadn't.

MILLER J:

The terms of this document are very important, we accept that, and the lower courts looked at them closely. I have the sense that there's, no one is arguing that the lower courts missed anything, although the characterisation of the provisions of this agreement is obviously in issue.

MR WALKER:

Correct your Honour. The lower courts haven't failed to faithfully record what it is the contract says, that's correct.

MILLER J:

Right.

MR WALKER:

So very briefly, and I promise I won't read the whole thing, and I imagine you may return to specific provisions with Mr Wicks. I want to start with clause 1 for a good reason. It's Rasier NZ provides, "procure and facilitate the provision of lead generation services", and you'll see that in the second paragraph under clause 1. The reason I pause on that is because "facilitate" is actually a term of art in this context. It's in the Land Transport Act 1998, that idea of facilitating ride-sharing, introduced by a 2017 amendment, and I'll come back to that in greater detail shortly.

Clause 1 also described, you know, Uber BV and its role, to which we've already referred, and it also describes what it is drivers do, in the terms we've already described.

Briefly then on clause 3, here is the direct and legal business relationship as between riders and drivers, to which your Honour Justice Miller referred, and then clause 4, very briefly, this sets out the manner in which drivers will provide transportation services, and key points that we would emphasise to your Honours, and to which Mr Wicks will no doubt return, that drivers decide when, where, and for how long to use the app, and whether to accept, decline, or ignore a request, and they retain the complete right to engage in other business or income generating activities. So Mr Wicks will return to those no doubt.

So the final two clauses I wanted to comment on were 12.1, which confirms that drivers are required to meet their own tax obligations, as his Honour Justice Miller noted earlier, and then the final clause is clause 28.1. So this is what has been referred as a labelling provision, so this is an express agreement by the parties that the status of the relationship cannot be one of employment, and there was exchange between the Bench and Bar around "well, how would you characterise it or categorise it if all of these relationships are excluded" and

indeed the respondents submit that this clause excludes all tenable relationships and so therefore you can't really glean much from it.
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Now, we'd resist that, your Honours on the basis that it doesn't exclude an ordinary contractual business relationship and that's precisely what's anticipated by this contract.

WINKELMANN CJ:
Well, what you do you mean "an ordinary", it doesn't – are you saying it doesn't exclude the ordinary business relationship that is set out in the contract?

MR WALKER:
Quite, quite, your Honour, it –

WINKELMANN CJ:
Which is Uber providing services, Uber and Rasier providing services to drivers.

MR WALKER:
Quite, your Honour, because the point I'm trying to make is what clause 28.1 largely does is it excludes contract-plus type arrangements, so employment agency, partnership, things that come with additional obligations beyond that are set out in the contract, and so when the respondents submit "well, look, clause 28.1 excludes all tenable relationships", we submit that's not the case, and the submission for the appellant, as it will be developed by Mr Wicks, is that the provisions of the contract as a whole are actually consistent with that labelling.

Turning then to that rider terms and conditions, Mr Tocher will bring these up. I was only going to cover these very briefly, your Honours, unless you had specific questions, but just to note that the contracting parties are Uber BV and riders. The riders get access to the app as well as matching and facilitation services and I will take your Honours to clause 2 if I may, just a couple more

pages down, and this just confirms the services that are provided by Uber under this agreement. And then –

GLAZEBROOK J:

Can you not – can you perhaps just make sure we can read it before you – thank you.

MR WALKER:

Thank you, Mr Tocher. So two points to make on this clause, your Honour, Justice Glazebrook. First, this says what Uber is doing and then if you scroll down slightly, Mr Tocher, there's an acknowledgement that it's not Uber providing the transportation services, it is drivers. Otherwise these are reasonably detailed terms and conditions that aren't particularly relevant to the question before the Court but obviously –

WINKELMANN CJ:

Independent third party contractors.

MR WALKER:

Quite, your Honour.

WINKELMANN CJ:

That's a label.

MR WALKER:

Yes, that is a label. As Ms Dunn submitted earlier, independent contractor is one of those terms that can actually mean different things in different context. So you could call it a contractor, that might be an accurate label.

WILLIAMS J:

What's that clause number?

MR WALKER:

It's clause 2, your Honour, the services.

GLAZEBROOK J:

Because if they're not provided by independent third party contractors, then because they're not independent third party contractors what does this do to this? What do you say you get from this, because somebody who certainly won't have read this by signing up to this, because it's very take it or leave it for a rider, what do you take from the fact that a rider says – that agrees that services are provided by an independent third party contractor, if they're not?

MR WALKER:

Well, my submission would be, your Honours, that they are provided by somebody independent.

GLAZEBROOK J:

Well, no, no, I understand that.

MR WALKER:

Yes.

GLAZEBROOK J:

But what happens if they're not? What does this do for you, in terms of the argument, is what I'm asking?

MR WALKER:

Oh, the submission we would make based on this is that there is a consistent contractual framework and platform offered by Uber, that is the Uber platform, and the conception of it that we're pushing on the Court is consistently seen in all of the written contractual documentation. So that's the relatively small point I'm making based on this, your Honour. Does that answer your question?

GLAZEBROOK J:

I'm not sure it gets you anywhere, is what I was suggesting.

MR WALKER:

And I'd disagree with that, respectfully, your Honour.

GLAZEBROOK J:

Yes.

MR WALKER:

On the basis that I can sense perhaps from the bench a little reluctance to place much weight on these contracts on the basis that they, I believe the language used was “take it or leave it”. I would advance the same language that my learned friend Ms Dunn did of “take it or take it later” but they are contracts to which people have agreed and they are still meaningful, in my submission. They can't simply be put to one side because of the context in which they may or may not have been signed, that would be my –

MILLER J:

For myself, I have no difficulty with the idea of a matching service in which two people who want to do a transaction are matched, one can see how economically efficient it is. The difficulty is the dominance that the platform assumes in this, to the point where the relationship between the other two parties is obscure to them. They think they’re dealing with the platform.

MR WALKER:

And that's ultimately the question your Honours have to assess when you’re looking at the real nature of the relationship as, you know, how do we best categorise it? But the submission for the appellants is that the contracts are central when undertaking that analysis.

WINKELMANN CJ:

Does this document go on to say that the contract, that the contract for the ride is between the rider and the driver? Contract or carriage or something? Or does it say the only contractual relationship between a rider is rider...

MR WALKER:

Sorry, your Honour, what was the question?

WINKELMANN CJ:

Well, where – is there anything that suggests that there is a contract between the rider and the driver in the documentation?

MR WALKER:

Yes, I believe there.

WINKELMANN CJ:

I was just wondering where that is?

MR WALKER:

Just scroll down, Mr Tocher. Perhaps I can come back and give you the direct reference after the break, your Honour. It's quite a – it's 11.27.

WINKELMANN CJ:

Right, you're wanting us to break.

MR WALKER:

I think I can keep going, your Honour, and cover one point briefly and then come back and give you that direct reference.

WINKELMANN CJ:

Okay, that would be good, thank you.

MR WALKER:

So and this is drawing on a theme perhaps of my portion of the oral presentation which is that the respondents have submitted that Uber accepted in the Court of Appeal that many of the written terms were not real. That's at paragraph 42 of the respondent's written submissions and so just to be very clear, the submission is that Uber accepted that many of the written terms were not real and I will –

GLAZEBROOK J:

I mean, that's written into what – not, sorry?

MR WALKER:

Of the contract, your Honour. And I wanted to clear that up and it's a good time to do it because that's simply not the case. As will be apparent, I hope, from the presentation I have made so far, Uber has never accepted that the written terms are not real and indeed its case is to a significant extent premised on those terms. And so for the avoidance of any doubt, Uber's position is that it is drivers who provide transportation services to riders and it provides a platform pursuant to which that occurs.

On this issue of services, Uber accepted in the Court of Appeal and it accepts here that drivers may provide some services to Uber. In the Court of Appeal, there was no discussion at all as to the content of those services that are being provided by drivers to Uber and it is not something that was covered in evidence in first instance, but an example would be Uber paying drivers who refer other new riders – new drivers, rather, to the Uber platform, so there's a referral fee that is paid sometimes to drivers.

MILLER J:

Yes, I see that, it was advertised in the paper recently.

MR WALKER:

Correct. And so Uber would accept that there's an exchange of consideration there.

MILLER J:

But that's just at the margin, right?

MR WALKER:

That sits outside the primary provision of transportation services but that is the limit of the acceptance of the services that are provided by drivers up to Uber and we certainly do not, as my learned friends for the respondents submit, accept that the terms of the contracts are not real.

MILLER J:

I have a – I wonder if I could raise a question, perhaps for Mr Wicks later?

WINKELMANN CJ:

Yes, that's a good idea.

MILLER J:

So I want him to think about it, yeah. One of the points which Uber emphasises is that drivers are free to work for other platforms. Now the literature on this, these platforms, is that they tend to – they're extremely beneficial and economically efficient in connecting people who want a service, and people who are willing to deliver it, but they tend to be exhibited by competition for the market because if everyone in the world is on Uber, then Uber is extremely valuable to everyone who wants this kind of service, you can get it anywhere from Uber. So there are network effects going on, in other words, and there is in this case evidence that drivers can use other platforms, but also that they effectively cannot from their perspective. So I wonder to what extent Uber has effectively won the competition for the market in New Zealand, such that this freedom which you have to work for another platform as a driver, is illusory. Is there any evidence about that, and what does Uber say about it? Maybe you can come back to it later. I appreciate that you won't have thought about it at this moment.

WINKELMANN CJ:

It's morning tea. Can I just ask you, what's the third document number you're going to refer us to?

MR WALKER:

The third document will be the guidelines which I will cover very, very briefly.

WINKELMANN CJ:

And what's the number?

MR WALKER:

They are 303.1094 your Honour.

WINKELMANN CJ:

Okay. We'll take the morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MR WALKER:

Before the break his Honour Justice Miller asked a question about market power and market dominance, and that is something that perhaps, as your Honour anticipated, Mr Wicks will deal with when I finish shortly, and I'd also promised to come back to you on the rider terms and conditions, and Mr Tocher is bring these up now. so the first question is, well, what do the rider terms and conditions say about the relationship between riders and drivers, and that is contained in the paragraph that's on your screens now. "Uber does not provide transportation or delivery services… all such transportation or delivery services are provided by independent third party contractors…". Then the final sentence: "Third party providers are responsible for the services they provide to you."

Now your Honour picked up earlier on the use of the language there, independent third party contractors, and I believe sought to contrast that with the language in the services agreement, which seeks to exclude independent contractor. Having reflected on it over the break, I think there's a way in which you can read both these documents together. The independent third party contractors are drivers, and they are that, but they are that to riders in the sense that they are contracting with riders to provide them with the transportation services. So that's how I would submit the two contracts should be read together.

WINKELMANN CJ:

So where is the contract between the rider and the driver?

MR WALKER:

That is the unwritten contract to which I have already referred your Honour. There's no – and these rider terms and conditions do not say "there will be an unwritten contract between you and a driver". They don't say that.

WINKELMANN CJ:

So what is the obligation of the rider, say, where does the obligation of the rider to pay an amount of money if they damage the car. Where does that arise?

MR WALKER:

So that is covered in these terms and conditions your Honour, and perhaps I'll go to the payments clause first. Perhaps Mr Tocher. So in terms of the exchange earlier around well how do the payments work. This clause 4 sets out the payment flows after receiving services: "…Uber will facilitate your payment of the applicable charges on behalf of the third provider as such third party provider's limited payment collection agent."

WINKELMANN CJ:

Well where is the obligation on the rider to pay for damage et cetera?

MR WALKER:

If you scroll…

WINKELMANN CJ:

Because there is an obligation on the rider to pay for damages, isn't there?

MR WALKER:

Yes, there is.

WINKELMANN CJ:

Cleaning fees.

MR WALKER:

Yes, there's cleaning fees. So repair or cleaning fees, here we go, so: "You shall be responsible for the cost of repair for damage to –

WINKELMANN CJ:

So is this in terms of contract terms since the obligation is, you say, unwritten contract between the rider and the driver. Is this a contract, Contracts (Privity) Act provision where they are entering into a contract. Well how does it work if a contract has been arrived by driver.

MR WALKER:

So the position advanced for the appellants, your Honour, would be this contract as between riders and Uber, sets the basis for the unwritten contract that springs into force as between riders and drivers, and that's consistent with this repair or cleaning fee clause your Honour, which talks about being, responsibility "for the cost of repair for damage to, or necessary cleaning of" and then sets out a process by which that is assessed and paid. So in the event that a third party provider reports the need for repair or cleaning, Uber verifies it, Uber reserves the right to facilitate payment for it.

MILLER J:

This is consistent with an arrangement that might conceptually work, which is that Uber is acting as the agent for the driver in forming a contract for the provision of the ride. This idea of otherwise a contract that magically springs into existence on the exact terms prescribed by Uber is a little fanciful, isn't it? What's wrong with Uber accepting that it is, at the very least, an agent of the driver?

MR WALKER:

So that's not how Uber sees itself, your Honour. Uber sees itself, and I think justifiably by reference to the contracts, as establishing a platform that riders and drivers can use if they wish. They are not –

WINKELMANN CJ:

But then why is it effectively a negotiating contract in terms of the drivers here?

MR WALKER:

Because that is what makes the platform as a whole work. It goes to the efficacy of the platform to have these baseline terms and conditions.

MILLER J:

That seems quite irrelevant, does it not? That may be true, but the point is that Uber is insisting on it. It doesn't really matter why Uber does it, the fact is it exercises a measure of control in order to achieve it.

MR WALKER:

So it accepts, your Honour, that that is something that would need to be considered as part of the control test, but the rationale for these mechanisms, rules, policies, does go to, in my submission, control, and I've no doubt Mr Wicks will return to that in due course.

WINKELMANN CJ:

So you accept there has to be a contract for the ride, and you say the contract is between the rider and the driver?

MR WALKER:

Yes, there is a unwritten contract between the driver and the rider pursuant to which the driver provides transportation services to rider. Because –

WINKELMANN CJ:

And the content of the contract is provided by Uber?

MR WALKER:

Correct. So the content of that third unwritten contract is set out in the individual written contracts as between Uber and drivers on the one hand, and Uber and riders on the other.

WINKELMANN CJ:

But you say that's not Uber acting in any sense as an agent for the rider because – and your legal reason for that is it's just how the platform works?

MR WALKER:

Correct, and the legal reason your Honour –

WINKELMANN CJ:

Is that a legal reason? It may be what the business model needs, but is it a legal reason?

MR WALKER:

Well the legal reason would be, your Honour, that's because that's what the contract says as between Uber and drivers and Uber and riders.

GLAZEBROOK J:

Well it says that the services are provided by independent contractors, and if they're not independent contractors, but employees of Uber, then saying that doesn't help you, does it?

MR WALKER:

Yes, although in the services agreement, which we've already referred to, does talk about it, I believe the phrase used is a direct and business legal relationship as between drivers and riders.

Moving then to the issue of unmatched payments, your Honours, and perhaps if Mr Tocher can bring up –

GLAZEBROOK J:

Do we have anything in here about complaints provisions?

MR WALKER:

In what sense your Honour?

GLAZEBROOK J:

In the services agreement with riders. Because there are complaints provisions.

MR WALKER:

Yes.

GLAZEBROOK J:

So where are they set out?

MR WALKER:

They're set out in the rider terms as well. Yes, here we go: "Uber will maintain a complaints management framework, and will manage this framework on behalf of third party –

GLAZEBROOK J:

Sorry, so where's this?

MR WALKER:

Sorry, this is being brought up on the screen now. It's page 15 of the PDF 303.1359 I believe it is. It just talks about Uber maintaining a complaints management framework, and will manage this framework on behalf of third party providers. Perhaps it's useful there your Honour –

WINKELMANN CJ:

So how does that operate, because if it – is Uber completely uninterested in the complaints?

MR WALKER:

Well no it's not your Honour, in that Uber has a real interest in complaints being well managed and the platform working well, and I think the best example of this is seen in the community guidelines that I was going to cover shortly, but I'll just turn to now. So these are at 303.1094. So there's various iterations of these guidelines, but they're essentially a policy document produced by Uber

that apply to all users of the platform, so riders and drivers, and they set expectations for everybody, as it says at the beginning of that paragraph, to "make every experience feel safe, respectful and positive". And the guidelines here are referred to in both the services agreement and the rider terms. So the purpose of these is to set baseline expectations for everyone, and most of the guidelines are actually quite common sense propositions like, treat everyone with respect, if you go over the page Mr Tocher, help keep one another safe, follow the law, they cover a bunch of basic legal requirements.

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So these all go to my point that I will impress upon the Court, that this is Uber establishing a platform, there might be room for reasonable people to disagree as to exactly which ground rules are necessary for a platform to operate, but the submission is that these are reasonable and appropriate ground rules that help ensure the platform operates well.

WINKELMANN CJ:

So this isn't just a platform then, it's no longer just a platform, it's the creation of an – it's the regulation of an entire working experience and a consumption experience.

MR WALKER:

Respectfully, I would beg to differ your Honour, on the basis that Uber does set the ground rules in the terms of the contract and the community guidelines, that that's accepted, but it is still providing a platform that people can choose to use or choose not to use.

I had two final topics to cover briefly. First is on this issue of unmatched payments. This comes up at paragraph 185 of the judgment under appeal and it might be helpful, Mr Tocher, if you can bring that up. So what the Court does in this paragraph, your Honours –

GLAZEBROOK J:

Is it 185, is it?

MR WALKER:

Paragraph 185, yes. It refers to payments being made by Uber to drivers where there is no matching payment from the rider. And so the Court of Appeal referred to these unmatched payments, unmatched in that sense, and sought to make inferences about Uber's business model as a result and we've got a few submissions to make on that.

The Court refers to three types of payments in this paragraph. It refers to lost item fees, cleaning fees and then payments for participating in promotions, and so the first point would be that in terms of lost item fees and cleaning fees, these are normally mapped. It is normally the rider soils the Uber, the rider pays, Uber BV collects that and passes it on to the driver. But really, that will not be the case, for example, if the rider disputes the fact that it soiled the car. In some circumstances, Uber BV will still make a payment to the driver and Uber's position, the appellants' position, is that that's justified by normal market hygiene reasons, goes to the overall functioning of the platform. That's in Uber's interests but it's also in driver's interests and rider's interests.

GLAZEBROOK J:

Can I just check, is that an obligation in the services agreement or is that what might say how it operates in practice?

MR WALKER:

Which aspect of that, your Honour?

GLAZEBROOK J:

Well, you said in some circumstances they will still make a payment to the driver, is that in practical terms or is it in the services agreement?

MR WALKER:

Oh, that's in practical terms, your Honour.

GLAZEBROOK J:

Yes.

MR WALKER:

So that's in accordance with any policy documents that are issued.

GLAZEBROOK J:

Yes.

MR WALKER:

But it's certainly not something covered in detail in the services agreement.

WINKELMANN CJ:

Again, so this is I'm saying it to you because I think it's a point you need to answer, but maybe Mr Wicks does, you keep on saying it's necessary for the operation of the platform, but it is necessary that the provision of services occurs in this way so that the platform has a market, it's not necessary for the operation of the platform, it's necessary for there to be demand for the platform, and so Uber is actually regulating the operation of the provision of services and the consumption of them so as to maintain demand for its platform. So it's going beyond a platform.

MR WALKER:

But the submission would be and perhaps this is where I respectfully part ways, would be that I have used the word "necessary" for the function of the platform, the submission would be it doesn't have to be necessary for the functioning of the platform to be permissible. The question is, well, is this a reasonable way of structuring the platform?

WINKELMANN CJ:

No, that's not the question. The question is what the extent of the control Uber needs to exercise so as to maintain its demand for its platform, the extent to which that – whether that level of control actually results in the drivers being employees.

MR WALKER:

Quite.

WINKELMANN CJ:

So it's not really what anthropologically this platform needs to survive and thrive in a capitalist society, it's what the implications of its operating model is.

MR WALKER:

And I would accept, or the appellants would certainly accept the fundamental point is, well, what is the real nature of the relationship and the presence of control, which Mr Wicks will cover, is one factor that goes to that.

Finally then, on these unmatched payments, the payments for promotions that are referred to at the final part of paragraph 185, so they're a payment provided for in the contract and at clause 13 of the services agreement, and again Uber's position is that these payments are made for market hygiene reasons, they go to the overall functioning of the platform, and so we therefore submit that the Court of Appeal was wrong to extrapolate inferences about the business model from any unmatched payments.

WINKELMANN CJ:

Well, again, you're really answering it just that this is "the platform needs it", it's not really answering the Court of Appeal's point.

MR WALKER:

Well, the Court of Appeal says these unmatched payments to the drivers reflect the reality acknowledged by Mr Wicks that drivers contract with Uber to provide transportation services to riders and we would push back on that, your Honour. We would say the final part of that sentence is, with the greatest of respect, a little bit unclear, in that drivers do contract with Uber in a way to provide transportation services. They contract with Uber to have access to a platform pursuant to which they provide transportation services to riders, that is of course accepted, but the agency of Uber accepting an obligation to perform transportation services and then subcontracting that out, that is certainly not accepted.

MILLER J:

There are, well, there's quite a lot of discussion in the judgments under appeal about the concept of goodwill and the way in which the platform is set up to prevent drivers from obtaining it on their own behalf. Do you want to take us to any of the provisions about that? I'm offering you opportunity to do so, it seems to me an important feature of the case.

MR WALKER:

I wasn't proposing to take the Court to any provisions.

MILLER J:

You're not proposing to do that? Okay.

MR WALKER:

But I believe it will come up in Mr Wicks' section on that.

MILLER J:

Right.

MR WALKER:

That portion of the submissions. So the final topic I had is on the regulatory framework and we filed yesterday, alongside the road map that we've been following, the relevant provisions from the Land Transport Act and also a set of operator licencing rules that are promulgated under that Act, and although the regulatory regime hasn't been a significant feature of the case to date, it is quite helpful context, in my submission, for understanding the business structure, in turn the real nature of the relationship.

So, the one provision I wanted to focus in on is section 30P and so this provides that: "A transport service driver must [have] when using a vehicle in a transport service ..." one of three types of licence. Either they have the licence themselves, they can drive on behalf of someone who has a licence, or where someone – where the transportation service has been facilitated by a facilitator who holes a P licence.

And so “facilitate” is in turn defined in the Act as meaning: “... to enable drivers and passengers to connect ...” and so Uber is a licenced facilitator. And so the small submission, your Honour, and Mr Tocher has brought it up here: “... to enable drivers and passengers to connect by electronic or any other means ...” and so the reasonably confined submission I would make off the back of these provisions, your Honour, is that the services agreement uses this language of facilitation, Uber facilitates the provision of lead generation services and Uber’s role as facilitator, as described in the contract, matches quite neatly with the regulatory regime.

WINKELMANN CJ:

Is that not because the regulatory regime was altered to reflect this kind of arrangement?

MR WALKER:

So the regulatory regime was altered in 2017 and the contract to which we have just been referring was 1 December 2018, I believe.

WINKELMANN CJ:

Did Uber only arrive on the scene in 2018, or was it?

MR WALKER:

No, so it arrived in 2014.

WINKELMANN CJ:

So that’s it was around before then, wasn’t it?

MR WALKER:

It was, your Honour, yes.

WINKELMANN CJ:

So how does that respond to the point I just made?

MR WALKER:

In what sense, your Honour?

WINKELMANN CJ:

Well, was – is it not reflecting the business model, this provision? It was amended to reflect the new business model, wasn't it?

MR WALKER:

And the point I would make is that there is a regulatory regime which includes this concept of facilitation. The point that is being made against the appellant is, well, the contractual terms are not real, there is legalese, you use this language of "facilitate the generation of lead and matching services" but that language is consistent with the regulatory regime.

WINKELMANN CJ:

Well, thanks for that.

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MR WALKER:

The final point I have is on *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 which Mr Wicks will pick up in much greater detail when I sit down very shortly, and that is related solely to the part of *Aslam* which is the regulatory regime at issue in the UK. So the appellants' position is that the Court should be cautious in drawing too much from the *Aslam* decision, especially insofar as it relates to the business model. Both the business model and the regulatory framework were quite different in the UK, and in particular in the UK there was no concept of a facilitator, which is what we've got here. Instead Uber London was the only entity that could provide the transportation services, and that regulatory quirk is not a feature of this case.

WINKELMANN CJ:

Sorry, can you just go through that again? The regulatory model was different?

MR WALKER:

Yes, the regulatory model was different. So in the UK and the *Aslam* decision one had to be licenced to provide transportation services. The only entity that had a licence was Uber London, and it had the licence to provide the transportation services. So the Court concluded, well, on that basis it must be Uber London that provides the transportation services because it has the licence to do so. That is a distinction with this case where you have Uber, which is a licence facilitator, facilitating others to provide the transportation services, and that's covered in paragraph 46 of the *Aslam* decision.

WINKELMANN CJ:

And where is it covered in your written submissions?

MR WALKER:

I'm not sure if this features heavily in the written submissions your Honour. Or rather, I'm sure it does not.

MILLER J:

I'm not sure myself that that is a sufficient reason to distinguish *Aslam*. Much of that decision appears to be focused on the same terms that we are looking at here.

MR WALKER:

And that is something Mr Wicks will address in greater detail.

MILLER J:

Right.

MR WALKER:

I was just focusing simply on the regulatory regime at play. So perhaps, unless your Honours have further questions, that might be a convenient point for me to pass over to Mr Wicks.

WINKELMANN CJ:

Thank you, thanks very much.

MR WICKS KC:

Your Honours, I'll pick up where Mr Walker left off by just addressing *Aslam* and I address *Aslam* as the respondents' place heavy reliance on the conclusions reached in that case, and the respondents submit in their written submissions that the conclusions reached in *Aslam* are identical to those referred to by the Court of Appeal. The submission is made that reliance on *Aslam* is misplaced as that was a case regarding whether drivers for Uber in the UK were workers as defined under the relevant provision of the Employment Rights Act 1996 in the UK. Now that provision is referred to in *Aslam* at section 230 and it defines the term of a worker, and paragraph 35 is up, defines the term of a "worker" to mean: "An individual who has entered into or works under… (a) a contract of employment, or (b) any other contract… whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any… business undertaking carried on by the individual."

If we go to paragraph 38 of *Aslam*, there is a helpful reference there to observations of Baroness Hale of Richmond in *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] 1 WLR 2047 which sets out that under the Employment Relations Act 1996 in the UK that has the effect of employment law in the UK jurisdiction distinguishing between three types of people. So first you've got those employed under a contract of employment. Secondly, you've got those self-employed, people in business on their own account undertaking work for their clients or customers, then you have this third, intermediate class of workers who are self-employed but providing their services as part of a profession or undertaking carried on by someone else. This third class in the UK is entitled to many, but not all, statutory rights provided to employees.

So as can be seen, the statutory framework is fundamentally different in the UK. It is not as binary as section 6 of the Employment Relations Act is, and the finding in *Aslam* was that the drivers were workers in the third class. There was

no submission in *Aslam* that the drivers were employees. In section 6 in our legislation –

WILLIAMS J:

I guess there didn't need to be, did there?

MR WICKS KC:

Well that's the submission made by the respondents. In our respectful submission the submission was made that they were workers, they didn't need to be employees because they were captured in that third intermediate category. Yes, your Honour is correct.

So section 6 of the Employment Relations Act here delineates only between employees and those who are not. It doesn't include individuals, as the UK legislation does, that maybe working substantively and economically in a similar position as employees, but who are not employees. We submit that the conclusions reached in *Aslam* go no further than a finding that the drivers in that case were self-employed, but providing their services as part of an undertaking provided by Uber. So in the absence of *Aslam* including that the drivers were employees, it doesn't reliably serve as a cross-check as the respondents have submitted it does, and in fact considering section 6 and its binary nature, such a finding in this jurisdiction, that the drivers are self-employed but providing their services as part of an undertaking provided by Uber, would result in a necessary declaration the individual drivers are not employees.

WINKELMANN CJ:

Well, would it? Isn't it a different model than you're suggesting? Here they're providing their services to Uber, I suppose.

MR WICKS KC:

And this is just looking at the findings in *Aslam* and saying there the same findings or conclusion was reached.

WINKELMANN CJ:

So was it –

MR WICKS KC:

You don't get a better result is another way of putting it.

WINKELMANN CJ:

So was the finding that they were providing their services to the public? What was the finding as to the relationship with Uber though?

MR WICKS KC:

That they were workers under that intermediate category.

MILLER J:

You have to confront what was said in *Aslam* at paragraph 83 and following, don't you, because here the Court is saying well the question here is what's the real relationship, and then it goes on to look at a number of features of that relationship, and it says that it's Uber that dictates the terms, exercises a significant degree of control, "restricts communications between passenger and driver to the minimum necessary to perform the particular trip", so very tightly controlled. All of those features are present here, aren't they?

MR WICKS KC:

They are, and the Courts here have followed those features. We say that looking at the application of section 6 of this jurisdiction a different position can be reached, and I'll come to that when I deal with those factors as I address the control test.

Against the different legal framework in the UK including that the UK Supreme Court did not treat the written terms as the starting point, there –

WINKELMANN CJ:

Can I just return to the point you were going to say before. I mean isn't the major problem, difficulty for you with the *Aslam* case, the factual findings that are set out there?

MR WICKS KC:

The analysis is a hurdle that we need to overcome, and this Court is ultimately going to be invited to approach those, or that analysis in a different way based on the submissions that are to be made around, for example, relevant controls in an employment relationship. The efficient operation of a platform for the benefit of both users, being riders and drivers, and I'll come to that.

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There were also some distinguishing facts in *Aslam* that are relevant. Firstly, there was no assessment of the agreement and intention because Uber London Limited, which is the equivalent of Rasier New Zealand Limited, was not a party to the agreement with the drivers and by contrast, of course, in this appeal is, it's been discussed, Uber drivers have a services agreement with both Uber BV and Rasier New Zealand Limited. There is the point that Mr Walker has already touched on that under the Private Hire Vehicles (London) Act 1998 a private hire vehicle operator licence is required to accept private hire bookings. Uber London held that and the drivers did not, which meant that Uber was required to accept trip requests before transmitting them to the driver.

As Mr Walker has explained, the New Zealand law permits drivers to operate under a transport service licence held by Uber as the facilitator of transport services and we submit that Uber's business model cannot therefore be rejected on the same basis as in *Aslam*.

WINKELMANN CJ:

Well, what occurs to me though is that that might be said to be a statutory model of what is being talked about in Uber, with Uber London, that effectively they're the licence holder and are accepting it and transmitting it to the driver.

MR WICKS KC:

The difference is that here we now, we have a facilitator regulation, if you like, this is different.

WINKELMANN CJ:

Well, where's the magic of the word "facilitator"? Is that – is there a definition in the legislation?

MR WICKS KC:

There is, your Honour, if that could be – Mr Tocher will bring that up. So it: "... means to enable drivers and passengers to connect by electronic or any other means ... facilitator means a person facilitates who facilitates a small passenger service ... ".

The final point I want to –

WILLIAMS J:

Just before you do, the idea that idea that Uber was a monopsony in London, is that were there no other licensed providers than Uber?

MR WICKS KC:

I don't know the answer to that, I'm sorry, your Honour.

WILLIAMS J:

Because it's quite important in terms of the choices could make.

MR WICKS KC:

Mr Tocher has assisted here by...

WILLIAMS J:

There were certainly taxis.

MR WICKS KC:

There were certainly taxis and there were certainly what they called "minicabs" it's referred to.

WILLIAMS J:

Yes.

MR WICKS KC:

So it may well be that there were other organisations who were in a similar position to Uber London, but I don't know the answer to that, your Honour.

So the final point was just that the same extent of control, we submit, doesn't exist in this case and *Aslam* had the following features which are absent here. In *Aslam* there was a robust onboarding process that was carried out, including what the Employment Tribunal found amounted to an interview, that's referred to at paragraph 14 of the *Aslam* judgment. New drivers were given a welcome pack that explained their obligations using the description "when going on duty". There was also what was described as a penalty where there was a 10-minute stand down period that took place should drivers not accept three trips in a row or if they cancelled trips, and in summary, we say *Aslam* is of limited assistance and even on its conclusions doesn't support any different outcome than –

MILLER J:

You have the same provision here, don't you, or you have a stand down if the don't accept trips, but you say the 10 minutes doesn't apply?

MR WICKS KC:

There's a log out if a driver doesn't accept three consecutive trips being offered and that occurs and the driver is able to immediately log back in and that, as Uber has, I think the evidence set outs, is to ensure that drivers haven't inadvertently left themselves logged in but they don't wish to be working.

MILLER J:

Right.

MR WICKS KC:

So just in summary, we say *Aslam* is of limited assistance and even on its conclusions doesn't support any different outcome than the drivers here falling short of employees. Can I move then to –

WINKELMANN CJ:

Can I just ask a question about that.

MR WICKS KC:

Yes.

WINKELMANN CJ:

Looking at the pack, the community standards document is expressed in the kind of 2025 way to be the riders and the drivers are as part of a community, but isn't it just a reformulation of a driver pack? Because it's pretty clear who Uber's really concerned about their behaviour and that's the drivers as counsel said, you know, the platform needs good behaviour for – Mr Walker said the platform needs good behaviour.

MR WICKS KC:

It does, on both sides, to be a platform that both the riders and both drivers wish to use.

WINKELMANN CJ:

But we know who is going to be held to the Uber community guidelines in reading it, don't we?

MR WICKS KC:

Well, we're going to come to some evidence that, in fact, riders are also held to those community guidelines and I will come to that. The point about the introduction pack and this was seized upon or some weight was given to it by the UK Supreme Court at paragraph 127 of *Aslam* about the reference to the drivers' obligations being described as "going on duty", a term that reflected from the UK Supreme Court's perspective an employment relationship. So, that

was the point to be made about the welcome pack and also the fact of this reference to "going on duty" and the instruction: "'Going on duty means you are willing and able to accept trip requests'."

So unless your Honour has any follow-up questions, I will move on to intention and I brace myself for a number of questions on that.

WINKELMANN CJ:
It was certainly signalled, Mr Wicks.

MR WICKS KC:
Yes, it has. I am not going to be surprised. It is settled law, following *Bryson*, that the relevant intention, in respect of section 6, is the parties' common intention as to the status of their relationship and that is a question which is assessed objectively at the time the parties entered a relationship.

The written terms and conditions are an important source of evidence for determining intention. They are objective evidence of what kind of relationship the parties intended to enter. Now, it is accepted that the labels given to the relationship in the written agreement are not determinative of the real nature of the relationship.

WINKELMANN CJ:
Yes, well, as to that, the common intention is as to the status of their relationship, it's not the common intention as to what label they apply, is it?

MR WICKS KC:
No, it's not.

WINKELMANN CJ:
It's how it operates.

MR WICKS KC:
No, that's right, it's concerning the status of their relationship.

WINKELMANN CJ:

It's how it operates.

MR WICKS KC:

Yes, does it operate as a relationship of employment or does operate as –

WINKELMANN CJ:

No, that's a label again. Because would you really be asking that question? Wouldn't you be asking as for the kind of nuts and bolts of it and then the Court looks as what is actually...

MR WICKS KC:

Well, perhaps I could deal with it by –

WINKELMANN CJ:

Well, yes, I'm not trying to be difficult, because I –

MR WICKS KC:

No, no, no, I understand your Honour's point and it might just be convenient and perhaps instructive if we go to look at an example of the approach taken in the Employment Court by the Chief Judge in the case of *Leota v Parcel Express* and at paragraph 39 we see there that her Honour refers to: "The agreement, which Mr Leota accepts he signed, described him as an independent contractor [and it was] and express acknowledgement that the relationship was one of an independent contractor and 'not as an agent or employee.' Other terms of the agreement, in relation to financial matters, reinforce the independent contractor point." And that goes back to his Honour Justice Miller's reference to the description of what taxation arrangements are going to be and: "The way in which the relationship is described in the agreement and the associated documentation ... points away from an employment relationship and suggests an objective intention by the parties to structure their relationship as one of independent contractor." That's the example of how the question of common intention is approached.

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What occurs in some cases in this jurisdiction, the employment jurisdiction, is that that common intention can be vitiated by individual circumstances, and here that was vitiated somewhat by the fact that Mr Leota did not understand the relationship, or the status of the relationship that he had signed up to. We don't have any evidence of any matters of vitiation arising on the evidence in this case, and in *Leota* your Honours will see the Court found that the way the relationship was described in the agreement and the associated documentation, suggested an objective intention by the parties to structure the relationship as one of independent contractor.

The Court then goes on, as it must under section 6, to apply the three common law tests and ultimately determine in that case that they displaced common intention, and the relationship should properly be classified as one of employment. But the critical point demonstrated, in my submission, by this, looking at the case and the approach by the Chief Judge in this matter, is that common intention may point in a different direction to the common law tests, and it's considered separately, and usually first, and then the common law tests –

MILLER J:

There's a slipperiness about this term "objective" which is referred to. The Court is always objective in its assessment of the evidence, including evidence of what a person say they subjectively intended at the time. You seem to be using the term here to say it's the intention that one draws from reading the contract without reference to anything else, and then you can qualify that by evidence of how the relationship worked in practice. What I want to suggest to you is that may not be correct. That what the legislation directs us to is, what is the real nature of the relationship, and any evidence, including the terms of the contract, that goes to that is admissible in the sense the Court can take it into account.

MR WICKS KC:

That's right, and indications as to common intention of the parties is usually found in the written agreement.

MILLER J:

Usually but not always.

MR WICKS KC:

Not always, and we say here there are strong indications of that common intention based on the agreement.

MILLER J:

Well there's very strong evidence of Uber's intention.

MR WICKS KC:

There is, and if I also turn though here to now consider the evidence of the parties common intention as to their status, both in terms of the business structure of the written agreement that Mr Walker took to you, because there's little other evidence relevant to intention. I mean there's no evidence that any of the drivers thought they were signing up to an employment relationship, or that they were confused as to the nature of the relationship when it was entered into, or as Mr Leota was not aware of the distinction between an employment relationship and not an employment relationship.

WILLIAMS J:

That's really the point, isn't it. aren't you putting too much weight on the use of the term "status" in paragraph 32? As if everyone's an employment law expert that engages in one of these transactions.

MR WICKS KC:

I'm certainly not suggesting that.

WILLIAMS J:

No, I'm sorry, I was being cheeky.

MR WICKS KC:

No, I know your Honour is.

WILLIAMS J:

Isn't it much more sensible to just look at the substance and then see whether it matches one category or the other?

MR WICKS KC:

And that was essentially accepted by the Court of Appeal in the judgment at paragraph 177 where it…

WILLIAMS J:

Yes, that's right. It does seem to me to be more –

MR WICKS KC:

Says the substantive rights –

WILLIAMS J:

Otherwise you're having this abstract category discussion before you look at the substance of the transactions, and how's that helping.

MR WICKS KC:

Well the starting point, as I understand this Court's decision in *Bryson*, is obviously the terms of the agreement, within which you're also looking for indications of the common intention of the parties, and those, the common intention of the parties are informed by the agreement itself and it's terms which include, for example, that here on its face the driver agreement doesn't give rise to an employment relationship. But of course it's then subject to the common law test analysis as to whether that takes you to a different place than common intention objectively being not to have an employment relationship.

WINKELMANN CJ:

Because what I was testing is whether it's a common intention as to the label to be applied, or as to the operation, of how it would operate, and I think it probably is the latter.

MR WICKS KC:

And we say that when you look at the agreement the answer is that here the common intention as to status, as your Honour describes it, is not to have an employment relationship.

WINKELMANN CJ:

When you look at the operation of the agreement, or the thing that's set out?

MR WICKS KC:

Yes.

WILLIAMS J:

I wonder whether you, this is dancing on the head of a pin a bit, because if your job is to assess the status of – if your job, sorry, is to assess the substance of the agreement, you're obviously going to start with the words, and the words are very clear that this is not an employment arrangement, but that's not the end of it.

MR WICKS KC:

No it's not the end of it because you've got –

WILLIAMS J:

Well that's all, really. Isn't it any more difficult than that?

MR WICKS KC:

No it's not, and you form an objective view of what the common intention is and we say that undertaking that exercise here, the position you reach is that the common intention was not to have an employment relationship. So you've got through that first element of the analysis.

WILLIAMS J:

But you say the Court of Appeal has undertaken some methodological error.

MR WICKS KC:

We do.

WILLIAMS J:

By not coming to a view about status.

MR WICKS KC:

That's right.

WILLIAMS J:

When really what you're arguing is the Court of Appeal didn't apply enough weight to the words of the contract.

MR WICKS KC:

In part, yes. we say that what the Court of Appeal has done is that they have not assessed the parties common intention about the nature of their relationship. What they've done instead is consider the common intention about the substance of the mutual rights and obligations.

WILLIAMS J:

Which takes me back to the point that I wonder whether having a prior question about status really helps with clarity of analysis here.

MR WICKS KC:

Well it can do if you get to a position where the common law tests are evenly balanced, in our submission.

WILLIAMS J:

Okay.

WINKELMANN CJ:

Because it seems to me, and this is my opinion, it's not suggesting it for anybody else, but the common intention that you're looking to is what was the common intention as to – was the common intention to have a relationship, which the law would regard as an employment relationship, because we haven't got people out there who are lawyers on a daily basis negotiating these agreements. They're not – it really doesn't avail us much, which is why there's that focus on not focusing on the labels.

MR WICKS KC:

No, but the labels are not irrelevant.

WINKELMANN CJ:

No.

MR WICKS KC:

As the section sets out, which does take me back tot eh position that when the Supreme Court in *Bryson* talk about common intention as to the status, it's were the parties intending to have an employment relationship, were they intending to have a different type of relationship.

WINKELMANN CJ:

Yes, and I would put the question, were they intending to have a relationship that the law would describe as an employment relationship, and I see, and the contract is obviously incredibly important, so if it sets out someone's got an obligation to pay PAYE, well that's quite a nice little piece of evidence.

MR WICKS KC:

Oh it is indeed, yes, I agree, and I took you to, sorry?

GLAZEBROOK J:

I think, I was just going to say taxation is probably quite an important point here because many people, workers, might decide they might want to be in an independent contractor relationship because they get deduction for expenses,

which they don't if they're an employee. So is that the point that you're making, that there could be this common intention, but in fact the way it operates means that they actually weren't independent contractors no matter what their intention might have been?

MR WICKS KC:

That's where the application of a common law test may bite to displace that common intention. That's what section 6 provides for.

GLAZEBROOK J:

So your submission really is that you're looking at what the intention is, looking at the contract and what it was at the time.

MR WICKS KC:

When the parties entered into the relationship.

GLAZEBROOK J:

But accepting that, in fact, the common law test may mean that that common intention is not realised, if you like.

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MR WICKS KC:

Correct, and that's why I took the Court to the *Leota* case because that gives, I think, a nice case-based example of how the analysis is undertaken and that common intention was displaced in that case for the reasons that there was some vitiation of it because of Mr Leota's circumstances and then the application of the common law tests, particularly control in that case, overcame that common intention.

MILLER J:

There doesn't seem to be any evidence about what are the consequences for the business and for the drivers, if the drivers, these four drivers and the unions, win. Because as Justice Glazebrook says, that would seem to transform Uber's

operations. You can no longer supply your own car and claim tax deductions in respect of it, for instance.

MR WICKS KC:

It's fair to say – and there is no evidence on that, but fundamentally it's quite a different set-up if it becomes an employment relationship and as I think is referred to in the submissions from my learned friends, there's I believe in the region of about 11,000 Uber drivers and there's about 1,000 or 1,100 employee status claims on foot, a number of those are stayed in the Employment Relationship Authority pending the outcome of this appeal process, but to answer the point from the bar, it seems plainly obvious that there are flow-on consequences without question, because it creates a different type of relationship that comes with it. The obligation to deal with taxes, to exercise good faith obligations under the Employment Relations Act, holiday pay, all those sorts of things which –

MILLER J:

Minimum pay, how would that work?

MR WICKS KC:

Minimum wage, I haven't turned my mind to how Uber might operate under an employment model, if it was even prepared to. Well, there is really a discussion we can only speak to on the basis of what is plainly obvious as a result of whatever the outcome might be.

Just to wrap up, if I can, the intention point. There is no evidence in the case before your Honours that any of the drivers thought they were signing up to an employment relationship, that they were confused as to the nature of the relationship, or were not aware of the distinction between being an employee and not being an employee, where that was they were factors in cases like *Leota* and the case of *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178.

In fact, the only evidence on this point suggests the contrary and that relates to the driver Mr Ang, where the evidence from Mr Ang, I think Mr Tocher is taking us to that, was that he said he initially thought he would be self-employed, his evidence was that he signed up to drive using the Uber app in response to advertising on Trade Me to the effect "be your own boss, be flexible, be independent" and then there is some –

MILLER J:
Is he the witness who talks about how as things moved on he was having to work much longer to get the sort of income that was promised him?

MR WICKS KC:
Yes, yes. Yes, he does, if I remember rightly, and then there is the third point that there was evidence of correspondence between Mr Ang and Uber before he signed up which demonstrates, we submit, the mutual understanding that Mr Ang would not be an employee of Uber. In that correspondence, Uber said: "As you are not an employee of Uber, we do not withhold any income tax from payments that we help facilitate between you and the rider." That's the only evidence that might inform common intention and it only relates to, from an individual perspective, it only relates to Mr Ang.

We also submit that the common intention here is not undermined by the fact the services agreement was offered as non-negotiable, or take it or take it later. There was no compulsion to accept the agreement at all or within a certain time. The offer to accept the agreement doesn't lapse and it also doesn't require the driver to do anything, so that is a driver can sign up and do nothing and have no obligations and an example of that comes with the driver Mr Rama who on the evidence accepted the agreement on the 1st of April 2019 but did not use the app for driving until 18 July 2019.

The drivers, in accepting the offer when they did not have to accept it and that they did not enter the agreement on the basis it was employment, we submit, is a genuine and compelling indication of intention. The fact the drivers subsequently say it should be classified as employment engages the section 6

test but it is not relevant to common intention at the time of entry into the relationship, and it is submitted that if you stand back and look at the actual evidence of common intention, mainly the services agreement, the correct conclusion is that the parties didn't have a common intention to enter into an employment relationship.

I move then to the control test and this is section 4 of the written submissions.

GLAZEBROOK J:

Under the common law test and that this is where I'm not entirely sure whether you accept that section 6 changes this or you're submitting that section 6 changed it. Intention just goes in the mix with everything else.

MR WICKS KC:

It does, so that there –

GLAZEBROOK J:

And so you're saying that's still the case?

MR WICKS KC:

It's still the case. There are four tests, if you like: common intention, control, integration and fundamental. And in the common law, they were the four assessments made in the overall mix and –

GLAZEBROOK J:

So why are we doing intention first then rather than – I mean, we obviously have to work out what intention was.

MR WICKS KC:

Yes.

GLAZEBROOK J:

But what's wrong with it going in the mix? Now, I know you say the Court of Appeal didn't put it in the mix and that was the error.

MR WICKS KC:

Yes. We rely on what we consider to be the position taken by the Supreme Court in *Bryson* which says you start with the written terms of the agreement and the reference to those –

GLAZEBROOK J:

But don't you do that for the whole of the control test as well?

MR WICKS KC:

Where you start –

GLAZEBROOK J:

I mean, you start and work out what the –

MR WICKS KC:

– you start with them and then obviously they're going to go give you indications of common intention and –

GLAZEBROOK J:

As well as control and –

MR WICKS KC:

And they are also going to inform the other common law tests in due course, but they are separate considerations. You don't conflate common intention with the other – the, yes.

GLAZEBROOK J:

Oh, no, I mean, I am with you on that, personally –

MR WICKS KC:

Yes, no, but –

GLAZEBROOK J:

– but I'm not sure that necessarily my colleagues are, but...

MR WICKS KC:

But so –

WINKELMANN CJ:

And do you accept when you start with it, that the cogency or how much weight you give those written terms depends upon the circumstances which they are entered into, so –

MR WICKS KC:

It may do, but also if you reach a common intention, position of common intention that the parties did not intend to enter into an employment relationship, that may also assist in informing how you approach the common law tests and whether those end up being equally applicable to whether it's an independent contractor relationship or whether it's an employment relationship. There is some instruction, in my submission, as to applying those common law tests by looking at what the parties' common intention was and I will come to that as I work through those tests, if I may.

So in terms of control, the changing nature of work as demonstrated by the gig economy, an example of modern work, invites reconsideration of section 6 for the first time in some 20 years but more so as to how the application of the common law tests could accommodate the modern working environment and the appellants' position is that this case, as I set out in the introduction, can be decided on existing law.

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We submit that the tests are sufficiently flexible to accommodate different relevant factors, and the Court should also be cautious to change a gateway test in a way that will impact on existing ways of working because those existing ways still continue despite the emergence of the gig economy and modern ways of working.

Having said that, we submit there would be benefit from refocusing the common law tests and approaching them in a flexible way to ensure they operate

effectively in the context of modern work, and I propose to address the appellants' submissions on each of the common law tests as we get to them and I'll start with the control test as I've said.

In recent years the work environment has become increasingly more flexible: flexible hours, remote working, the introduction of automated systems to complete work. However, employees remain subject to methods of control where, for example, leave must be approved, instructions must be followed when given, work is supervised and communicating a worker's whereabouts, an employee's whereabouts or work days and hours remains important. Work in the gig economy doesn't have these hallmarks. Individuals can piece together multiple flexible jobs or gigs to make up their living. Any given work might be a second or third income for that person. It might involve different work or different gigs, part-time employment, contracting or other business ventures, and in those circumstances flexibility when work is done and whether it is done at all becomes critical to enabling a portfolio approach and may, we submit, indicate a relationship other than employment.

If we take the four drivers involved –

WINKELMANN CJ:

So what did you just say? "Portfolio approach"?

MR WICKS KC:

So in other words, a person may have a portfolio of gigs that they use to generate their income and, for example, using four workers here, four drivers, I should say, three of them used Uber in sort of a portfolio way. Mr Rama worked as a part-time chef and used Uber to fill in on his off days. Mr Ang had a massage business and made decisions about whether to do massages or driving with Uber and mixed those around, depending on what suited him. There was evidence from him that a massage generated for him $70 an hour, so if he could slot that in he'd do that.

WINKELMANN CJ:

But on the other side of the equation what's happening is that technology and the accumulation of capital, arguably, is making human beings entirely fungible and so the question is where we draw the line and there is no particular incentive on the holder of the capital, the capital of the equation, to provide a living, notwithstanding how many hours a person works or decent conditions of work, et cetera. So the question is where the law draws the line.

MR WICKS KC:

And the law draws the line on the basis of what the legislature has put in place by way of section 6 and the application of the considerations in determining under section 6 whether a person crosses the line and becomes an employee or not, and obviously we see in the United Kingdom with their legislation they've introduced a third and intermediate category. That hasn't happened in this country.

We submit that with modern ways of working control should be viewed in totality, identifying the full extent and boundaries of the obligations and expectations on the individual, and that's because absence of controls can, we say, be just as relevant as the presence of others, especially where that absence of controls is essential to enabling portfolio work, so enabling an individual to have the flexibility to have various gigs which they undertake or to work, for example, using the Uber platform if you're a transport service provider, use other platforms, drive as a taxi driver, do other driving-related gigs.

WINKELMANN CJ:

Is your submission here that actually there's benefit for the worker in the absence of control?

MR WICKS KC:

There is, we would submit. Controls that are absent which would otherwise point to employment we submit must weigh into the balance of assessing the degree of control or supervision engaged.

GLAZEBROOK J:

And do you say the Court of Appeal failed to do that, because they did recognise that flexibility for drivers, didn't they?

MR WICKS KC:

They did.

GLAZEBROOK J:

Or what do you say about what they should have done?

MR WICKS KC:

We say that what the Court of Appeal did is not – first of all, they concluded at paragraph 221 that there was a limited extent of control exercised when a driver's not logged in and we submit there is an absence of control at that time. The structural features of the relationship weren't engaged –

GLAZEBROOK J:

Sorry, perhaps if we can just have a look.

MR WICKS KC:

Sorry, your Honours.

WINKELMANN CJ:

This is quite, what you're going through now, Mr Wicks, this is quite important so maybe just slow down again.

MR WICKS KC:

Yes, and I just wonder, if it's convenient to the Court, if I deal with these as I go through, the errors we say they Court of Appeal made, as we go through the discussion. That –

WINKELMANN CJ:

No, that's fine if you're going to deal with it, yes.

MR WICKS KC:

Yes, otherwise I'm going to be jumping around –

WINKELMANN CJ:

Okay, so you're coming to them?

MR WICKS KC:

– and I'll run the risk of confusing your Honours rather than…

WINKELMANN CJ:

So we're on the subject of "control" at the moment. Are we on the subject of "control"? Is that where we're at?

MR WICKS KC:

We are on the subject of "control" and I was at the point where I was introducing "control" and was about to make the submission that the kind of control should also matter in the section 6 analysis of the control test. Every business or contractual relationship will have elements of control. There are statutory and regulatory frameworks that have become increasingly prevalent and they also require control to be exercised in some circumstances. The most obvious example is health and safety. We submit the kind of control that assists in identifying an employment relationship is the kind exercised by an employer, being subordination, generally understood in terms of the control test to be giving instructions on how the work is to be performed, disciplining or performance managing, penalising shortcomings, monitoring and supervising while a person is performing the work, and all of this is purposeful control to ensure that an employee is performing their duties for their employer, but it is different to the other kinds of control that often exist in business relationships.

We submit that the drivers here are not controlled like employees, and turning to the facts in that regard, it is submitted that the compete absence of control the appellants have over the four drivers when they're logged out the app, along with minimal control when they are logged into the app, points strongly away from an employment relationship and in particular –

GLAZEBROOK J:

I still have a bit difficulty with absence of control when they're logged out because to a degree employers have an absence of control as to what people do when they're not at work, don't they? So I'm not quite sure what that means. Do you mean…

WINKELMANN CJ:

As to when they log in really.

MR WICKS KC:

Well, that's the critical point, but we say the Court of Appeal found there was minimal control when the drivers…

GLAZEBROOK J:

Well, it's really when they – minimal – well, no control virtually.

MR WICKS KC:

"No control" is our position when they are not logged into the app, correct.

GLAZEBROOK J:

They're not required to log in at certain times. Is that for the –

MR WICKS KC:

They're not and I was just coming to those particular points. Firstly, you've got no obligation to work; secondly, the drivers exercise a sufficient degree of autonomy when they are logged into the driver app; and, thirdly, the structural features of the relationship upon which the Court of Appeal focused, being service standards, app systems and incentive schemes, are not, we submit, indicators of employment. I'm going to run through those three particular points when we resume after the lunch break.

WINKELMANN CJ:

We'll take the lunch adjournment then, thank you.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.18 PM

MR WICKS KC:

Your Honours, dealing then with the, under the control test, this no obligation to work. All four of the drivers accepted, as is detailed in footnote 114 of the written submissions, that they had complete flexibility and choice whether to provide transportation services. That is, they were not expected to work and no rosters dictated when to work. The drivers didn't need to indicate their availability to work. They had no obligations around advance notification of when they would be available to work or if they were not working on any given day. They could also stop from using the platform permanently or for a period of time they chose without having to advise the appellants.

This contrasts with casual employees who, whilst not obliged to accept an offer to work, they must complete an engagement once agreed. Put another way, a casual employee's freedom to decide to do something else, or another piece of work whilst engaged as a casual employee, so during a period of their casual employment, is constrained. The drivers under the services agreement are not so constrained. That –

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WILLIAMS J:

Is that quite true? I think of fruit pickers. You turn up for the day, you don't turn up again. You're still an employee during that period.

MR WICKS KC:

But when you turn up for the day in a casual employment arrangement to work, or you accept an offer to come and work for two days, you're expected to work for those two days, whereas –

WILLIAMS J:

But a lot of these situations are you just turn up and pick what you want to pick and then stop when you want to stop. You're still an employee.

MR WICKS KC:

There may be circumstances such as that, but broadly speaking a casual employee, once they've accepted an assignment to work for a period, is expected to complete that engagement, and we've referred to in the footnote 116 to the case of *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 103, (2011) 9 NZELR 159 and also an Australian case of *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 which demonstrate that proposition, but I take your Honour's point that there may be in some industries potentially that type of scenario where a person may be free to come and go.

WILLIAMS J:

Highly casual labour forces, that's very common in Nelson, Marlborough, Hawke's Bay, Gisborne.

MR WICKS KC:

Your Honour may have more direct knowledge of that than I do, I suspect, but…

WILLIAMS J:

Some bitter experience as a 14-year-old, I can tell you.

MR WICKS KC:

I thought that might be the case, your Honour.

MILLER J:

This argument you're making only goes to show that they're not employees when they're not on the app.

MR WICKS KC:

That's to a degree correct, yes. But when they are logged in, they have –

WINKELMANN CJ:

Well, do you mean that, Mr Wicks? Because don't you give away a bit when you say that? I mean –

MR WICKS KC:

Well, I'm not giving it away, but –

WINKELMANN CJ:

Because you're saying that employment is a relationship that subsists when the person is working, and when they're not, and so…

MR WICKS KC:

Yes, that's right, I – and forgive me if I've mis-stepped in how I've put that, but your Honour is quite right, that's not the way I mean it.

In terms of autonomy while logged in, as we have already set out, the drivers can choose when, where, for whom and for how long they would work and they have a high level of autonomy and I have already touched on those in the opening introduction and it's in the written submissions and that high level autonomy tells against an employment relationship.

Now, the appellants accept, of course, that drivers exercise that autonomy within a framework. There are some decisions drivers make that will have consequences like taking an inefficient route or driving during periods of low demand, when a driver may not receive as many trips or earn as much as if they had made different choices, but that doesn't equate to subordination.

Some of what the drivers mention in their evidence is, we say, simply market forces. Drivers increase their revenue if they drive during busy times like weekend evenings. In addition, Uber's platform does contain levers such as surge pricing and incentives to ensure that the platform functions smoothly for both drivers and riders. It is best for all, we submit, if it is a frictionless platform and, for example, if everyone cancelled trips all the time, for example, no one would use the platform and there would not be rides available for drivers.

Turning then to the context for the structural features of the relationship and we submit the Court of Appeal did not focus its control analysis on control in an employment sense. To the extent Uber does exercise control as facilitator over

its platform, this does not indicate an employment relationship, and the Court of Appeal focused its control analysis on three features of the relationship, being minimum service standards, automated app systems, and the appellants' incentive schemes, and the respondents claim that these are ways that Uber controls its driver, but that is not the reason for many of these features. Some are regulatory requirements, many of them are for consumer protection, and others are just good business for a platform facilitator like Uber, and in turn for the drivers themselves.

MILLER J:

If they're regulatory requirements, why are they in this arrangement at all. Why does Uber care about them. Why does it insist that drivers comply with them?

MR WICKS KC:

Because in law a facilitator would be, from a health and safety perspective, considered to be a PCBU in my submission. So it needs to cover those –

WINKELMANN CJ:

But I mean isn't it, doesn't it, you know, you can say that's all the platform needs, that's all that health and safety needs, et cetera, but that doesn't answer much, does it, it's just another way of slicing the thing, but what it all goes to show is that Uber is actively involved and concerned about the quality of the services being provided, and the circumstances in which it's being provided, and therefore needs to exercise some control over it.

MR WICKS KC:

That's correct, but that doesn't just lead then to a conclusion that it is employment. For example, if we take minimum service standards, the drivers must meet certain minimum requirements to provide transportation services using the platform, including in relation to the vehicle used, the driving, and behaviour. Now that's not unusual in commercial arrangements, and it's not a useful indicator of employment status, and –

WILLIAMS J:

You do have to, don't you, assess the rationality of any requirements. I mean employers don't generally impose controls on employees just because. They impose controls because it's good for business, or why have it so –

MR WICKS KC:

Precisely, and your Honour is correct, and here there are matters that are, for example, minimum service standards, that are good for business for both, or for all users of the platform.

WILLIAMS J:

Yes, but that's, my point is that doesn't really tell you anything either way because it would be a rare employer that imposed a control that wasn't good for business in respect of an employee.

MR WICKS KC:

That's fair, and of course if it doesn't tell you anything either way, it doesn't mean it's not a relationship that isn't employment.

WINKELMANN CJ:

No, but what it might tell you is that your client is not just providing a platform. They're actively trying to control – they're actively controlling provision of the services, the experience of the consumer, and the service provided by the driver.

MR WICKS KC:

And it wants to do so for the benefit of the platform.

WINKELMANN CJ:

Yes, but saying it wants to do it for the benefit of the platform doesn't change what it's doing. It's not just providing a platform.

MR WICKS KC:

No, no, I agree with that, but it is a…

WILLIAMS J:

It's a version of control, right?

MR WICKS KC:

It is a version of control but it doesn't just into the next conclusion being that it is control that is within an employment relationship.

WILLIAMS J:

Yes, well that might well be the case, but it's not an answer to that to say, yes, but it's good business.

MR WICKS KC:

I'm not –

WILLIAMS J:

That's irrelevant.

MR WICKS KC:

I take your Honour's point. I wasn't necessarily suggesting it's just good business, but it is a matter that leaves control in this respect sitting neutrally as opposed to being driven towards an employment relationship.

WINKELMANN CJ:

So is your point that it's really good for both?

MR WICKS KC:

It is.

WINKELMANN CJ:

It's symbiotic. It's not, this is not just the drivers doing something which is to create profit for Uber. It's…

MR WICKS KC:

It's for both, and you can imagine if you will a driver who meets the minimum service standards, say there weren't any and they just did a particularly good

job in their provision of transportation services, but another Uber driver, or several of them turn up in a beaten up old 1912 vintage car with –

WILLIAMS J:
You'd pay a lot for that.

MR WICKS KC:
You would, I'm sure you would.

WINKELMANN CJ:
1912?

WILLIAMS J:
Be a slow trip.

MR WICKS KC:
It would be a very slow trip but, no, look, perhaps that's, when I reflect on that, your Honour is very well entitled to call me on that. In an old car that is barely roadworthy.

WINKELMANN CJ:
1970s perhaps.

MR WICKS KC:
1970s or 80s perhaps, and in the course of providing the services drives dangerously, puts the passenger at risk, that's going to have an effect on the attractiveness of the platform to users. It's also going to flow on to a negative effect for other drivers who want to use the platform because the less riders there are using the platform, the less opportunity there is for the drivers to earn money. So it is –

GLAZEBROOK J:
Isn't your argument rather that these provisions would be in there, whether they were independent contractors or employees. So that's where the good business comes about?

1430

MR WICKS KC:

That's, indeed, and that's where –

GLAZEBROOK J:

Is that, is that?

MR WICKS KC:

That is the point I was endeavouring to make. It becomes neutral, it could apply to both, one or the other.

ELLEN FRANCE J:

If you look at those what they call the tickets for Mr Keil.

MR WICKS KC:

Yes.

ELLEN FRANCE J:

For example, that covers quite a range of different things, like fares, rider behaviour.

MR WICKS KC:

Yes.

ELLEN FRANCE J:

And for example, there's one there dealing with the situation where there's a complaint of verbal abuse and so there's a suspension of the ability to stay on the app. Why is that not control in an employment sense?

MR WICKS KC:

Well, it could be but equally it could be for the efficient and safe operation of the app and if we talk about that evidence of the tickets and Mr Keil, as your Honour's referred to, if I can take your Honours to 301.0027 and I signalled this

earlier today that there would be examples also of Uber taking steps against a rider for not meeting these minimum standards and this is an example of that.

If we look at row 15, at 80 – there's "rider at fault", "inappropriate behaviour", 88 there's another represent of "rider at fault" and then –

GLAZEBROOK J:

Why does that help if it's Uber that's adjudicating on this?

MR WICKS KC:

Well, it's because it's consistent with it putting in place a platform that benefits all the users and expects minimum standards by all the users to make it a better platform to encourage more people to use the platform which in turn flows on to a benefit for the drivers, and in 91 we see there was a warning to a rider in relation to –

GLAZEBROOK J:

But aren't these adjudications? There's been this complaint, there's been this fight, "we think the driver's at fault", "we think the rider's at fault".

MR WICKS KC:

And they're adjudications by it as the platform facilitator.

ELLEN FRANCE J:

But if you –

GLAZEBROOK J:

Which isn't providing transport services, according to...

ELLEN FRANCE J:

If you contrast that with someone who is in business on their own account, which is presumably the other side of the equation, and something like it's a problem for the driver because they refused to take, you know, the pet Uber,

for example, I'm struggling to see what – how you are categorising that sort of restriction on the provision of a service.

MR WICKS KC:

Well, all contracts where there are services provided to a party, whether it be here the driver, the rider, driver to the rider, there will be consequential provisions within all agreements as to how the relationship should be conducted, I would expect. We say that these controls don't point just to employment. They're equally applicable in a contract, a relationship or an independent relationship.

WINKELMANN CJ:

I mean, your problem is, of course, that you say these don't necessarily point to this because they're consistent with something else, but the fact that they're consistent with something else doesn't take us very far, does it?

MR WICKS KC:

No, but what it results in is an inability to conclude that there are, that the control elements result in a conclusion that the relationship is one of employment and there's been a number of cases where the Court treats matters of control not necessarily being a useful indicator of employment. So it becomes a neutral factor in the overall analysis.

WINKELMANN CJ:

Well, the problem for you, though, is that your case is "oh, look, we're actually the service providers here, we're just an app provider and that's all we're doing", but the reality, the reality, business reality for you, is that your app's got no value if you've got – if every driver is using it is a complete ratbag. So you have to reach down to the marketplace and regulate the drivers and then, then you have to exercise control.

MR WICKS KC:

And that's a functionality feature that, yes, it involves a kind of control but it is, we submit, an expected and mutually benefit component for the efficient

running of a platform and it's agreed to by the drivers via the services agreement and if I can take your Honours –

WINKELMANN CJ:

Which takes you into integration, doesn't it?

MR WICKS KC:

We're coming, yes, we'll come to that and in that regard can I take your Honours to the comments of the full court of the Employment Court in *Head v Chief Executive of Inland Revenue*, at 250 to 251, and it has long been the case in the employment jurisdiction that control factors have to be considered in the particular context and you'll see there at 251 the full court says: "Control may in fact be a necessary component of a working relationship, whatever its composition, so that this consideration is not a reliable indicator as to the identity of the workers' employer; or where the issue is one of status, namely, whether the individual is a contractor or employee." And –

WILLIAMS J:

Although a key aspect of your argument was you didn't have control.

MR WICKS KC:

There is an acceptance that there is some control that comes with the services agreement and the –

WILLIAMS J:

Yes, yes, right, but I thought your argument to be essentially "we don't have enough control".

MR WICKS KC:

Not enough control to make it an employment relationship.

WILLIAMS J:

Well, although your argument is not the kind of control which is a different point.

MR WICKS KC:

That is, yes, it is and the kind of control is relevant in relation to things such as regulatory obligations around health and safety and the like, that's where that bites. Then you have elements of control here that are explained by the efficient operation of the platform.

WILLIAMS J:

So what would make something inherently employment, if it were a matter of control?

MR WICKS KC:

In terms of control, that would be, for example, rostering, directing where a person is required to perform the work, requiring a person to turn up and do the work at a particular time.

WINKELMANN CJ:

So you're saying it's this type of the control?

MR WICKS KC:

Yes.

ELLEN FRANCE J:

So fixing of price is not in that category?

MR WICKS KC:

No, we say it's not. We say that is not, again, a useful indicator of – actually, it relates more to the fundamental test, or of control and I will come to that when I deal with the fundamental test, if I may.

Your Honours, also in the case of *Leota*, consistent with other cases and including *Head*, noted at 47 that the parties: "... may accept a degree of control as necessary and/or beneficial to both of their ... interests. In such circumstances, control is not indicative of an employment relationship; it is a neutral factor."

WILLIAMS J:

So the rostering and place of work and so forth, these are historically relevant indices, aren't they? That's what employment used to always look like and rather less so now.

MR WICKS KC:

Yes.

WILLIAMS J:

But what is it that is qualitatively distinctive about that, in the world of platforms and gigs?

MR WICKS KC:

It's the autonomy and complete freedom of choice that arises for the driver on the platform.

WILLIAMS J:

You said control was neutral.

MR WICKS KC:

Well, control is neutral, in our submission. It's explained by the – reason for the control is explained by the efficient operation of the platform and it's control that the parties mutually accept as beneficial to both their interests and we say it's not indicative of an employment relationship but is neutral.

MILLER J:

You're asking us to look at the concept of control by reference to a very old concept of work, one where people turn up, clock on, do their eight hours and clock off. In this world, if we look at what control is directed to here, it is about maximising Uber's revenue which is a proportion of the revenue gained from each rider on each ride and one can see that the features that we're pointing to as control all point in that direction. They're all about maximising use of the platform, not just sharing the platform but making sure it's used to the maximum extent because that is how Uber makes its money.

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MR WICKS KC:

And we say that is also how the drivers individually make their money, by having the ability to sign on and use a platform that is popular and is used.

MILLER J:

So they do but the fact that they benefit from it in that way nonetheless doesn't explain why Uber insists on including these provisions in its terms. Those provisions give Uber control.

MR WICKS KC:

They do in the sense that it is control for the mutual benefit of both parties using the platform and its actually also beneficial for the riders using the platform.

MILLER J:

It may well be but it seems to me that's almost beside the point.

MR WICKS KC:

I can't take my argument any further than I have other –

WINKELMANN CJ:

Can I just ask you to clarify then, are you saying the only kind of control that would be significant is clocking on and clocking off rosters?

MR WICKS KC:

No, I don't. As the full court said in *Head*, it has to be considered in a particular context and the particular context here is that elements of control are a necessary component of the use of the platform.

WINKELMANN CJ:

Yes, that's your problem, isn't it? We're saying: "Well, so what?"

MR WICKS KC:

I understand.

WINKELMANN CJ:

But just so if we put it on an ordinary – we're thinking about the world as it is, not just this case. So what else would you be saying in this case, or in any case, we should be looking at? We're talking about rosters and Justice Miller's just said to you, but hang on, that's freezing the employment relationship in time whilst the world is moving at high speed around us.

MR WICKS KC:

Well, the things such as you would be directed where to work, you would be directed and required to take a particular route in transporting a rider.

WINKELMANN CJ:

Well, I thought they are.

MR WICKS KC:

No, they're not. There is a preferred route. There is a –

WINKELMANN CJ:

And there's consequences if you don't take it?

MR WICKS KC:

There are consequences, and there is also the issue that arises in that regard around the requirement under the Land Transport Regulation to take the most efficient route in transporting a passenger.

WINKELMANN CJ:

But there's a human judgement in that, isn't there?

MR WICKS KC:

There is some human judgement but –

WILLIAMS J:

Not much any more.

WINKELMANN CJ:

No, there is human judgement.

MR WICKS KC:

No, not much any more. No, that's fair with –

WINKELMANN CJ:

You're getting a note there.

MR WICKS KC:

So just dealing with that, Uber recommends a route. It is not mandatory that a driver take that route.

ELLEN FRANCE J:

But there can be consequences if they don't?

MR WICKS KC:

There can be consequences if a driver makes a decision not to take that route. That's accepted. But what also has to be borne in mind is the requirement, the legal requirement that a driver, a passenger service provider, takes the most efficient route that's available, and in some respects what Uber is doing is recommending a route that is the most efficient, so it's assisting the driver in that regard.

WINKELMANN CJ:

Where does that obligation on a P licence person come in?

MR WICKS KC:

It's up on the screen now, your Honour, the Land Transport Rule: Operator Licensing, 3.7(2).

WINKELMANN CJ:

And what's the adverse consequence?

MR WICKS KC:

The adverse consequence is that Uber may refund the fare. I just need to check the facts on this. So if the rider complains, there may be a partial refund of the fare and Uber may recover that from the driver.

WINKELMANN CJ:

So they're controlling the contractual relationship? On your analysis the contract's between the rider and the driver, so they're adjudicating a dispute and…

MR WICKS KC:

They are in that respect. The facts are the facts in that regard, but again there is the operation of the platform or the facilitation or the use of the platform to facilitate rides with which Uber does have some elements of control as we accept.

MILLER J:

And do we know that the route which the app suggests to the driver is the most advantageous to the hirer?

MR WICKS KC:

The documents that Uber, the policies I think Uber has refer to if a rider requires a particular route to be taken –

MILLER J:

No, I'm asking how the algorithm does it. Is that its metric?

MR WICKS KC:

I don't know how it does it, your Honour. It relies on a GPS algorithm that works out which is the most efficient route, as I understand it.

GLAZEBROOK J:

Taking into account traffic conditions?

MR WICKS KC:

Speaking from experience using the Google maps application, that seems to do that, so I –

GLAZEBROOK J:

No, that certainly does that. Well, maybe not the _-

MR WICKS KC:

That certainly does. Again, I don't have the evidence at my fingertips but I expect it would do so, but that's me speaking from the Bar on that rather than having an evidential reference.

The other difference with employment is that if it was employment a driver would be required to accept, in other words they must accept all trips. They couldn't have any declines or rejections. There would be no ability to cancel after acceptance which is also something that's available to drivers.

WINKELMANN CJ:

Just thinking about logging them out, is there something – when they're logged in does Uber keep on offering them things, so it's actually disadvantageous to Uber that they're logged in but not accepting rides?

MR WICKS KC:

Well, it's potentially it's disadvantageous to other drivers because if a person logs in and they happen to have just forgotten to log out and they're off at home mowing the lawn, and then they happen to be closest to rides that are offered, that's going to slow down the system and it's going to disadvantage other drivers who may be close but not as close as that driver who's forgotten to log out.

WINKELMANN CJ:

And it's just a matter of a minute or something to log in –

MR WICKS KC:

It's just a matter of – I don't know whether you take a minute. One push. One push of a button to log in. Seconds, I think, your Honour.

At footnote 145, and I don't need to go there, your Honour, there are a number of cases referred to there which –

WILLIAMS J:

Is this of *Head*?

MR WICKS KC:

Sorry, this is – no, there are cases referred to there, *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 (NZEmpC), *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156, (2022) 317 IR 253, *Gupta v Portier Pacific Pty Limited* [2020] FWCFB 1698, (2020) 296 IR 246, and others there which demonstrate that the general standards of behaviour under the services agreement and community guidelines, we say, are no more than common sense commercial terms to be reasonably expected in any commercial contract. We've had a discussion on that. I understand your Honour's –

WINKELMANN CJ:

149?

MR WICKS KC:

145.

WINKELMANN CJ:

Are those cases that you referred to at footnote 145?

MR WICKS KC:

Yes.

WINKELMANN CJ:

What do they stand as a proposition for?

MR WICKS KC:

They stand for the proposition that common sense terms can be reasonably expected in any commercial contract, including terms that set expected minimum standards.

WINKELMANN CJ:

But what does that – but within the employment relationship, what do they stand for?

MR WICKS KC:

Clark v Northland Hunt was a status case in this jurisdiction in which it was found that the individual, despite the commercial terms that required him to do certain things, was a contractor, not an employee.

1450

If I can turn then to the automated app systems, and the Court of Appeal, we submit, at 192 and 193 of the judgment, placed too much significance on the logistical features of the Uber platforms, particularly the fare setting system. Care must be taken not to conflate the reasonable enforcement of contractual rights with control indicative of an employment relationship. As the submissions, I think, set out in –

WINKELMANN CJ:

Which paragraphs of the Court of Appeal judgment?

MR WICKS KC:

Paragraphs 192 to 193, and this comes back to the point that any business exercises a degree of control in its external contractual relationships, we submit, and the Court of Appeal in *TNT v Cunningham* confirm that a degree of control may be inevitable and voluntarily assumed by both parties for the cohesive and efficient running of a business and this is also borne out as an established principle in a number of subsequent employment cases which are detailed at footnote 149, so we've got *Head* which I have already taken your Honour's to, we've got *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC

230, (2020) 17 NZELR 794 and we've also got *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 (NZEmpC) which was the first section 6 case after the amendment. There is, as I have said, a –

GLAZEBROOK J:

I think I possibly slightly lost you here, so you might have to go back.

MR WICKS KC:

Yes.

GLAZEBROOK J:

Because isn't the argument that Uber sets the fares?

MR WICKS KC:

Uber does set the fares and in our submission –

GLAZEBROOK J:

And the driver has absolutely no control over that, apart from depending upon when the driver might log in or log out in order to take advantage of surge pricing?

MR WICKS KC:

Yes, and a lack of control over pricing, we submit, is not exclusively an indicator of an employment relationship and at footnote 153 of the submissions –

GLAZEBROOK J:

And why is that?

MR WICKS KC:

We rely on examples of set pricing and rates in cases where contracts of services were not found to arise. Simply put, any service providers, sometimes even sophisticated businesses, may be subject to inequality of bargaining power and the ability to set prices is a function of market dynamics, not necessarily employment status, so it's –

GLAZEBROOK J:

Except this is pricing of this, the very service they're supposedly providing to riders that's being set by somebody else, so it's not a function of whether Uber gets 25% or 10%, it's actually a function of what the pricing is to the consumer.

MR WICKS KC:

Indeed, but there are a number of case examples where the fact that a price being set did not result in there being an employment relationship found and if I can just briefly run through those, there was *TNT* at footnote 153 where the applicant was paid a guaranteed minimum amount each month or a figure related to a price per item delivered and that was set by the putative employer in that case. *Downey v New Zealand Greyhound Racing Association Inc* (2006) 3 NZELR 501 (NZEmpC) where there was reimbursement –

WINKELMANN CJ:

Is *TNT* under the Employment Contracts Act or is it under the –

MR WICKS KC:

Under the Employment Contracts Act.

WINKELMANN CJ:

Is that useful?

MR WICKS KC:

We say it is, as an example that the setting of the price didn't shift the dial.

GLAZEBROOK J:

But that's the price that's paid to the person?

MR WICKS KC:

Yes, it is, and I take your Honour's point about –

GLAZEBROOK J:

Whereas here you're actually setting the price of what supposedly you say is the driver's business.

MR WICKS KC:

And the best example then of that is *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 where there was again a set rate at which earnings were accrued.

GLAZEBROOK J:

What was the – what are the facts of that?

MR WICKS KC:

I'll just bring that case up.

WINKELMANN CJ:

I mean, I may, I'm not a legal historian in the area of employment law, but I thought the approach to employment relationships was different under the Employment Contracts Act, more contract-based.

MR WICKS KC:

Your Honour is quite correct, it was a contract-focused jurisdiction rather than a real nature of the relationship.

WINKELMANN CJ:

Because that sounded like an employment relationship.

MR WICKS KC:

So in *Singh*, thank you, Ms Dunn, he sold insurance policies, price was set by the insurance company and Mr Singh received a percentage as commission.

GLAZEBROOK J:

I suppose what I'm challenging really is the whole concept that you are actually arguing that Uber is not providing transport services because certainly in Mr Singh's case they were providing insurance policies.

MR WICKS KC:

Yes.

GLAZEBROOK J:

Of course they set the price of the insurance policies they provide, and then they then can set a commission for their contractors or employees, whatever it happens to be, and that doesn't necessarily say whether they're going to be contractors or employees, I accept that, but if you're going to say "well, no, actually, we're not even providing transport services", then why is Uber setting the price of the transport services?

MR WICKS KC:

Well, it's set –

GLAZEBROOK J:

And why, and it's possibly an integration issue?

MR WICKS KC:

And it is setting those prices in relation to the platform that it facilitates the use of by drivers and riders and that's it.

GLAZEBROOK J:

It's just using the words, isn't it? You need to look at the substance of the arrangement, surely?

WINKELMANN CJ:

Well, it's your submission, isn't it, Mr Wicks?

MR WICKS KC:

I'm just reflecting on that.

WINKELMANN CJ:

Yes.

MR WICKS KC:

Uber does set the pricing, there's no question about that and that is provided for in the services agreement, it's an element of the relationship, yes, I can't make any submissions to suggest anything other than as I have, that that on its

own is not sufficient to push this into employment. There are a number of cases that, as I have said, do demonstrate that the recipient of the payment for providing their services is not the one setting the pricing. I can't take it any further than that.

WINKELMANN CJ:

If you had a different model where the platform was provided by Uber but people were free to offer, the riders were, drivers were free to offer a whole bunch of different contracts, different prices out there, so and that might be a – that would be a better argument for you, it's not what you have, but it's a different model, is it? No, so it's actually a true, it's just providing a marketplace and perhaps a marketplace and an accreditation, but here it's not, it's providing a whole pricing system and regulating the quality of services provided.

MR WICKS KC:

And designed towards making this a platform that is attractive to all users, both the riders and the drivers.

WINKELMANN CJ:

I mean, I can understand the needs, the driving force and the needs, the business model.

MR WICKS KC:

Sorry, I will just check that. If your Honours just wanted a reference point for this question of whether the route is required to be followed by the drivers, it's 304.1775, and the relevant aspects are at .1776 and .177 where it records that the Uber app suggests an optimal route using GPS, it encourages drivers to ask riders to choose the route and says that drivers can follow GPS or alternate navigation apps so making it clear they're not required.

WINKELMANN CJ:

What does: "This feature will deflect the first touch on bad route contacts," what does that newspeak mean?

MR WICKS KC:

I just need to find that, your Honour, where –

WINKELMANN CJ:

It's in the middle of the screen, second sentence of that paragraph.

MR WICKS KC:

I assume “bad route contacts” is somebody raising an issue about –

WINKELMANN CJ:

Yes, I was just wondering what “deflect the first touch” means, but probably is inconsequential.

MR WICKS KC:

Yes.

WINKELMANN CJ:

Well, it probably just means that it deflects it to someone and they deal with it and then the driver has response, blah, blah, blah, it's a tech thing.

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MR WICKS KC:

It does seem to indicate that the first sentence explains what it means. “Riders are able to receive an instant refund through a self-service in-app feature if their driver takes a significantly poor route.” And of course taking a significantly poor route would be a breach of the Land Transport Regulations.

If I can now just turn to the Uber incentive schemes, and the Court of Appeal emphasised, and this was at paragraphs 199 to 200, emphasised that the incentive schemes Uber operated involving optional promotions for drivers, drivers and riders rating each other voluntarily, and drivers voluntarily participating in a loyalty programme where they can unlock benefits by completing trips and receiving acceptable ratings and reviews, were considered as the exercise of control over where, when, and how drivers carry out their

work. The appellants submit that in the modern context of using a platform it is not properly control as it is meant in employment law.

The Uber loyalty programme known as Uber Pro is a programme that Uber has to strengthen its relationship with driver partners described as providing value in exchange for their continued engagement with Uber, and that's consistent with the evidence that Emma Foley for Uber gave in the Employment Court, and that is at 202.0551, that Uber Pro was in place to make the platform more attractive to drivers than competing platforms, and crucially those loyalty programmes and other incentive schemes are optional, and they provide drivers with the means to increase their profitability, and there's no doubt the appellants certainly want to encourage drivers to log on during periods of high demand, and they don't want drivers to be declining or cancelling trips, and as stated in an Uber policy document, which is found at 304.1442: "Cancelling rides after accepting them is a poor experience for other drivers and riders and prevents them from using the app smoothly… These behaviours have knock-on effects on wait times for both drivers and riders and in turn on 'trust' and 'certainty'."

But that dynamic doesn't convert incentives into a form of control that is indicative of the employment relationship because all those incentives and rewards that are available to drivers could only do is encourage them to log onto the app, including in periods of high demand. They cannot compel that, and they demonstrate the inability of Uber to tell individual drivers when and where to drive, and the drivers always retain the ultimate decision-making power to decide whether they will be available for work, or take up any ride requests, and incentives and rewards are Uber's response to not having control over drivers, and encouraging them to be available in peak times, and an employer, of course, has no need to encourage employees, because they can simply instruct employees what to do and when to do it. In their written submissions –

GLAZEBROOK J:

Well employers often do provide those sort of incentives, don't they?

MR WICKS KC:

And I'm coming to that because your Honour is quite correct.

GLAZEBROOK J:

I mean isn't the Court of Appeal's point rather that the drivers don't actually have that autonomy if they want to earn a decent living because they only have the ability to access the real advantages of the Uber Pro system, if they do actually behave in the way that Uber wants them to behave. It doesn't take away the view that they can decide they don't care about maximising their income, or they're perfectly happy only to work an hour a day or whatever because they're doing their massage business on the rest of the time, and this is only a top-up.

MR WICKS KC:

Well I guess it's important to consider what's being incentivised, and incentive schemes in employment tend to reward above average performance. Uber's incentive schemes reward logging on at particular times and accepting consecutive trips, and these are the core basic things a driver does, and Uber incentivises this because it's not able to control it, as an employer is, by direction. But the –

WINKELMANN CJ:

Well I suppose if we break this down to legal terms, one of the fundamental questions for us is, are we going to say control, which is exercised through economic power/economic incentives, is less impactful in terms of determining an employment relationship than contractual power.

MR WICKS KC:

Well what that –

WINKELMANN CJ:

I accept you'd say there's questions of degree.

MR WICKS KC:

There are, indeed, and that was addressed to some degree in the UK legislative change where they introduced this intermediate category. But it's really a question of compulsion versus persuasion. They're quite different. As an employee you can be compelled. As a contractor –

WINKELMANN CJ:

Well, no, you can't. You can be –

MILLER J:

Not really no. They're just points on a continuum, aren't they?

MR WICKS KC:

Here the driver always has the ultimate choice, and –

MILLER J:

So does an employee. They cannot turn up to work and accept the consequences.

MR WICKS KC:

They can but for them there are consequences. For a driver there are no consequences of not turning up.

ELLEN FRANCE J:

Well there are some in the sense that you can't get to Diamond tier, for example, if you weren't doing any trips, any rides.

MR WICKS KC:

That's correct, but you might, for example, as one of the drivers was, have a massage business, and you might make the decision that you will accept massage appointments because they are paying more money than you might in an Uber, so you make a business decision to give away some of those incentives, or higher tiers within Uber for your own business purposes i.e. doing something else which ultimately is rewarding you at a greater level.

Because we've got to be careful, with great respect, not to focus just on a position that a driver does nothing other than drive for Uber. So there are those types of what we would describe say are business decisions made that, like any business, have consequences of what your profitability might be. Now you might make a bad decision but –

ELLEN FRANCE J:

Or you might be sick.

MR WICKS KC:

Yes, you might be sick.

WILLIAMS J:

That suggests employees don't make business decisions, and of course they do, particularly in this day and age where you can have several different forms of employment, all at the same time, perform serially, and you're making business decisions about which one you're going to focus on. There's, you know, the ancient institution of piece work, where the harder you work, the more you get paid, but you might have something else to do. I mean these are just, this is just an evolution of an old model into a new reality that either this system fits to make sense, or it doesn't.

MR WICKS KC:

And may have argued that and the appellants' submission is that this doesn't go that far.

WILLIAMS J:

Yes.

MR WICKS KC:

In terms of creating an employment model.

WILLIAMS J:

So –

WINKELMANN CJ:
But this –

WILLIAMS J:
– Justice Miller is right that this is a continuum question. This isn't black and white or binary.

WINKELMANN CJ:
But this –

MR WICKS KC:
And as I – sorry?

WINKELMANN CJ:
I've lost the thread now because I was interrupted by Justice Williams and then you, carry on Mr Wicks.

WILLIAMS J:
I think you interrupted me actually.

WINKELMANN CJ:
Don't think so.

MR WICKS KC:
And in my opening remarks, or introduction, the appellants don't say this is an obvious case with an obvious answer, and…

WINKELMANN CJ:
I know what I was going to ask you now. In terms of the operation of the incentive system, one assumes that the ability to know where the fares are going to go is very significant in terms of the profitability of the model. So you basically have to do a low – you probably have to run a high risk of doing a very low profitability series of work to get to that level.
1510

MR WICKS KC:

I can't point to evidence that –

WINKELMANN CJ:

We don't know what the evidence is on that?

MR WICKS KC:

On that. I'm not sure if there was evidence to that effect, bearing in mind I didn't appear at first instance in the Employment Court.

WINKELMANN CJ:

But to get to that level of control –

GLAZEBROOK J:

There is evidence as to the difference though, isn't there?

MR WICKS KC:

Well, clearly you're getting –

GLAZEBROOK J:

So one assumes that it is important if it's in a set of incentives to do something.

MR WICKS KC:

It makes sense.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

It would be difficult to say, well, that really doesn't matter.

MR WICKS KC:

It seems to be a logical conclusion to draw.

WINKELMANN CJ:

As a matter of logic, it must be better to know where the fare's going before you accept it.

MR WICKS KC:

Agreed, yes, and again that's an incentive to encourage drivers to log on to the app in circumstances where they can't be compelled to do so, taking his Honour, Justice Miller's, point about the continuum, but ultimately, if you don't accept the opportunity to log on, say, for example, at a period of high demand or you don't wish to work through to a point of those higher tiers where you get more information, that's an individual choice.

WINKELMANN CJ:

So do you accept my point that economic power can be relevant in this assessment for the Court? Because contracts are just a formalised exercise of economic power, they were…

MR WICKS KC:

Well, we would say that no, it's not relevant to the section 6 analysis for the reasons that we've already…

WINKELMANN CJ:

Do you mean it's not relevant to the assessment of whether someone's an employee or –

MR WICKS KC:

Well, the test as described by *Bryson* is, with respect, clear around common intention, control, integration and the fundamental tests, and we say that none of those are informed by economic power.

GLAZEBROOK J:

But can that quite be right? I'm not sure that is actually your argument totally in the sense that if you are forced to do something because otherwise it's a choice between earning nothing and earning something, and you say: "Well,

we're not exercising control because they can choose to earn nothing," you say this doesn't go as far as forcing them to do something, but if it did that would be – I mean it certainly encourages them to do something in this sense.

MR WICKS KC:

That's, as I view it, a factual issue because here we're dealing with four individual drivers and there's no evidence, as I understand it, that any of those four were in that position, but I accept that that is a possible factual scenario but here it's not engaged on the evidence.

WINKELMANN CJ:

So you say the –

GLAZEBROOK J:

Although I would say that at the very least the fact that you have these incentives to log on reduces the significance of you saying that drivers can choose not to do it if they don't want to.

MR WICKS KC:

Again it would depend on that driver's circumstances. For example, the driver who has other opportunities that –

GLAZEBROOK J:

Are we going to be looking at it in individual driver's circumstances, because really if you've got a standard form contract it seems to me very difficult to say, well, you have – and in fact I think you argued against that in terms of vulnerability to say, well, if you have a PhD you're not vulnerable and therefore – you've got a standard form contract; it surely has to be the same for everybody. You can't have some of them employees and some of them independent contractors depending on individual circumstances, I would have thought.

MR WICKS KC:

I go back to the position as I've already set out that we say economic power would be an individual circumstance and the cases – and even the decision of the Chief Judge in the concluding paragraph referred to it being a declaration made for the four drivers, not for the entire Uber driving community.

WINKELMANN CJ:

So just relating that to your – because you were saying that the Court of Appeal was wrong at 199 to 200 and I was asking you are you saying therefore the economic power, the Court of Appeal was wrong to regard economic power as sufficient for control at 199 to 200, and you're saying yes, they were because they needed to show that an individual – they needed to take into account the experience of the individual driver, because that doesn't seem to sit very well with section 6.

MR WICKS KC:

Well, we say it's an – section 6 is driven by an individual, an intense factual analysis on an individual basis.

WINKELMANN CJ:

And what happens if we were satisfied that that game theory would suggest that this would exercise considerable control over people?

MR WICKS KC:

I can point your Honours to a case of *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413 where there was a mixed situation of some drivers being contractors and others being employees. Now the Labour Inspector brought its claim only in relation to those drivers that were said to be independent contractors that it considered were employees, leaving standing the rest of the work force as independent contractors. That's the only example I can immediately take your Honours to.

WILLIAMS J:

It's the case, isn't it, that the primary indicator in section 6 of the importance of the power relationship is in the ability to walk away from the words, because one side usually provides the words and the other side signs them?

MR WICKS KC:

That's the genesis of the "real nature" test. You can displace or…

WILLIAMS J:

That's right but the writing of the contract is the primary and most important exercise of asymmetric power.

MR WICKS KC:

It's the first thing that happens, yes, and it's usually –

WILLIAMS J:

But that's why there's contractual theory heresy going on here. In the Employment Relations Act, I mean.

MR WICKS KC:

Yes, yes. There's no denying that the drivers gave evidence and say they have felt economic pressure to drive at certain times and to accept trips but that, with respect, is not the same as control by Uber indicating employment for the reasons I have set out.

If I turn then to the integration test, and that, your Honours are well aware, assesses the extent to which an individual is part and parcel or integrated into an organisation, an identified ongoing connection between the individual and the organisation, rosters, uniforms, holding the individual out as a member of the organisation, staff and business cards. The individuals are part of the organisation.

As the full court in *Head v Chief Executive of Inland Revenue* set out at 260, the integration test can also take account of factors such as duration of the

work, training and reporting requirements, and the practical operation of the business relationship agreed to by the parties. For a traditional example of integration, there's *Prasad v LSG Sky Chefs* where contractors were working side-by-side performing the same role as the employees where third parties would not have been able to distinguish them from the employees.

In this case, the Court of Appeal at 226 didn't see a finding made by the Employment Court that each of the four drivers was integrated into the Uber business during the times that they were driving as being a strong indicator of employment status, and it is submitted that on a structural and a presentational level drivers are distinct from and not part and parcel of Uber.

In terms of that structural integration, the drivers have the freedom completely to engage in transportation services for other businesses, including competitors, including while logged on to the Uber app. They're not subject to a restraint of trade. The duration and intensity of their arrangements is solely within their control, so quite different to a long-term relationship with ongoing obligations to perform work in the sense that the integration test captures.
1520

The practical operation of the business relationship didn't involve coordination between the individual drivers. Each of them worked autonomously. Drivers don't wear uniforms or display Uber branding on their vehicles. They're not required to present or behave in a distinctive manner beyond complying with basic community guidelines. The Court of Appeal correctly accepted that some of the above contraindications of integration were present. However, it concluded instead that the drivers integral to the appellants' business, and without them Uber would have no service to offer to the public.

WINKELMANN CJ:

What paragraphs are you at there?

MR WICKS KC:

Paragraph 226 on, of the Court of Appeal judgment. The particular paragraph in which the reference to “integral to the business” is paragraph 225 into 226. In relation to errors we say in relation to integration firstly, no individual driver is essential to the operation of the appellants’ business, and it is, we say, a misapplication of section 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; or were described as the "eyes and ears" of the business and performed no work for any other business. There are thousands of drivers in New Zealand for Uber, and the barriers to become a driver are low. Drivers also work only when they choose, so they can't be relied up on Uber as integral parts of the business, and I've taken you to Mr Rama’s circumstances where he registered – or I may not have taken you to Mr Rama’s – yes I did. He registered 22 December 2018, accepted the agreement 1st of April 2019, and then didn’t undertake his first trip until 18 July 2019.

GLAZEBROOK J:

I don’t think integration has been looked at, only for very important people. It’s just whether the work they perform is integrated into the business or not, and each of these drivers, if you are looking at it as a transport business, which I'm sorry but I do, then each of them is integral to that business, isn't it?

MR WICKS KC:

We look at it, at the business differently but…

GLAZEBROOK J:

I realise that.

MR WICKS KC:

And other than trotting out the arguments I've already made.

GLAZEBROOK J:

No, I can understand the view that says that they work only as they choose, and therefore that diminishes the integration, I can understand that argument, but just to say they can only be integrated if they're essential at some high level I don't think is what the cases have said.

MR WICKS KC:

Well I'd take your Honour then to even if a driver were essential, that is not determinative if their services could be performed equally well by a contractor of an employee, and authority for that is *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, (2010) 7 NZELR 232, and this was a case that found that while the civilian medical officers services were essential for the proper running of a hospital, it did not follow that she was integrated into the Defence Force. So in other words an individual could be essential to an operation without being integrated, being part of an operation.

WINKELMANN CJ:

What happens if it's, if there were, is an integral, is the key part of the operation. If there's nothing without it.

MR WICKS KC:

Well it depends on what the operation is here. We say it's a platform to facilitate connecting drivers and riders. So obviously the platform without a –

MILLER J:

To carry on with the military analogy, we're not dealing here with a doctor, we're dealing here with all the troops, and you're telling us that because you've got individual relationships with each of them, none of them is integral to the business. They're all exactly, they're all one large horizontal class of people, and your whole business model was premised on them, or a substantial number of them, turning up. I don't see how they can not be integral as a collective.

MR WICKS KC:

We would accept they're essential to the operation of the platform in the sense that if you had no drivers, you had no riders, you don't have a, you might have a platform that goes nowhere, nothing happens.

MILLER J:

And your terms of engagement of each of them are identical.

MR WICKS KC:

And that's the point that the Court of Appeal made. With respect we make the submissions as I have that the drivers were not integrated into Uber's business.

WILLIAMS J:

You do see though –

MILLER J:

This is Uber's business though, isn't it? Uber's business is about earning money from people taking rides from out the door there to the airport, and it is, that is the lowest denominator of their service, an individual person getting a particular ride for a particular price that's set by Uber. It's not about, ultimately about the provision of the platform. The platform is just the vehicle by which Uber gets to integrate to provide that service, connecting two people and setting the price.

MR WICKS KC:

And it receives a service fee from the driver.

MILLER J:

Sure.

MR WICKS KC:

For making the platform available.

MILLER J:

This case might be different if it was a flat fee for people joining the app for instance. It would be much more like, say, Trade Me or something like that. But its entire business is about the transportation service.

MR WICKS KC:

As Mr Walker set out, its services agreement sets its position as being the facilitator of a platform from which, yes, income flows to Uber when there are users to that platform. That revenue comes to it as a service fee from the users of the platform. I don't need to repeat what Mr Walker has said. The fundamental test, if your Honours don't have any further questions on integration –

WINKELMANN CJ:

Because the Court of Appeal actually moved to the fundamental test very quickly, didn't they? They said basically the integration didn't help as much?

MR WICKS KC:

That's right, and as our written submissions set out, the Court question under the fundamental test focuses on whether the individual has control of business decisions. The changing nature of work such as has arisen with gig work means individuals, as I have said, can put together their own portfolio of different opportunities they control to earn income flexibly. Those opportunities don't come with the binds that traditional employment does, and it is submitted that the notion of being in business on one's own account has broadened with the emergence of the gig economy, and beyond the traditional association with professionals, tradespersons or small enterprises.

We submit that what comes with an individual having portfolio work is the requirement to make business decisions even where they have less control over each income source than a traditional business might. Features we have discussed such as price setting become even less important in that even – sorry, in the overall scheme of the business decisions being made, noting that in even more traditional work an inability to set prices may simply

indicate an agreed efficient provision of services such as, for example, a franchise.

The business decisions made by an individual with a portfolio of work include matters such as what particular work will they do, where will they do a piece of work, and when will they do that work, and also what business expenditure they make, decisions about which may in some circumstances more directly influence profit, and the Court of Appeal at paragraph 228 did acknowledge that: "There are a number of factors that are consistent with Uber's submission that drivers operate their own businesses. They decide when and where to work. They are required to provide their own car and phone, and meet associated costs such as data and insurance."

That they can increase their net earnings by effectively managing costs and particularly costs relating to ownership and running of their vehicles. They could improve their earnings by responding to Uber's incentive structure, choosing to work in places at times where surge pricing was on offer.
1530

These factors were then, we say, wrongly disregarded by the Court of Appeal, and if I can refer your Honours to some, the cases in footnote 186 of the submissions of *Arachchige* where despite Uber setting the price for services the Employment Court found there were other ways Mr Arachchige could improve profitability of his business, including where and when he drove, making the most of peaks and demands, what car, phone, data plan, insurance and other business support, the Court finding that Mr Arachchige had the freedom to work for others and the fact that he elected not to was his choice, and importantly not exercising a right is still making a choice and, in our submission, does not affect determination of whether a person is in business on their own account.

The case of *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* [2015] NZEmpC 224 referred to again at footnote 186, important factors there were a high degree of autonomy, the physiotherapist deciding her own hours, being

free to accept or decline work, that she could work elsewhere and increase earnings by taking on extra work, she was found to be a contractor, and then *Chief of Defence Force v Ross-Taylor*, again the freedom to work for others, increase or decrease hours were considered important factors and notably the Court there held that it was the fact of freedom of choice that was important, not whether it was exercised.

WINKELMANN CJ:

Which brings us back to the economic model, doesn't it, really.

MR WICKS KC:

It does and I simply make the point, as I have, that individual circumstances will drive that analysis. It is a factual consideration. Drivers using the Uber platforms have a degree of control over both revenues and expenses as a result of the choice and flexibility they have over key business decisions. While fees are determined by the appellants, drivers can maximise revenue by choosing to drive at peak times and/or in busy areas or by participating in incentive schemes. Drivers can harness the surge pricing system to increase their earnings. Drivers have access to heat maps to find out around them where there might be higher demand and therefore higher fares and they could then decide to drive to those areas and increase their earnings by doing so.

MILLER J:

But what they can't do is compete with Uber in the provision of transportation services.

MR WICKS KC:

Sorry, your Honour, I missed the first part.

MILLER J:

I'm saying what they can't do is compete with Uber in the provision of transportation services because they don't get to know who the customer is, the customer doesn't know who they are, they are not in the position to build

their own goodwill, all they can do is go onto someone else's app, if there is one.

MR WICKS KC:

They, your Honour is correct, they can't compete with Uber in the sense of that connection with Uber riders, but they can, as your Honours pointed out, use other ride-sharing applications. They could offer their – they could operate as taxi drivers for a taxi organisation. They could undertake to their own client base private hire services to individuals if they chose to. There is a number of alternatives that on the face of it would be competing with Uber but outside the Uber platform.

MILLER J:

Right, so you say they can, in fact, build their own goodwill, they just can't do it using the app?

MR WICKS KC:

They just can't do it using the app.

GLAZEBROOK J:

And are you going to show us why you say the Court of Appeal went wrong? When you get to it, I presume?

MR WICKS KC:

Well, I'm endeavouring to demonstrate, we say that the factors that the Court of Appeal acknowledge were consistent with drivers operating their own business and I've listed those, were then wrongly disregarded and I then am taking your court through how those matters demonstrate that they are in business on their own account.

WINKELMANN CJ:

I think you've been doing it as you've been going, have you been doing it as you've been going?

MR WICKS KC:

I have, yes.

WINKELMANN CJ:

In this bit where, so where the bit you were –

GLAZEBROOK J:

But you're saying the Court of Appeal disregarded them, I just want to say where you say they did that?

MR WICKS KC:

Well, they list them at or refer to them at paragraph – Mr Tocher, if you can bring that up for me please – I've just lost my point in the submissions, my apologies. Yes, 228, thank you, those matters are recited but then appear to be simply put to one side and not regarded in weighing up the conclusion or the fundamental test which seems, on my reading of the judgment, to have been a decision that there's no goodwill able to be generated, therefore they are not in business on their own account. Yet these factors and the matters I am taking your Honours through in detail, in my submission, ought to have been taken account of to drive a conclusion that the drivers were in business on their own account.

WILLIAMS J:

If you, if you –

MILLER J:

So there's nothing about, sorry, there's nothing in here about the advantages of being able to deduct the costs of running the vehicle and the phone and so on. At 232, the Court just talks about the fact that everyone has a car anyway and it seemed to me that this could be potentially economically significant for a driver. In other words, the tax status of being self-employed is important but where is the evidence about that?

MR WICKS KC:

My understanding is there was evidence of drivers having an accountant, there's evidence from a driver being in charge of paying their own tax and ACC levies, the third –

MILLER J:

Well, Uber effectively requires them to do that, but it may be advantageous –

MR WICKS KC:

They do and that's often just a consequence of the arrangement.

MILLER J:

Yes.

MR WICKS KC:

But nonetheless, it is a factor that goes into the fundamental test analysis.

WILLIAMS J:

Well, the evidence is there are 1,100 drivers fighting to get through the gateway, as it's called in this proceeding, that's pretty strong evidence there's a chunk of, big chunk of drivers who do not see that as advantageous.

MR WICKS KC:

Is about 10% of the workforce, on the numbers, that take that position, yes.

WILLIAMS J:

Yes. I see Mr Cranney, this is just an aside, Mr Cranney in his submissions referred to 6,000 and you refer to 11,000. It's gone up from Mr Cranney says? It's – right.

MR WICKS KC:

Yes, but, yes, and I think in Mr Cranney's submissions, I can't remember whether they refer to six or 11, but it's certainly now up to 11,000.

WINKELMANN CJ:

Can I –

WILLIAMS J:

So, and can I just ask one, in response to Justice Miller you said you can build goodwill but you just can't do it using Uber's app, right, do you recall that?

MR WICKS KC:

Yes, that's correct.

WILLIAMS J:

Isn't that the same as saying "you can't do it while you're working for me", and isn't that an employee indicator?

MR WICKS KC:

No, because while you're doing it for me, for while you're doing it for Uber, you can also be on other apps and taking up other opportunities.

WILLIAMS J:

"But you can't use my app"?

MR WICKS KC:

You can't use the Uber app to do it.

WINKELMANN CJ:

Can you give – can I give you my, can I as a driver, give my customer my business card whilst doing an Uber fare? I think that's not allowed, is it?

MR WICKS KC:

I understand it's not allowed.

WINKELMANN CJ:

May I? Thank you. I wanted to ask you a question about the Chief Judge's approach which had emphasised vulnerability and it's just occurred to me that we're talking about economic power, it seems to me that the section 6 definition

really now does allow a court to look at economic power because it goes beyond the formalistic contractual analysis and asks you to look at the substance of what's going on. If you accept that economic power can result in control, and I think you do, you just say that it's case-by-case basis.

MR WICKS KC:

Yes, that's...

WINKELMANN CJ:

Doesn't that mean that the vulnerability of the individual is an issue that's relevant to the assessment? The vulnerability of the individual to the exercise of that individual – to the exercise of that economic power?

MR WICKS KC:

It can be, for example, to vitiate common intention and it has been used to vitiate common intention, a lack of understanding of the agreement. I think it's important here to recognise the, for example, if I can just deal with the individual drivers. Mr Abdurahman has a Bachelor's degree and a Master's degree, he's the chair of the African Community Counsel Wellington, and he ran for Labour in a local body election and was elected and remains a sitting councillor, we would say not inherently vulnerable.

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Mr Ang became an AML regulator for the DIA, Department of Internal Affairs, previously worked for the Commerce Commission and Chartered Accountants Australia New Zealand, wrote a paper *The Gig Economy: Our Current Frameworks and Worker Protections* which is in the bundle. I'm just –

WINKELMANN CJ:

I mean I accept – but what I'm asking you is about the legal model that we apply because the Chief Judge's approach has been, to use an old-fashioned word, pooh-poohed by using the concept of vulnerability, but it seems to me that the concept of vulnerability lies at the heart of the attempts of Parliaments to protect workers from exploitation, et cetera, in various scenarios, and vulnerability is

always in play in the employment relationship, and I'm just wondering if it is quite right just to cast her concept aside as a useful tool.

MR WICKS KC:

We submit that it much depends on what is meant by "vulnerability". We would accept that vulnerability in the sense that, as I've said, a worker or an individual lacks understanding of their contract might be a relevant factor when deciding how much weight to place on common intention, but inequality of bargaining power which is not a relevant consideration, that's a feature of many relationships. It's not unique to employment and it is, in our respectful submission, not –

MILLER J:

Except it's expressly referenced in section 3.

MR WICKS KC:

And where there is an employment relationship.

MILLER J:

I find it very hard to see how it cannot be relevant to the determination of what's the real nature of a relationship.

MR WICKS KC:

We submit that the Court of Appeal was right in concluding that the gateway test for entry into the protections of the statute should be interpreted neutrally.

I'll just find the passage of the judgment and bring it up on the screen.

GLAZEBROOK J:

I think the idea was the vulnerability of the role and the vulnerability in terms of the contractual relations rather than individual vulnerability –

WINKELMANN CJ:

And to control.

GLAZEBROOK J:

– because one can always have individual vulnerability but if you're looking at an employment context you would be looking at the vulnerability of the role and a highly skilled computer programmer whose services might be sought by a number of people and highly paid might be less than vulnerable earning what turns out to be way less than the minimum wage. I'm not putting this into this particular context.

MR WICKS KC:

No, and there's no –

GLAZEBROOK J:

But if you're looking at, say, cleaners who are told they're going to be independent contractors and are going to earn $2 an hour instead of whatever the…

MR WICKS KC:

Again it is very much, we would say – depends on what the vulnerability is and, as I say, the Court of Appeal we agree with where it said at 123, the judgment which is up on your Honour's screen, 122, that the Court has some reservations about the Chief Judge's statement and that the Employment Relations Act provides a clear answer.

WINKELMANN CJ:

I suppose that what's happening with new models of work like Uber is that the market power of entities like Uber is such that the notional control that individuals have is slight. They are very vulnerable to the market power of providers like Uber.

MR WICKS KC:

And again that will very much depend on individual's circumstances.

WINKELMANN CJ:

It's no use in a legal analysis just as a political party political statement.

MR WICKS KC:

I'm just going to check one thing if I may. There's no evidence that suggested that –

THE COURT ADDRESSES COUNSEL – TECHNOLOGY ISSUE (15:44:52)

MR WICKS KC:

There was no evidence that suggested that any of the four drivers here were earning $2 an hour or earning less than the minimum wage. The four drivers? I am told one of them was.

MILLER J:

One of them talked about how difficult it was to – I don't know that he said it was less than minimum wage but certainly.

MR WICKS KC:

But certainly we would adopt the Court of Appeal's position that minimum protections provided under the Employment Relations Act and other minimum requirement statutes are intended to apply to employees and the function of section 6 is to clarify which workers are employees for the purpose of the Employment Relations Act. My learned friend goes down further.

WINKELMANN CJ:

I have some reservations about that approach, given its the objects of the Act, I think, although I don't have screens to look at that.

MR WICKS KC:

Sorry, your Honour. If your Honour goes through to 124 or 5 of the judgment. I think the Court of Appeal are right that there's a risk of having people declared employees who are not in reality employees purely because they are said to be vulnerable and the Court of Appeal make the observation at 124 that it is true many, but not all, employees are vulnerable. "And it's equally true that the Employment Relations Act responds to that vulnerability. But vulnerability and employee status cannot be equated. Vulnerability does not, without more,

establish that a worker is an employee," and the Court of Appeal goes on to say: "Some independent contractors in highly competitive and poorly paid occupations are vulnerable workers. Some franchisees are vulnerable workers."

WINKELMANN CJ:

I suppose it might be relevant to the issue of control though, mightn't it? You might say, well, that's not going to control them, but in fact because of their set-up they're particularly vulnerable to economic control.

MR WICKS KC:

There may be – in an individual circumstance again, yes.

WINKELMANN CJ:

But I take your point, you can't just say vulnerability is a relevant principle, that it actually has to be worked out through the *Bryson* test.

MR WICKS KC:

Yes, it does. Can I just finish off dealing with the points around the fundamental test, and one of these picks up on the point that your Honour, Justice Miller, made around taxes. Drivers have autonomy over their business expenses. They can reduce costs and tax obligations by choosing what equipment and resources to use. Drivers can share their vehicle to reduce costs. The Courts below have dismissed the management of those expenses because phones and cars are common household items. With great respect, that misses the point which is that using those items for business purposes is quite different, including that business decisions influence purchases and the additional business costs require management which permits risk and reward for drivers, and to give examples on the evidence Mr Ang purchased a larger car so he could provide a better airport pickup service, and you'll see that on the screen now: "I did change the car because I sort of felt the current car I had was a bit too small. It's a bit more lucrative if you have something slightly bigger."

But then he later, on the evidence, swapped back to a smaller car for fuel economy. Mr Keil switched to a diesel vehicle to reduce his operating expenses, then switched again to a small hybrid, and that's in his evidence-in-chief there at 72 on the screen. The evidence was that all those decisions were made for business purposes.

I have already made the point drivers can be employed elsewhere or take up different earning opportunities. Mr Ang was the individual of the four drivers who was also a masseuse and his evidence was that he would decide when to drive against when to book masseuse appointments, including based on big events or times of likely surge pricing.

Drivers could also choose to drive using competitor platforms. Now the –
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MILLER J:
And do they?

MR WICKS KC:
– players in the market, and I will come to that, but yes they do is the answer. At the time of this case proceeding there were Ola, Zoomy and DD, DoorDash and Delivereasy. Your Honours may have appreciated from media that at least one of those entities is no longer in New Zealand, but another ride-share entity has recently started up. I don't want to give evidence but the Bar but there are still competitor platforms.

MILLER J:
But none of these drivers use them? It's just the evidence was it's not really feasible.

MR WICKS KC:
Well three of them use competitor platforms from time to time. Mr Ang, while he was waiting for a certificate of fitness for his vehicle getting approved by Uber, stated to Uber on a phone call: "In the meantime I'll drive for Ola." It is

also possible, we submit, to use the Uber platform at the same time as being logged in to other platforms. This is the multi-apping point. It's not prohibited by the services agreement. It is simple enough with the use of a hands-free set to accept the next trip that arises while driving, and the Court of Appeal, we submit, wrongly disregarded Ms Foley's unchallenged evidence that multi-apping is a common practice and questioned how a driver could safely use a competitor's app while driving with Uber.

What I'd like to take your Honours to is 304.2222, because this demonstrates that Ms Foley's evidence is consistent with the Union's evidence, and there was a paper produced by the Union in the Employment Court case which mentions a driver's experience in keeping both the Uber and Ola apps on simultaneously, and you'll see the italicised aspect refers to a driver's description of that. So keep both apps on, keep my Ola on. "If I get an Ola trip and if it's surging I would take the Ola trip because… is more lucrative [on the] commission." And there are different commissions between the platforms as the evidence demonstrates.

MILLER J:

Do you know anything about their market share?

MR WICKS KC:

It's smaller than Uber. Some way smaller than Uber.

MILLER J:

There's some evidence somewhere in the record about that?

MR WICKS KC:

There is, I believe. I can't take your Honour to it.

MILLER J:

Maybe if you could give us the reference at some time, not right now.

MR WICKS KC:

Yes, we will. But you'll see that this driver refers to both of them on, which is a demonstration of multi-apping, and this came from that, as I say, the paper produced by the Unions in the Employment Court case. I'll just deal with, I'm conscious of the time, deal with –

WINKELMANN CJ:

How much further have you got to go Mr Wicks?

MR WICKS KC:

Very close to the end your Honour.

WINKELMANN CJ:

Do you think you're going to finish in the next five minutes?

MR WICKS KC:

Probably not, I'm probably 10 minutes or 15 minutes maximum.

WINKELMANN CJ:

Okay.

MR WICKS KC:

But your Honours will wish me to carry on through to 4 o'clock I expect.

WINKELMANN CJ:

Yes.

MR WICKS KC:

As a final note under the fundamental test, the Court of Appeal, we submit, erred in focusing on the inability of drivers to generate goodwill. They could through other endeavours, of course, but the appellants submit that generating goodwill is not a necessary consideration for the fundamental test. Many businesses do not generate goodwill. There's an illustration of that in the High Court of Australia decision in *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, (2022) 275 CLR 254, where at paragraph 58 the Court said:

"More importantly, many businesses – such as manufacturers of products for a single customer – do not generate goodwill. That is a feature of the niche in the market occupied by these businesses; it is not a circumstance which denies the independence of such businesses from their customers."

We submit that the absence of being able to generate goodwill is not an answer to determining whether a person is in business on their own account.

GLAZEBROOK J:

Do you say it's irrelevant? Because that seems to imply it's irrelevant, and I don't think it is.

MR WICKS KC:

Again, and I hate to harp on about this, but it may be a relevant factor depending on the particular factual circumstances. But it's not – the fact that an individual or a business doesn't generate goodwill is not fatal to finding that that individual is in business on their own account.

WINKELMANN CJ:

Could it be relevant though, that this is a business where you would normally be generating business on your own, goodwill. So it would be absolutely key to a driver to generate goodwill, and here Uber stops them doing so.

MR WICKS KC:

Only insofar as its platform is concerned, but there are other ways to generate goodwill for those drivers elsewhere as transport providers. We submit that the Court of Appeal should have asked the fundamental question, are the drivers in business on their own account, and the answer, we submit, is that they were. I'm about to move on to the overall assessment.

WINKELMANN CJ:

So we should do that tomorrow.

MR WICKS KC:

If that's convenient. It won't take very long.

WILLIAMS J:

Most of the points you've raised, that you've drawn threads from particular cases as you have to do, and I'm sure Mr Cranney is going to do it as well, and I'm not being disingenuous here, it's all very well, but in the end the real substance test means it's the overall assessment that really counts.

MR WICKS KC:

And I'm coming to it. That's the next bit.

WILLIAMS J:

So I was surprised when you said you wouldn't take very long, that's the point.

MR WICKS KC:

Well…

WINKELMANN CJ:

Don't invite him to take long.

GLAZEBROOK J:

You'd say you've made the points already, though, as you go through.

MR WICKS KC:

That's quite right. I don't want to repeat the points I've made. I really want to demonstrate that overall assessment approach.

WILLIAMS J:

Yes, the alchemy is the key in this case, as it appears to be in all of them.

MR WICKS KC:

It is indeed. I have given you all of the ingredients from the appellants' perspective.

WILLIAMS J:

Let’s see if we can burn it.

MR WICKS KC:

And when you tip them into the pot we have a pretty good stew, in my view, but I'll deal with that tomorrow.

WINKELMANN CJ:

Thank you. We’ll take the adjournment.

COURT ADJOURNS: 3.57 PM

COURT RESUMES ON WEDNESDAY 9 JULY 2025 AT 10.01 AM

MR WICKS KC:
Mōrena, your Honours.

WINKELMANN CJ:
Mōrena. So you will, I imagine, you won't be too long.

MR WICKS KC:
Very, very brief, I would think, in this concluding section.

I will first address your Honour Justice Miller's question yesterday regarding evidence on Uber's market share. In short, there is no direct evidence on this matter. Ms Rosentreter filed evidence on behalf of the unions in opposition to leave before the Court of Appeal. In that evidence, she stated that Uber holds: "... over 90% of market share in platform-based delivery business for both passenger (Uber rides) and food delivery (Uber Eats)." That reference is at 05.0141 if you need it. However, no basis has been provided for this figure and little weight can, in our submission, be placed on it.

There is no concrete evidence before the Court but Uber accepts that it's market share is likely significant. Taxies are also a large competitor, including because they can do trips that ride-shares cannot, so rank and hail. Indeed, I understand many drivers do taxi and ride-share work, as I mentioned yesterday. I cannot take matters any further than that in relation to the market share point.

So I will now turn then to the overall assessment which flows from the matters put in submissions yesterday on behalf of the appellants and the ultimate issue in this case is whether the four drivers were employees.

As I said yesterday, at the outset, this is not a straight-forward case with an obvious answer. After considering the application of each of the four tests, the Court is required to stand back and weigh each of the tests and make an overall assessment and a good description of this overall assessment in the case law

is found in *Clark v Northland Hunt* at paragraph 22 where the Court sets out: "In assessing the real nature of the employment relationship, the Court tends to apply a number of tests. This is the approach, which was adopted in *Bryson*. None of the tests individually will necessarily be conclusive although respective weight will be placed upon them depending upon the overall factual matrix: *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 (PC). A consideration of each of the tests in turn, will give the Court an overall feeling for the underlying nature of the relationship. In some cases the position will be patently obvious, in other cases there will be a fine balance."

And a good example of this overall assessment is in the *Arachchige* decision of Judge Holden of the Employment Court where at paragraph 56 her Honour sets out: "On balance, Mr Arachchige was not employed by UBER [56] While there are aspects of the relationship between UBER and Mr Arachchige that may point to employment, the intent of the parties throughout their relationship was that Mr Arachchige would operate his own business in the manner and at the times he wished. His work was not directed or controlled by UBER beyond some matters that might be expected given Mr Arachchige was operating using the Uber 'brand'. The agreement between UBER and Mr Arachchige reflected the parties' intention, and the parties acted in accordance with the agreement."

In this case, we submit the common intention was that the relationship between each driver and the appellants was not one of employment. Even the drivers do not contend that they signed up to use Uber's platform thinking they were agreeing to an employment relationship. Rather, the respondents' case is that the relationship should be an employment relationship and that must result from the application, they would say, of the three common law tests justifying departure from the common intention.

In this case, the most illuminating of those common law tests is the fundamental test. For the reasons I outlined yesterday, the four driver were, we submit, in business on their own account. They made choices for themselves affecting revenue and expenses. It is accepted that Uber's regulation of its platform also impacted on revenue through pricing.

GLAZEBROOK J:

I'm sorry, no, if you could just repeat that again and possibly slow down slightly.

MR WICKS KC:

Yes, sorry, your Honour. I will go back to the commencement of that section. In this case –

GLAZEBROOK J:

No, no, just the last one, I've got the others.

MR WICKS KC:

They made, the drivers, made choices for themselves affecting revenue and expenses. It is accepted that Uber's regulation of its platform also impacted revenue and that is through pricing, and had a limited impact on expenses through some restrictions on vehicles. But that does not take away from the fact that the drivers were making their own important business decisions. They decided whether, when, where and for how long to drive, or whether to do other work instead. They also had the ability to and did make business decisions around assets, business costs and organised their own tax affairs efficiently and, as I indicated yesterday, too, had their own accountants. There were benefits on both sides of this arrangement.

This is evidence that both parties operated in accordance with the services agreement and the common intention that it evidences, that is a relationship was not one of employment. Uber accepts that the drivers did not have input into the structure but the drivers choose to accept and use it. They have entered into the services agreement with knowledge of what the deal was and acted accordingly.

Turning briefly to the other common law tests, on –

GLAZEBROOK J:

What are you, in that, what do you say about the incentives?

MR WICKS KC:

We say that the incentives are there to encourage drivers to log onto the app and offer their transportation services to riders.

GLAZEBROOK J:

That's not really an answer as to whether that diminishes both the control aspect and the business on their own account aspect.

MR WICKS KC:

Well, it doesn't diminish, with respect, the business on their own account aspect, because it –

GLAZEBROOK J:

Is that just a take it or leave it, the same sort of –

MR WICKS KC:

They're making the decision whether they want to work, where they want to work, for how long and whether this is the piece of work they want to do, or they want to do another piece of work.

WILLIAMS J:

Your essential point is that the primary characteristic of contract of service is one of control of one party by the other, incentives are encouragements, they are not control.

MR WICKS KC:

Indeed, yes, your Honour has it correct, insofar as our case is concerned.

WINKELMANN CJ:

And what about the discipline?

MR WICKS KC:

That's an aspect of control and I addressed yesterday how that is explained by Uber as being necessary for the efficient operation of the platform and I was just going to turn now to the other two common law tests in this overall

assessment and, on control, it's accepted that Uber had control over its platform and that manifested in some control over drivers' use of the platform and those consequences of breaches of community guidelines is one example of that. But we submit that control should not be given much weight in the overall assessment, because it is explained by regulatory requirements, consumer protection, and maintaining an effective platform which is of mutual benefit to all users. The features of control identified in this case –

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WINKELMANN CJ:

So just, can you just restate that, can you just state that again, sorry?

MR WICKS KC:

Yes, certainly.

WINKELMANN CJ:

So, too much weight shouldn't be given to control?

MR WICKS KC:

Not too much weight in the overall assessment should be given to control, we submit, because it's explained by regulatory requirements, consumer protection and maintaining an effective platform which is of mutual benefit to all users. The features of control identified in this case are equally consistent with other contractual relationships and therefore we submit that the control test should not have a material influence on the overall assessment.

On the integration test, the duration and timing of connection between drivers and Uber is entirely in drivers' hands. That is quite different to an employment relationship with an ongoing obligation to perform work in the sense that integration captures. Drivers alone decide on the extent of their connection with Uber. The Court of Appeal was correct that the integration test is not here a strong indicator of status.

So drawing those threads together, the services agreement is not an employment agreement and the parties' common intention was not to enter into an employment relationship.

MILLER J:

Can I just take you up on that integration point? If we start from the premise that Uber is in the business of delivering transport services, and I know you still resist that, if we take a realist view that that is what is happening, then is it not the case what must be a very large proportion of the entire capital of the Uber business is provided by its drivers in the form of the 11,000-odd cars that are working for Uber in New Zealand? Doesn't that suggest that in fact the drivers and their cars are an essential, necessarily an integral part of the Uber business?

MR WICKS KC:

I can't resist the fact that the platform would not work without drivers and their vehicles being able to provide the transport services to riders, but we take the position, respectfully, that that, the integration test, as the Court of Appeal found, having taken the same position that your Honour has just set out, is not a strong indicator of status.

WINKELMANN CJ:

I must say I found that a surprising conclusion also because it seems to me that it is a very highly integrated model but depends upon the sort of fungibility of the human resource, and that's the only aspect where there isn't complete control.

MR WICKS KC:

And you can have a workforce, for want of a better description, that is equally a contractor and equally an employee. An example of that I gave your Honours yesterday was in the *Southern Taxis* case where they had drivers doing the same work, some were contractors, some were employees, the Labour Inspector – well, they were all treated as contractors but the Labour Inspector brought a claim for a group of those drivers, that they were, in real

terms, employees, and that was found to be the case. So it doesn't just automatically lead to a conclusion or carry the day, if you like, that this is an employment relationship.

Drawing those threads together, the services agreement is not an employment agreement and the parties' common –

GLAZEBROOK J:
Have you finished on integration?

MR WICKS KC:
I have unless your Honour has a question.

GLAZEBROOK J:
Well, can we look at why the Court of Appeal said it's not a strong indication, because is that what you're relying on to say it's not a strong indication, because I think you've probably gathered that at least three members of the Court think that it's integrated. Whether that means it's integrated as contractors or employees might be another issue.

MR WICKS KC:
Indeed.

GLAZEBROOK J:
But – so what do you say about that?

MR WICKS KC:
We say that that is balanced by the contra indications that I've referred to in the sense of the duration and timing of connection being entirely in the driver's hands.

GLAZEBROOK J:
So their choice as to when they're integrated?

MR WICKS KC:

That's right.

GLAZEBROOK J:

Yes, it's integrated as a whole with all of the drivers but each individual driver has a choice as to the duration, time and whether to be part of that business?

MR WICKS KC:

That's right. The drivers decide on their own the extent of that connection.

GLAZEBROOK J:

So that's the answer to that?

MR WICKS KC:

That's the answer we make to that.

WINKELMANN CJ:

How does that – you know zero –hour contracts, zero-hour performance contracts where the employer can decide when a person works? How's that – that's still an employment contract.

MR WICKS KC:

Well, they're illegal now, your Honour.

WINKELMANN CJ:

Are they?

MR WICKS KC:

Yes.

WINKELMANN CJ:

Well, that's good news.

MR WICKS KC:

So that is good news.

WINKELMANN CJ:

But there's still employment contracts –

MR WICKS KC:

They were framed as employment agreements, but quite properly they became illegal.

WINKELMANN CJ:

But you still have employment contracts where the employer has a great deal of control over when – you know, so okay, right.

GLAZEBROOK J:

So that's the employer control. I think you were saying here it's the putative employee control as to when they work which makes a difference.

MR WICKS KC:

That's right. It's a contra indication that diminishes the impact of the integration test.

GLAZEBROOK J:

And I suppose you'd say that insurance agents who are clearly independent contractors are still integral to the business because if you can't sell your insurance contracts you don't have a business.

MR WICKS KC:

Indeed.

GLAZEBROOK J:

And so that's what you – you would say they're at this end of the spectrum rather than the other end of the spectrum, I'd imagine?

MR WICKS KC:

Yes, your Honour.

WILLIAMS J:

So the essential point is that you apply the integration test to individual relationships, not to the overall model, because clearly cars are deeply integrated into Uber's model?

MR WICKS KC:

Yes. I –

WILLIAMS J:

But, and this comes back to control really, if integration means that, or lack of it, means you have freedom when to plug in and when not to, that really takes you back to control.

MR WICKS KC:

Yes, and they – well, they overlap and there's cases that talk about the control integration test having some overlap and your Honour has just given an example of that.

GLAZEBROOK J:

And possibly the cars is actually a strong indication against employee because…

MR WICKS KC:

They're not Uber's fleet.

GLAZEBROOK J:

They're not Uber's fleet but also business on their own account, they get to choose the car within reason, they get to have deductions which they wouldn't as an employee.

MR WICKS KC:

Indeed, and that leads me to the next point is that the parties, we submit, have then executed that common intention not to have an employment relationship and the conclusion as to the fundamental test demonstrates that the common

intention has been realised by the drivers being in business on their own account and therefore not in an employment relationship with Uber.

In this case, to conclude, there's no need to have regard to economic power between the parties to arrive at that conclusion. There is limited evidence of that being a factor in this case and, in any event, determining status based on an imbalance of economic power risks expanding the category of "employees" to include dependent contractors, and although that matter has been considered in the political sphere in this country in the past, Parliament has not yet chosen to include a category of dependent contractors in the Employment Relations Act, and although – sorry, I should say, Parliament has not chosen to include dependent contractors within the Employment Relations Act or otherwise provide them with the sort of entitlements that are provided to the worker category under UK legislation and expanding the reach of the Employment Relations Act in this way should be a matter for Parliament. It would not be a proper application of section 6 as it currently stands and the *Bryson* test.

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Can I also add here that a year or so ago in Australia federal legislation was introduced under the Fair Work Act 2009, section 15P, and your Honours have that up on the screen now, introducing a category of an employee like worker, and your Honours will see there that refers to an individual who is party to a services contract and this, I raise this on the basis of the indication your Honours may land in a position that is different to the submissions made on behalf of Uber as to the relationship and who provides the transport services.

But if we just scroll down when your Honours have familiarised yourself with that and you will see it refers to: "... the person [performing] all or a significant majority, of the work to be performed under the services contract ...", it refers to digital platform work and it then requires that the person satisfies under (e): "... 2 or more of the following: ... low bargaining power ... remuneration at or below the rate of an employee ... low degree of authority over the performance ... [and] such other characteristics as are prescribed by the regulations."

MILLER J:

When was this introduced?

MR WICKS KC:

Approximately 12 months ago, I'll endeavour to get that correct.

MILLER J:

Right, so it's subsequent to the Australian cases which have tended to say that people in this position are not employees.

MR WICKS KC:

And, yes, it has, yes, that appears to be the case.

MILLER J:

Right.

MR WICKS KC:

But it's another example of the legislature dealing with this type of circumstance, just as the UK legislation has and the submission is made that if your Honour's reach the same position, were you to, as in *Aslam*, you're not through the gate, you're just short of the gate and therefore a declaration that these drivers were employees should not be made.

WILLIAMS J:

So you, you take the view that this is a, rather than a spectrum, this is a straight category issue?

MR WICKS KC:

Yes, we do, it is a –

WILLIAMS J:

Because there's a lot in *Aslam* that looks very familiar to Employment Court jurisprudence and it's hard to work out whether this really is a category issue or whether it's a spectrum issue.

MR WICKS KC:

Well, it does, but of course the submission made in *Aslam* was that the individuals were in that third category, in the worker category, which is –

WILLIAMS J:

Yes, absolutely.

MR WICKS KC:

And that's the only point I made, really, in relation to *Aslam* is that that's as far as it –

WILLIAMS J:

But talking about the substantive reasoning the Court employs.

MR WICKS KC:

Yes.

WILLIAMS J:

That is not unfamiliar to ERA vocabulary.

MR WICKS KC:

It's not, I accept that.

WILLIAMS J:

And that's the problem we've got here.

MR WICKS KC:

Yes and that's where you go back to that ultimate overall assessment of all those factors and as I have said –

WILLIAMS J:

But that's suggests it's a spectrum, not a category.

MR WICKS KC:

The ultimate question is one of category but, yes, there is a spectrum, I think that's a fair description. We say that, on the spectrum, the case here falls short of reaching and going through the gateway so that there is an employment relationship.

WINKELMANN CJ:

So your submission is what you started out with, the appellants' point is really that they should be employees, not that they are employees when you apply the test, although that's not how the put it.

MR WICKS KC:

The respondents, yes, yes.

WINKELMANN CJ:

Yes, sorry, the respondents.

MR WICKS KC:

Yes, no, thank you. Yes, no, your Honour has captured that accurately.

WINKELMANN CJ:

And this is the model you say would have to exist in our legislation for them to be employees?

MR WICKS KC:

We do, yes.

GLAZEBROOK J:

I suppose what you are saying, really, is that there are factors going either way but in this case, at the most, the factors going either way would put them in the intermediate category. That the UK and possibly, well, actually, it's a slightly different category in Australia.

MR WICKS KC:

Yes, it is.

GLAZEBROOK J:

Because that is low bargaining power.

MR WICKS KC:

Yes, yes, indeed.

GLAZEBROOK J:

Which actually looks quite good to me in terms of what one might want to do.

MR WICKS KC:

Yes.

MILLER J:

Your answer on the integration point has got some superficial appeal to it, the idea that drivers collectively are integrated into Uber's transport services business, but individual drivers are not because they choose how much or whether they work. But the real problem for you in this case is that what we're looking at is whether they are employees when logged on. In other words, we suppose they've made the choice and, at that point, they are working for Uber and being paid by Uber, effectively, that's the economic reality of it.

MR WICKS KC:

Respectfully, we take a different position, but I don't think we need to traverse –

MILLER J:

I know you do, I know you do, but we went around the money flows yesterday.

MR WICKS KC:

We don't need to traverse yesterday's exercise again, but –

GLAZEBROOK J:

But do you say there just that it can be logged on is, they can be integrated as independent contractors?

MR WICKS KC:

We do, yes, yes.

GLAZEBROOK J:

Is that the real point there?

MR WICKS KC:

And that is not necessarily an unusual feature of business relationships, or businesses I should say, that and, as I say, *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413 are – is a good example of that, where some doing the same work are independent contractors, others were not.

But then you have, on the other side of that coin, if you like, just to cover this off, you have the *Prasad v LSG* case where the labour hire company had sent people along on request to LSG but they actually were working in alongside employees, as if they were employees, as opposed to being more autonomous in the sense that a driver is because they're not connected and working in and co-ordinating with other drivers in the provision of whatever work they do. Unless your Honours have any further questions, that concludes the submissions for the appellants.

WINKELMANN CJ:

Thank you, Mr Wicks.

MR CRANNEY:

I wonder, your Honours, if I may start with an issue as to the numbers of people involved and refer your Honours to page, which my learned junior will now do, is it 05.0129. This is the affidavit of Ms Foley at paragraph 4, presuming the technology works.

MILLER J:

You have to be logged on first, Mr Cranney.

MR CRANNEY:

I think so. It's a bit –

WINKELMANN CJ:

Be nice.

MR CRANNEY:

I'm a bit too old for it. Sorry about this, your Honours.

WINKELMANN CJ:

That's all right. Do you know the document number, we could just look at it ourselves?

MR CRANNEY:

Oh, it's on now. So, this is Ms Foley's evidence. So: "There are currently 11,000 drivers in New Zealand who have signed up to provide services ... and are eligible to undertake trips and ... 17,000 [doing the] Uber Eats ..." and then it goes on to say: "There have been ... 26,000 drivers who have ever provided services [and] 43,000 ... partners [have] provided services using the ... platform."

Then the next document is the – that is quite a high number compared to be what seems to be persistent in UK and if I look at 304.2241 which is a post-*Aslam* article talking about 70,000 drivers can now join, collectively negotiate wages, sick pay and pensions. So that's what's followed on from the *Aslam* judgment and that seems to be the sort of numbers that exist in London where that case took place.

ELLEN FRANCE J:

So is that the only information we've got, Mr Cranney, about what's happened in the UK since in terms of practicalities, if you like?

MR CRANNEY:

Yes. The unions –

WILLIAMS J:

What happened to the platform, in other words?

MR CRANNEY:

The platform continues. I think that the – sorry, your Honour, the platform continues and Uber's – one of the big unions there have recruited a large number of them and they've sorted out the minimum entitlements, that seems to be what's happened.

MILLER J:

At some point it will be useful to know what employment status means in terms of things like whose cars get used and how is, if they're the driver's car, how does the reimbursement work.

WINKELMANN CJ:

And tax.

MILLER J:

But I don't suggest you need to do that now.

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GLAZEBROOK J:

I'm assuming you get tax deductibility in the UK for employee expenses because New Zealand is an outlier on that.

MR CRANNEY:

Yes. I understand the Court's view about this, not knowing how this is going to pan out.

WINKELMANN CJ:

It's not our job.

MR CRANNEY:

No, but it's also, going back to what happened in the beginning of this, when Uber first came here, and if you look, for example, at 304.2360, or perhaps

better – that will do. You'll see there that when the, in 2016, there was complaints by the New Zealand State that Uber was breaching the law here when they first came and that is quite a common complaint and a common experience in societies where this reality has been experienced where suddenly the whole of this market was turned upside down by this, and you will see also at – there's a letter from the Transport Agency to Julian "Ang which is in the evidence. Unfortunately, I don't have the number on it. If you can just get it on the screen, 302. Again, this is 2016.

GLAZEBROOK J:

What's the point of this? I mean some would say it's a good thing it's been turned upside down because that's increased consumer choice and flexibility and perhaps galvanised some of the other companies to change the way they provide services, but –

MR CRANNEY:

Yes, within the law, and if –

GLAZEBROOK J:

No, no, obviously.

MR CRANNEY:

Yes, and if they're employees by respecting those rights. I do understand there is uncertainty about who owns the cars and who pays for the petrol. Those things are going to have to be dealt with.

WINKELMANN CJ:

And who pays PAYE? Would it be…

MR CRANNEY:

Well, whatever the employer has to do, the employer has to do.

WINKELMANN CJ:

Yes, but your point is, because we heard a lot from Mr Walker about what the business model needs, but the business model has to conform to the law?

MR CRANNEY:

Yes, and what is the alternative really? To worry about the difficulties that may flow from the judgment and see the massive increase of these types of arrangements because they are not stopped by the Courts, and I realise that the Courts are in a difficult position in the sense that it requires quite robust decision-making by courts to confront this reality, if it's illegal, and that's what the Supreme Court did in the United Kingdom, and with the increase in power of these entities the superior courts in all sorts of jurisdictions are being placed in the same position that this Court is now placed in, and I've referred your Honours to *Aslam*, to the Cour de Cassation in France, and various other courts that are going to be, not just for this issue, but for a number of other issues, as history develops, are going to be placed in the position of playing a role in enforcing the rule of law against these entities.

WINKELMANN CJ:

I guess you'd say that consumers are also workers?

MR CRANNEY:

Yes, indeed. Yes, they are, Ma'am, and you'll see there the letter at the time, and so I do think that it is, to some extent, it does put the judiciary in the hot seat as the *Aslam* Court was put because it didn't know the answers either to these questions.

ELLEN FRANCE J:

One of the arguments made against you is, well, that's for Parliament. Is there anything you have to say about that?

MR CRANNEY:

Well, the law is as it is now, Ma'am, and it's essentially what was said in section 6 and in *Bryson*, and there has been no change to the statute at the

moment. There is a proposed change which your Honours can look at. There's an Amendment Act, Amendment Bill, but it doesn't fit Uber. It doesn't get Uber off the hook in its current form because it's proposing a new exemption conditional on various aspects which Uber does not have, one of them being a right to subcontract and the other one being – and the contract must state that the arrangement's an independent contract. Now none of those things apply here.

GLAZEBROOK J:

We're not looking at – we won't be looking at a proposed amendment and we will be applying the law as it is, but if you're suggesting – I think the issue is whether we're stretching the law as it is to say they're employees as against independent contractors and I know that's not quite the appellant's case but I think you've probably gathered that we don't buy the "we only provide a platform", well, at least not personally.

MR CRANNEY:

Yes, yes. I think that it's not stretching anything. These are simply unusual arrangements, that there is a very high level of control, intensive, unrelenting control, of these workers while they are working and I think also I submit, Ma'am, that they are totally integrated in any sensible definition of the word, and I don't understand the Court of Appeal's comment on that point. I know we can construct arguments to say that's not so, but if there are 11,000 drivers and nobody else here, that is the entity, and as it operates, and in terms of the fundamental test which is often the key to these things I think it's pretty obviously just application of the previous law of hundreds of years to these employees, and these fictional Jack and the Beanstalk contracts, fairy stories, are designed to get around the rule of law, quite clearly, and to allow the sorts of submissions that have been planned for to be made when they get to the high appellate courts, and the Cour de Cassation called it fiction, *Aslam* called it fiction as well and I'll take your Honours to that, and many other courts have.

GLAZEBROOK J:

But is that the whole, when you say "fiction", the whole platform issue or is there more to your "fiction" submission?

MR CRANNEY:

The main fictions are the assertion that there's a contract between the driver and the passenger, number 1, and number 2 that Uber does not control the employee while they're working, and that's written in. In rather strange language the second one, it says at clause – you might just want to get this up onto the screen and I'll take your Honours through some of the clauses – the first fiction is at paragraph 3 of the terms in the second line, "a legal and direct business relationship between you and the User". This is the one that springs into being, an unwritten contract that springs into being. It's fiction. The next one is…

GLAZEBROOK J:

That might be the case to a degree once you're in a car but whether that means that Uber doesn't have a relationship with the user or that that somehow means that…

MR CRANNEY:

I'm talking here about the driver/passenger contract.

GLAZEBROOK J:

Yes. In the sense that presumably the driver has agreed not to kick you out and take you to the place that you want to go to. So in that sense there's a contract but that doesn't mean there isn't a contract with Uber as well from the passenger's point of view.

MR CRANNEY:

Essentially what the Court of Appeal said. But this –

WINKELMANN CJ:

This doesn't actually say it's a contract though, does it?

MR CRANNEY:

No –

WINKELMANN CJ:

Because it says you're responsible for the provision of transport services? You might be responsible in negligence for it. What about the thing that the riders see?

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MR CRANNEY:

Well, the way it, the way the contract is formed with Uber and it hasn't been focused on very much, is that the passenger sends a request in writing to the Uber, to Uber, by way of an address "I would like to go to the Supreme Court", I don't know whether anyone with any sense would ask that question, but – and "I would like to go to the Supreme Court" and Uber doesn't say "yes, I will send a taxi", Uber sends a price "I would propose a price of $11.03", and you then accept it as the passenger. It's nothing to do with the driver. The contract was formed at that point and then Uber sends the job to the drivers and one of them chooses to accept the job. Usually, they call that "acceptance" and that comes up every 15 seconds, as they've said, and you can't – if you don't accept them, they turn you off and if you turn it back on and you don't accept it again, you get turned off again. You can't just have your thing on all day watching these jobs come in. So in terms of basic contract, the way in which it operates is pretty straight-forward. Uber forms the contract and then –

GLAZEBROOK J:

And you say both with the passenger which is done at the time that the price is accepted, and then with the driver which, effectively, which is done at the time the driver accepts the job.

MR CRANNEY:

Yes, yes, and –

GLAZEBROOK J:

And then there might or might not be some kind of relationship with the passenger and the driver at the time the driver turns up?

MR CRANNEY:

Yes, that's the substance of it, Ma'am.

WINKELMANN CJ:

How is it different, or can you tell me how it is different to sort of conventional piecework? Say, so say a tailor says "I will sell you this suit for X dollars" and then goes to find a pieceworker who – and says "you make this suit for X minus Y dollars for me".

MR CRANNEY:

That would be a subcontracting or an onward contract between the tailor and the sub-tailor.

WINKELMANN CJ:

But how is it different to what's happening here?

MR CRANNEY:

Well, here the agreement is made to deliver the passenger by Uber and offered/accepted by the mechanism to which I have just referred.

WINKELMANN CJ:

So it would be like the tailor, subcontracted tailor, fronting up in the shop and delivering the suit?

MR CRANNEY:

Yes, yes. I think it's pretty straight-forward, who would you sue if you suffered damage, if you accept such a trip? If you send the request and Uber offers you a price and then you accept the price and the contract is then formed, which it must be the case, because what happens then is you sit there waiting for your car to come, sent by Uber. You've accepted the price, so they've offered the

price, and if you suffered terrible damage as a result of them not arriving, you wouldn't sue the driver.

WINKELMANN CJ:

Well, in jurisdictions, if there is personal injury, has this issue squarely arisen? Has it arisen as to who can be sued in respect of the – I suppose there's all the tricky stuff about vicarious –

MR CRANNEY:

It must have, Ma'am, but I don't know if it's wandered into the higher courts.

WINKELMANN CJ:

It's very complex, anyway, it in itself is a complex area of the law.

MR CRANNEY:

And Uber would tend to settle, they would tend to be quite small cases and Uber would then settle it.

WINKELMANN CJ:

Uber would settle them.

MR CRANNEY:

So in terms of the law, and then if you look at those two fictions and then go and look at *Aslam* –

WINKELMANN CJ:

So the two fictions are that –

MR CRANNEY:

The number one is –

WINKELMANN CJ:

– there is a contract between the driver and the passenger and that Uber does not control the employee while they are working.

MR CRANNEY:

Yes and the second one is expressed in very odd language, it says: “Neither Rasier NZ nor Uber shall be deemed to direct or control you generally or in your performance ...” so it doesn’t say they don’t control you, because if that was a term of the contract it would be a breach of the contract for Uber to control the driver. It uses a strange phrase that Uber will not be deemed to control you. A bit of a somewhat meaningless phrase but the general drift of it is to say “look, we don’t control you”, and then if you look at paragraph 81 and I think Justice Miller picked this up earlier about the Uber, now these, both of these terms are considered by the Supreme Court in *Aslam* as being fictional.

MILLER J:

Can I ask about the implications of that in a world in which we begin by interpreting a contract. The Court of Appeal dealt with this by effectively saying “we put those to one side” and that’s a substantial part of Uber’s argument, it was wrong to do that because they do, in fact, evidence the intention of the two parties who signed up for this and let's suppose, hypothetically, the driver had read it, seen it and signed it, you would say that was so. How is the Court to approach that? Do we treat it, do we discount it because it's not real, or do we treat it as something else? I posited to Mr Wicks yesterday that it may actually be evidence of the very inequality of bargaining power which explains the existence of section 6.

MR CRANNEY:

The, in terms of the first one, the creation of illegal and direct business relationship between you and the user, it's almost impossible to even know what they’re talking about and so –

MILLER J:

I’m asking a question of law.

MR CRANNEY:

Yes.

MILLER J:

We are working in a contract world here.

MR CRANNEY:

Yes.

GLAZEBROOK J:

I mean, they do say they're not, but I think the, rather than those statements, the statements that say they're not employees, I mean, it goes on and says they're not independent contractors or agents, really, though it seems most of which are untrue, probably.

MR CRANNEY:

Yes, it's an acceptance by – yes, sorry, I beg your pardon, I understand the question now, so it's an acceptance by both parties of the situation that's untrue.

MILLER J:

Yes and so what are we to make of that? Do you say we just ignore it because that's not the real relationship, put it to one side, or is it, in fact, evidence of something which is perhaps more malign, evidence of it, because no, a driver would, why would the driver agree to this?

MR CRANNEY:

The, it's a, I think, the correct position taken and it's the same here in New Zealand under s 236 [sic] of the Employment Relations Act which says you can't contract out of it. It's an attempt to agree on something which is not real, presumably they have consented to it, in order to avoid the consequences of it.

WINKELMANN CJ:

And that's not unknown, the courts taking this approach to written contracts in unequal bargaining positions is not unknown, is it?

MR CRANNEY:

Yes and the case which I want to refer your Honours to on this topic is *Street v Mountford* [1985] AC 809 (HL) which is a House of Lords decision and it's about whether a particular document is a lease or a licence and the Court, there was an outbreak in the '80s of landlords, in order to avoid certain rental obligations, instead of renting or leasing property they licenced people to use it and these licences ended up in the House of Lords and the House of Lords said "look, the nature of the contract is for the Court to decide, it is categorisation, it is not a matter for the parties to decide", and that is referred to also in *Aslam*.

GLAZEBROOK J:

That isn't the case in employment relations though, is it, because intention has always been one of the tests. It's not controlling, but it's always been thrown into the mix, so that if you have parties who genuinely – and I don't know where inequality of bargaining comes, well, inequality of bargaining does come into there – so if genuinely they have that intention, that's taken into account as one of the factors which will be different.

MR CRANNEY:

Yes, I agree.

WINKELMANN CJ:

Well, that –

MR CRANNEY:

And that's the same as *Street v Mountford.*

WINKELMANN CJ:

Mountford.

MR CRANNEY:

The fact that intention may be a factor, and I'm coming onto a submission that section 6 is reflecting the common law.

GLAZEBROOK J:
Okay.

MR CRANNEY:
Yes, so section – intention is a factor –

WINKELMANN CJ:
Can I just ask you about that intention, I raised yesterday with Mr Wicks, is it intention as to the label or is it intention as to this amended, as to this operating substance, so our intention is that our relationship will operate in this way?

MR CRANNEY:
Yes, on that point, the Court of Appeal was correct, it's the substance. The intention as to the label may be an issue, it may be interesting, it may be helpful or not helpful as part of the evidence, but the Court's job is to look at the nature of this, the correct classification of the contract that's before it and that's the same in *Street v Mountford*. There's no special employment law rule. The Court always decides the nature of the contract, just before it, depending on, the parties don't do that, and the…
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We're coming now onto the question of *TNT*. Now in *TNT* the Courts made this point and it's referred to in my written submissions at paragraph 23, and I'm working to a submission that section 6 is common law and you can repeal it all you want; it doesn't make any difference.

GLAZEBROOK J:
So you do accept section 6 is common law?

MR CRANNEY:
Yes, I think the real nature of the relationship is common law, and the reason why it's so I'll explain in a minute, but paragraph 23 of *TNT* sets out what three of the Judges said, essentially putting aside labels, and I've set those passages out at 23. It's not determinative.

Now why was section 6 needed in light of that dicta? Because the case was interpreted as making the contract primary, the label primary, but that's not what the case actually said, and the section 6 was passed into law and section 6 was correctly characterised by Justice William Young in the Court of Appeal minority decision who said it was a nudge away from *TNT*. A nudge away from *TNT*, and that is correct, in my submission, and that's at – I don't know whether I can get that up on the screen.

GLAZEBROOK J:

Is that in the sense that the contract's supreme – the nudge away so that looking not just at the contract but the whole relationship, which *Bryson* says anyway?

MR CRANNEY:

Yes, essentially what's in paragraph 23 of my submission in those quotes. That was the nudge, and that was expressly approved by the Court of Appeal in this case at paragraph, I think, 96 whereon – that's *Bryson*. So looking at *Bryson* first, this is Justice William Young: "We start by observing that the approach dictated by section 6 is plainly not the same as that taken by Cooke P and Hardie Boys J in *TNT*. On the other hand, both the wording of section 6 and its Parliamentary history suggest that what was intended was more in the nature of a nudge [than a radical change]", and that was approved by the Court of Appeal in this case, correctly in my submission, and that is, I think, at paragraph – is it 96? Yes, you see the last sentence. "Labels used by the parties are not determinative (although it is implicit that they may be among the relevant factors to be considered). The provision did not represent a major departure from the common law — it was, as William Young J" said, a nudge, "more in the nature of a nudge", and that's what it was.

So this comes to the point about heresy yesterday, that we're not committing heresy to say that we look at the real nature of the relationship. Not only is that not heresy but that is the law, regardless of section 6.

GLAZEBROOK J:

Well, I mean I understand that. Just coming back to intention, if you say intention is the same as what the Court says the contract is then I don't agree that in fact it is, because that means you don't look at intention at all; you just say: "Well, whatever the parties intended, this contract is this," and that's what *Street v Mountford* would say, whereas I think in employment you do look at the intention. I mean obviously if the intention is totally at odds with the structure of the arrangement, but here I think it's conceded, at least by the appellants, that there are indications either way.

MR CRANNEY:

I think intention is always relevant to determining the real nature, definitely, but…

GLAZEBROOK J:

But certainly not determinative?

MR CRANNEY:

It's never – common law it's not determinative.

GLAZEBROOK J:

But it's not the same as saying intention is exactly the same as you would get just by looking –

MR CRANNEY:

Exactly, yes, we're in agreement, Ma'am, and if you go back to look at *Aslam* on this point at paragraph 82, the Supreme Court there discusses the situation where parties agree deliberately and lawfully to apply the wrong label to the nature of a contract, in order to avoid the consequences of that type of contract.

GLAZEBROOK J:

Well, they may apply the wrong label because they misunderstand the nature of the relationship.

MR CRANNEY:

That's one way. It may be a mistake, but it also may be deliberate. You may say, look, we don't –

GLAZEBROOK J:

Of course.

MR CRANNEY:

Yes. Now if it's deliberate there's nothing wrong with that as that paragraph says because what it means is that you're essentially agreeing that you're estopped from asserting a different nature if the matter gets to court, but it's not lawful in employment scenarios. You can't apply the wrong label in employment law because you can't contract out of it for very good reasons.

WINKELMANN CJ:

Mr Wicks says, well, but what the drivers do want actually is the independence that comes with not being employees because they want to be able to go and run their massage business and so he says what they're now asking for is not for the Court to give effect to what was the substance of what was agreed but now what they want to have been agreed.

MR CRANNEY:

So he's saying that they wanted to avoid, for good reason, the consequences of an employment relationship. I think that's what he's saying.

WINKELMANN CJ:

I don't think he does say that.

GLAZEBROOK J:

No, I think that the submission is rather that they genuinely did want an independent contractor relationship, that's what they thought they were doing, and an acceptance I think by the appellants that that can be overridden because it's not determinative by the other tests, and your submission is that it would be overridden by the other tests. Their submission is that it's not overridden by the

other tests because the other tests, while they have occasions pointing either way…

WINKELMANN CJ:

I don't think he says it's an independent contractor relationship.

MR CRANNEY:

No, no, that's the problem. I mean the difficulty with this is that –

GLAZEBROOK J:

Just ignore that –

MR CRANNEY:

All right, the principle, yes.

GLAZEBROOK J:

– because I think we're working on the basis that Uber – well, I certainly am – that Uber's operating a transport business and the issue is whether the drivers are independent contractors or employees.

MR CRANNEY:

Yes, and so he –

GLAZEBROOK J:

So I mean let – because that simplifies it.

MR CRANNEY:

Although the contract says they're not independent contractors.

GLAZEBROOK J:

Well, it does but it's a nonsense but –

MR CRANNEY:

Yes, so the difficulty, as the Court of Appeal said –

GLAZEBROOK J:

Well, I suppose you say it's not in their – they haven't an intention to be an independent contractor there but…

MR CRANNEY:

Yes, my understanding of the Court of Appeal judgment is that funnily enough it didn't start completely with the texts of the contract, even though it said it did. The first bit of it analysed the contract and said, and then made conclusions that it actually, in terms of the characterisation issue, supported Uber because characterised it as not being an employment agreement. Then it went through whether these terms were window dressing, and then towards the end of the judgment the Court then goes back to the contract and finds all of these provisions in it which indicate control, integration and fundamental test. So the…

WINKELMANN CJ:

So you would fault their reasoning there? You say the content of the contract supports your argument?

MR CRANNEY:

Absolutely, aspects of it. Obviously the labels don't, but obviously it's a contract which eliminates the possibility of business on your account which imposes intensive elements of control and intensive elements of integration, and in terms of section 6, sorry, in terms of *Bryson* where the, I think the phrase used is whether or not, at 32, the parties have agreed on the status. So the Court in *Bryson* said, well, the contract will often show indications of the status. Now what that means is the nature of the relationship. It doesn't mean the label, even in its own passage, and –

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MILLER J:

I'm still interested in how we analyse this as a matter of law. The presence of these provisions in an agreement which we'll assume the driver has read and signed, the English legislation says that any attempt, any provisions which

attempts to contract out is void, and so if you read the rest of that paragraph 82 in *Aslam*, so that's what was happening here, so these provisions are void. The New Zealand legislation just says you can't contract out of this Act, and you, what you're telling us is that these provisions which, unusual provisions which describe the status of the parties' relationship in the agreement itself, are attempts to contract out. We should, in effect, treat them as though they are void?

MR CRANNEY:

Yes I think if we can –

MILLER J:

Or do we – therefore we – they don't go to intent at all?

MR CRANNEY:

Yes, I wonder if I can just get the section up, section 236 is where –

WINKELMANN CJ:

Do we need to do that, or don't we just follow section 6 which says that labels aren't conclusive?

MR CRANNEY:

Well, both.

GLAZEBROOK J:

But you can have an intention to have a relationship and then find that in fact in law that's not the relationship, but intent is still taken into account, and I think it's probably conceded by the appellants that it would only be not necessarily controlling but important where you actually have a lot, where you have a very evenly balanced case, and you then have to decide whether it's an employee relationship or an independent contractor relationship, and then it might just tip the balance.

MR CRANNEY:

Yes, it may do, but in the, I've referred in my submission to an Australian Federal Court case *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Limited* [2020] FCAFC 122, which was overturned by the Supreme Court, which contains an analysis of the label as the gamebreaker theory, and says it's not label that's the gamebreaker, it's just label as evidence.

GLAZEBROOK J:

Which, I think, is what the appellants agree.

MR CRANNEY:

Yes, and they now agree to that, yes I do, I accept that. I'm just interested in looking at 236 to answer the question raised by Justice Miller. The actual language of it, if I can find it. Also give myself a bit of a rest.

WINKELMANN CJ:

I don't think 236 is it.

MR CRANNEY:

Oh 238, 238 I think, sorry. It's not coming up. "The provisions of the Act have effect despite any provision to the contrary…". So essentially it's a void. Operationally voiding of the provisions.

MILLER J:

Right.

MR CRANNEY:

I think.

MILLER J:

So you get that as your argument really. If we're satisfied that is the purpose, an attempt to contract out, which you describe it as, it's window dressing,

MR CRANNEY:

Well even the effects. I don't think I need to prove purpose, but if the effect is there.

MILLER J:

Okay. I just wanted to know.

GLAZEBROOK J:

Well you just say it doesn't meet the test.

MILLER J:

I don't want to take more time on it, I just wanted to know how you framed it.

MR CRANNEY:

Yes.

WINKELMANN CJ:

I wouldn't see it as framing in section 238, you just need to go to section 6 and say the substance of it is in.

MR CRANNEY:

Yes, yes, once you're in under section 6, you're in.

WILLIAMS J:

That's right, because you can contract out of the ERA by not having an employment relationship.

MR CRANNEY:

Yes of course yes, but you can't if you're an employee.

WILLIAMS J:

But not otherwise.

MR CRANNEY:

Yes, that's right. And if you're an employee. So what I intend to do, your Honours, if I may, is to go through some – the devil in some of this is in the detail, and in particular this thing about Uber Pro and how it actually works and what cancellation rates et cetera are. But just to briefly pass through the written terms.

WINKELMANN CJ:

Can I just take you back to the first affliction because we had a look at what the agreement between Uber and the driver says, but what is the passenger, what is the rider told about who they're in a contract with? Is it in the consumer, it's the consumer, what is the document that tells us.

MR CRANNEY:

We call it the passenger terms. If you could just pop it up.

WINKELMANN CJ:

Rider terms and conditions.

MR CRANNEY:

Rider terms, sorry. At the very end of that the issue arose about whether there was an agency between Uber and the driver, or whether Uber was acting as the passenger's agent, but you look at the sentence highlighted. "There is no relationship between the passenger, Uber, or any third party provider." This was a pattern not – now in terms, you're asking me Ma'am, what is the relationship that the passenger is told exists, and I think that's further up the document. Under "The Services". Uber will provide the service to you under the agreement. That is the platform. Which would enable the passenger to schedule transportation services with the driver.

GLAZEBROOK J:

Well that doesn't happen, does it, because Uber does that?

MR CRANNEY:

No, Uber does it so…

GLAZEBROOK J:

And the only thing the passenger does is accept a term.

MR CRANNEY:

Yes.

GLAZEBROOK J:

And Uber finds the driver and provides the driver.

MR CRANNEY:

Yes, yes, leaving aside –

GLAZEBROOK J:

So if you're looking at fiction.

MR CRANNEY:

Yes. One of the –

GLAZEBROOK J:

And sets the price.

MR CRANNEY:

And sets the price and –

GLAZEBROOK J:

And collects the money.

MR CRANNEY:

And collects the fee.

GLAZEBROOK J:

And organises any disputes.

ELLEN FRANCE J:

In terms of what the rider is told, it is an acknowledgement that Uber does not provide transportation of delivery services. So there's two things there, aren't there?

MR CRANNEY:

Yes, arrange – oh yes, it's making the claim, which has been overturned by all these courts, that they're not a transportation company, including by the European Court of Justice for taxation purposes. I mean the driver terms, the feature of the driver terms which is most important is they are not complete. That any policy, any document, any website is contractually binding, and that's in the documents, that there is dismissal at will by Uber, or termination at will by Uber.

Paragraph 5 deals with ratings, which I'm going to come to, the rating system, and how that relates to Uber Pro.

Paragraph 6, line 6, refers to the skill, care, and diligence requirement, and then three lines from the bottom of paragraph 6 you'll see that Uber can restrict you from using Uber services if you fail to meet the requirements in this agreement.

Paragraph 8 refers to the calculation of the fare, which Uber determines, the third line. A base fare, plus an amount, plus fare amount, plus distance as determined by Rasier. Then the third line from the bottom, Rasier can change the fare calculation at any time in its discretion.

WILLIAMS J:

How do these terms line up with what are described as dependent contractors? The middle category in *Aslam*?

MR CRANNEY:

They're completely, I've never seen anything like them, they're completely unique. It allows the engager to do anything at all it wishes to do. It is a total surrender of all contractual power to Uber.

WILLIAMS J:

Do dependent contractors, are they price takers too, and are they subject to unilateral changes in price and conditions?

MR CRANNEY:

I wouldn't rule it completely out your Honour, but it's not common.

1110

GLAZEBROOK J:

You'd normally have an ability to stop providing services under an independent contractor relationship if there was a price change.

MR CRANNEY:

Yes.

GLAZEBROOK J:

One assumes, because why would you sign up to something that says...

WILLIAMS J:

Well, you do here, too, don't you, you just stop.

GLAZEBROOK J:

Well, here you do have that choice, but if you're talking about a normal independent contractor where you're agreeing to do certain services.

MR CRANNEY:

The rights of the, well, if you look for example at 8.2, the second line –

WINKELMANN CJ:

Can I just ask you a question.

MR CRANNEY:

Yes.

WINKELMANN CJ:

Before you go to 8.2, which is you said this allows Uber to do anything at all with the contract, a huge discretion, did you just mean between the rider and the driver, or between Uber and the driver?

MR CRANNEY:

Between Uber and the driver?

WINKELMANN CJ:

Yes.

MR CRANNEY:

So for example –

WINKELMANN CJ:

But also between the rider and the driver?

MR CRANNEY:

Well the, to be honest, the driver –

WINKELMANN CJ:

Well, I mean, there's nothing there, you say.

MR CRANNEY:

Yes, the driver has no control at all and neither does – the driver has no control over the rider/driver contract and the rider has no control over the rider/driver contract. It's not really a contract, it's a rule, it's a thing written by Uber, Uber controls the entire "contractual relationship" between the driver and the passenger.

WINKELMANN CJ:

That's unilateral contract, isn't it?

MR CRANNEY:

Yes, it's a, sometimes they call it that, it's a funny term "unilateral contract".

8.2, again, there's a number of – there's a fiction there in line 2: "Uber's role is solely to accept the Fare ...".

And then 8.3, you'll see there, 10 or 11 lines down, the phrase "inefficient routes" and the line beginning – there we are – and then in the line above that: "... the right to adjust payment in relation to a particular Fare for reasons such as inefficient routes..." and then in the line beginning "Services" below that, you will see there that Uber may cancel a fare in its entirety and require reimbursement, and in clause 14, the –

WILLIAMS J:
Sorry, can you help me out here, I know we talked about this yesterday, but "inefficient routes" is that – does that simply mean you took too long with the trip?

MR CRANNEY:
Yes, and –

WILLIAMS J:
And you get taxed for having taken too long?

MR CRANNEY:
If there is a complaint by the passenger.

WILLIAMS J:
Right, I see, thank you.

MR CRANNEY:
Then Uber may cancel, may adjust the fare to – may reduce the fare.

GLAZEBROOK J:
And presumably if the driver, however, has taken Uber's recommended route that doesn't apply?

MR CRANNEY:

That doesn't apply in practice. One of the controversies is what are the rules by which Uber will adjust the fare and we'll come onto that.

GLAZEBROOK J:

No, I understand that.

MR CRANNEY:

And the rules are that, I think if the trip takes up to 21 minutes longer there is no claim for a higher fare from the driver, or if the trip finishes more than 1.1 kilometres extra then – sorry, less than 1.1 kilometres extra there is no claim from the driver. Now, those are quite significant figures, especially the 21 minutes.

WILLIAMS J:

Well, it's the big difference between Uber and taxis.

MR CRANNEY:

Yes, yes, that's right.

WINKELMANN CJ:

Can you just say what – no claim for the driver for what? The whole fare or –

MR CRANNEY:

Extra payment.

WINKELMANN CJ:

The extra 21 minutes or the extra 1. or extra kilometres.

MR CRANNEY:

That's right.

GLAZEBROOK J:

Well, there's a fixed price agreement, isn't there, between the driver and – between Uber and the customer.

MR CRANNEY:

Yes. There's a fixed price agreement, we'll come onto that. It does allow for adjustment by Uber and they can, in certain circumstances, but it is set up so that the threshold is quite high.

WILLIAMS J:

What do you mean "adjustment by Uber"?

MR CRANNEY:

Oh, the Uber can change, can increase the price to the driver – to the passenger.

WILLIAMS J:

Can charge the passenger more?

MR CRANNEY:

Yes. And it does. But it's quite rare because the high threshold for it is such that it's 21 minutes or 1.1 kilometres. So that's they way it works.

MILLER J:

The general rule is the driver cannot increase what the passenger pays by choosing to adopt an inefficient route.

MR CRANNEY:

No.

MILLER J:

So the passenger doesn't suffer from that, except the journey maybe took a bit more time.

MR CRANNEY:

Yes.

MILLER J:

But Uber can punish the driver for that.

MR CRANNEY:

That's right. So I give you an example, your Honour, you get into the taxi at the airport and it might cost $25 to come to Wellington. Now, there is obviously the airport charge which is part of the fare and which reduces what's available to the driver, there's the 28% reduction which reduces what is paid to the driver, but if there's a traffic buildup from Courtenay Place to the Airport and it's going to take an hour or 40 minutes to get out of –

WILLIAMS J:

What do you mean "if"?

MR CRANNEY:

"If", yes, exactly. Then you find the driver, you know, can say "well, I'm stuck with this fare" unless it goes over 21 minutes, in which case there's a possible claim, and all of this is controlled by Uber completely and that's the effect that this had had on – the shake-up, if you like, on the market has been entirely in favour of certain business players in it, and to limit the rights and income of other people in it and cause that social disruption that's associated with it, and then there is the right to cancel the fare, which is 8.3, five or six lines from the bottom. Then over to 14 and you'll see there in 14, there is a: "... discretion, [to] charge other fees ..." in the first line.

Then 15 and 16, which are rather interesting as well. The fifth line requires the driver to remove from his phone, or her phone, the app if they: "... cease to provide Transportation Services [from the] mobile device ...", that is if the whole situation is terminated.

Then 16 is about the termination. So the relationship continues, as my friend has said, whether or not the app is used, the relationship continues unless notice is given that there's termination and that's, the notice, is required under 16.

Then just skipping right over to 28, this is the "Relationship" and, as I have said in my written submissions, the best reading of the clause is that it's an attempt

to avoid employment law by both sides. The employer, the – Uber is obviously worried about ending up in some court somewhere, properly justified worry, of course, in this case, that it may end up having to defend itself against an assertion that there is an employment relationship and that's dealt with by 28.2 –

WINKELMANN CJ:

Might that fall foul of 238?

MR CRANNEY:

It could, yes, it would do, yes. So I don't think there's any realistic prospect in New Zealand that we will be paying Uber's bill in the event that we succeed, but that's what it says. It's a very repressive statute – very repressive contract in that respect, "if you get caught saying this or representing that you are an employee, then you are in trouble". Then 30 is very –

GLAZEBROOK J:

Well, that probably would get under section 238.

MR CRANNEY:

It would what, sorry?

GLAZEBROOK J:

That probably would come under section 238.

MR CRANNEY:

Yes, yes, it would, yes, so we haven't lost sleep on the possibility of that, on that particular possibility.

Then we go to 30 which allows the Uber: "... to modify the terms and conditions ... at any time, effective upon publishing [the] version ...", and I think somewhere it says that if you keep using it, you are deemed to have accepted the terms including, if you see in the second-to-last line: "... Fare Calculations ..." and it

includes the hyperlinked websites, et cetera. So that can be done at any time and I'll give you some examples of that in a minute.
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Then we have: "Supplemental Terms and Addenda." And the important point about this clause is that these supplemental terms and addenda prevail over the agreement. So they replace the – they are – the last sentence, they prevail over the agreement in event of a conflict, and we're about to come to one of them, or a couple of them.

So if I look at page – document number 303.1091, this is one example of, and this is 2016, and this happened in many cases where Uber went, 303.1091. "We have made some exciting changes in Auckland and Wellington. Prices are now 20% less!" So that was simply announced, and it's not inconsistent with the agreement of course. In fact it specifically allows this to happen.

WILLIAMS J:
Who is this communicating to?

MR CRANNEY:
The passengers and the drivers. It was referred to in the evidence.

GLAZEBROOK J:
Do you want to give us the reference in the evidence? It doesn't have to be now.

MR CRANNEY:
Yes, we will find it. Yes, it was referred to. So that was a 20% unilateral reduction in income. Then if we go to the upfront fare addendum, which is 302.0651, and this is an addendum under that clause, which introduced fixed – I beg your pardon. That one is about changing the percentage.

WINKELMANN CJ:
Which percentage?

GLAZEBROOK J:

A percentage of…

MR CRANNEY:

I beg your pardon. Upfront. I beg your pardon. It is in there. Paragraph 2 is upfront fares. So this is the fixed fare change, and this prevails over anything in the agreement, so the agreement that says you can fix your own fare, et cetera, is all gone, and you see there that the price is communicated after the ride, so this is six or seven lines down.

WILLIAMS J:

Is this sort of change different, any different to say any independent courier. I'm aware of *Leota* and I haven't read it so…

MR CRANNEY:

I'd be very surprised.

WILLIAMS J:

But isn't it likely that New Zealand Courier does the same sort of thing?

MR CRANNEY:

I'd be very surprised if they can just…

WILLIAMS J:

Okay.

WINKELMANN CJ:

Can I just ask you to explain for me, because I think I've lost the thread. This has changed the level of fare, but is it also changing some other aspect because it's changing from fare to fixed fare?

MR CRANNEY:

Yes, it changed from a measurement system, so the actual kilometres and so on, to a fixed fare system, so this allows the price to be communicated at the

beginning of the transaction. So once you ask for a trip, Uber sends you the fare. Not an estimate, but a guaranteed fare.

WINKELMANN CJ:
So does it give you the fare at the end of the trip?

MR CRANNEY:
That's the driver. The passenger gets it at the beginning when the contract is formed. The driver here is told at the end, this is what you've just earned on this trip.

WINKELMANN CJ:
And that's a change how, because they used to get it at the beginning?

MR CRANNEY:
There used to be a formula that was applied which everybody knew, or at least in general terms knew. So this the beginning of upfront fares, which has continued ever since.

Then the last one is on page 302.0821, of course there'll be many other ones, but I've picked out three, and this is 302.0821. This was an announcement by Uber that they were changing the contractual relationship with the Uber Eats people from, as they put it, employment by the restaurant, or engagement by the restaurant, to be independent contractors of Uber. So in the stroke of a pen every Uber Eats person became an independent contractor of Uber, and of course that prevails over the equivalent of 28.

The *Aslam* Court said that the terms dictated was the word used "dictated" by Uber, and these are three examples of it, of such terms being dictated.

WINKELMANN CJ:
So when you say it used to be a relationship with the restaurant, was the restaurant, would the restaurant pay the fee?

MR CRANNEY:

The restaurant would've been the equivalent of the passenger.

GLAZEBROOK J:

So paid the Uber still but…

MR CRANNEY:

Yes, yes. It's the same system except instead of delivering food – sorry, people, you're delivering food.

WINKELMANN CJ:

But what is the change here?

MR CRANNEY:

The change is the relationship became instead of a relationship springing to life between –

WINKELMANN CJ:

So it was engaged by the restaurant.

MR CRANNEY:

Instead of being a relationship springing between the driver and the restaurant, they were simply transferred to become employees of Uber, or independent contractors of Uber.

WINKELMANN CJ:

Independent contractors.

MR CRANNEY:

Of Uber, and this is, if you take these contracts at their, the way they actual work, you sign a paper with them saying, you do what you like, I agree, and you can change at any time you want, to do anything you want, about anything you want, including the price, including the work, including even the actual relationship itself. You can turn us into employees if you want, you can turn us into independent contractors if you wish, you can transfer us to another

company, you can change the pricing, you can do anything to us, and that's the way it works in practice, and as the agreement makes clear these contractual rights extend to every publicised policy of Uber.

WINKELMANN CJ:

So Uber would say, oh well, we've changed it. If you don't like it, don't sign it.

MR CRANNEY:

That's it. Just take it or leave it in a very interesting way. You'll see this when we come to Uber Pro, which is really in some ways is right at the heart of the system. Now coming to, if I may, briefly to the community guidelines.

WINKELMANN CJ:

So we've got two minutes until the morning tea.

MR CRANNEY:

Have we got a couple of minutes.

WINKELMANN CJ:

If you can use that usefully.

MR CRANNEY:

I think we can Ma'am, yes. I don't – what I intend to do is hopefully to highlight all the documents which I think are important, and the paragraphs, and I'm well aware that your Honours will be able to look into it later rather than labouring it. So the guidelines 303.1094, and at the end of paragraph 1 there: "In some instances our guidelines apply to conduct outside the Uber Marketplace Platform that we become aware of, including but not limited to information from other platforms, when such conduct may threaten the safety of the Uber Marketplace Platform."

So it contemplates not only an ongoing and permanent relationship between the drivers and Uber, but also even calls it a community. A community. So this theory that they just come and go and that's the end of it every time they take

a trip, is not correct. These are enforceable contractual terms which require, which impose limitations on the behaviour of the employees when they're not driving as well.

WILLIAMS J:

What's: "… threaten the safety of the Uber Marketplace Platform" mean? What's the about?

MR CRANNEY:

Perhaps we're doing it now Sir. It's, I don't know.

MILLER J:

Do you maintain that the drivers are employees while they are not on the app?

MR CRANNEY:

No, no, I don't have to go that far.

MILLER J:

Right. It would be problematic for you if you did, wouldn't it?

MR CRANNEY:

Yes. The, I'm happy with the – it's a funny question.

WINKELMANN CJ:

Well what does that mean?

MR CRANNEY:

Yes, that's exactly – what does it even –

GLAZEBROOK J:

They're employees on the terms that they can come in and out of the app.

MR CRANNEY:

In the same sense that everybody is an employee. So if you're an employee of General Motors, you're a cleaner, well are you really an employee in the weekends? I suppose in a way you are. In a way you're not.

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WINKELMANN CJ:

I mean are you, because I think Justice Miller is asking you if this is a new kind of employee who is an employee, and then isn't an employee, which is kind of Mr Wicks' submission. Not that they're employees, but they're coming and going at will, and is that consistent with them being an employee, and Justice Miller's saying, well, maybe it is because…

MR CRANNEY:

Yes, maybe it is. I mean we've got many cases of people getting punished for doing things outside of work because, as they've said, there's a sufficient nexus between –

MILLER J:

I'm not really interested in that. It's a much more concrete question. What benefits would you want these drivers to have that are outside their working hours? In other words, for instance, the calculation of holiday pay and leave. Is that all by reference to time spent on the app or is there some wider – I'm asking you a very practical question.

MR CRANNEY:

The various statutes govern it. So there are complicated methodologies and dispatches for dealing with irregular hours, irregular work, calculation methodologies. What we want out of it is minimum entitlements and collective –

MILLER J:

And you accept those'll be calculated on the basis of irregular hours?

MR CRANNEY:

Yes, whatever the statute says.

MILLER J:

Whatever the – okay.

MR CRANNEY:

Whatever the mechanism, and we also want the right to unionise and to organise, because that's fundamental to human rights in any country such as ours and there's thousands of people that don't have it. That's what we're looking for. So I think with that, Ma'am, it might be time for –

WINKELMANN CJ:

All right, we'll take the morning adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.52 AM

MR CRANNEY:

Now, your Honours, just to respond first of all to Justice Miller's question about Holidays Act 2003 rights and so on for irregular workers, there are special provisions for employees in terms of sick pay entitlements and bereavement leave entitlements which apply to them even without continuous employment as long as they meet certain criteria of so many hours a month and so on, and there are mechanisms in the Holidays Act for annual holidays purposes which deal with the issue of pay-as-you-go or payment at the end of an employment, and in terms of public holidays the test is whether the day would otherwise be a working day and that's an argument which we're all familiar with. We're all arguing about it all the time in all scenarios, so we'll continue to do so here.

So we have now in front of us "ordering a trip", it will only take one or two minutes, a video.

UBER VIDEO PLAYED

So you will see there someone is about to order a trip, this is a real trip, it was in evidence, to – and you'll see where this person is going in a minute. So now the address. It's from 27 Miramar Crescent to Ballance Street. I presume it was coming to court. Then there are different types of Uber offered: Uber X Comfort or Uber Pet, and the person will confirm Uber X and then confirm the pickup. Uber will now find a ride.

I forgot to mention prices, the prices at the beginning. That was my fault. I thought I'd made a mistake but I haven't. So just carry on now, back to the connecting you to a driver.

You can see Harvinder is the driver. He's got a rating of 4.94 and he's done 40,821 trips, and you can see his car now in the screen, and this is some details about Harvinder. Rating, six years service and some comments that have been made about him by his passengers. He's currently on the Uber Pro. He's come from India to New Zealand, and then the vehicle arrives and off you go.

There's one or two other very short videos that we'll play, including a very important one about Uber Pro.

Now, if I can briefly now to the Uber guidelines again, 303.1094, and just at the end of that page, the last line, you'll see there the last line of that page there, you'll see in the last sentence a violation of the terms of the agreement with Uber, "of your agreement with Uber", may result in loss of access to all or parts of the Uber platform, including not following one of the guidelines, which is the opening words of the sentence.

Then just to go through this briefly, on page 303.1096 above the term "Physical contact" you'll see a reference to "post-trip contact" being outlawed. "Post-trip contact," and then…

GLAZEBROOK J:

Sorry, where's this?

WINKELMANN CJ:

Is that under "Physical contact"?

MR CRANNEY:

Yes, and then the more detail about that's on 303.1097 which is "Post-trip contact". "Contact should end."

WINKELMANN CJ:

So I don't see the prohibition of post-trip contact on 303.1096.

MR CRANNEY:

I beg your pardon. It's there. It's identifying a list of policy headings and "Post-trip contact" is referred to in 303.1097. "Contact should end when the trip [has ended], unless it's to return a lost item. Unwanted contact shall be seen" –

GLAZEBROOK J:

Is this in relation to the ability to set up your own –

MR CRANNEY:

Yes, and then you'll see there at the top of the next page "testing, calling". So it's any "visiting or trying to visit someone in person after a trip". Any texting, calling, is prohibited, and then over at – and I won't go through the rest of all of this, your Honours. I just want to go through this more quickly, and to go now to…

WINKELMANN CJ:

You're coming back to the complaints thing, aren't you?

MR CRANNEY:

Sorry, to what, Ma'am?

WINKELMANN CJ:

Complaints. You're coming back to complaints?

MR CRANNEY:

Yes, indeed. Yes, some more detail about that. So 303.1109 is the prohibition on street hails, touting, while using the platform.

MILLER J:

What was that number again?

MR CRANNEY:

It's 303.1109. Street hails. "Never solicit or accept payment outside the Marketplace Platform."

WINKELMANN CJ:

How does that operate within doing something else or operating on other platforms, because you couldn't accept a hail outside the platform, could you, because you wouldn't be through the Uber app? It doesn't make sense.

MR CRANNEY:

Well, it does seem to conflict with that, with the terms.

GLAZEBROOK J:

Why do they say the law prohibits that? Is that to do with licensing?

MR CRANNEY:

Street hails? Well, possibly, Ma'am, because some of these things come from other countries and they just repeat them. Yes, and there's other examples of that. Some of the earlier service agreements refer to VAT, for example.

1200

Then over on "Ratings", which is over the page on 303.1110, and the important passage is the second paragraph: "There is a minimum average rating in each city. This is because there may be cultural differences in the way people in

different cities rate each other. Drivers… that don't meet the minimum average rating for their city may lose access to all or part of the Uber Marketplace Platform. If your rating is approaching this limit, we will let you know and may share information that may help you improve your rating."

So the rating is a five star system. You tick either one, two, three, four, or five, and we'll go into this in more detail. If you tick four, you're not indicating that you're 80% happy with the passenger, because – with the driver. If you tick four a list of problems pop up and you choose one them, and they're the same problems you get if you did one, two, or three. So you get a – a lot of problems will pop up, is the car dirty, did he or she drive too fast, did he, was he or she rude, was the music too loud, et cetera. That pops up on the 80% button. If you tick the top one, it's fine, there's no pop-ups. You get 100%, you get a rating of five for the trip, a perfect rating.

If you happen to press the four, and you report some problem, the driver is in the unfortunate position of being under five on average for the next 500 trips, because it takes 500 trips for that to be the one that drops off the end of the averaging, and we'll come into the details of this. It's a particularly oppressive form of rating which if you, for example, suffer 50 fours over a period, during the 500 trips, you enter into a quite a low rating in Uber terms. Down 4.5 or 4.6, which can be low, the city rating, and you can lose the job, and we'll give you some examples of that. I'll go into more details about it.

MILLER J:

Can I ask a question which derives from the example you showed before of a ride being ordered. The app said that the driver, Harvinder I think it was, will arrive in six minutes. What happens, I mean who gives that estimate? That's not the driver, presumably it's the app?

MR CRANNEY:

The app communicates the arrival time, and also the time it's going to take, actually –

MILLER J:

I'm just interested in the time to arrival.

MR CRANNEY:

Yes, that comes from the app.

MILLER J:

It comes from the app. So who is responsible if he turns up 10 minutes later instead of six, and the passenger is unhappy about it?

MR CRANNEY:

It could lead to a complaint using that star system. So they would report it to Uber, and say he or she took too long to come.

MILLER J:

Right, and Uber would treat that as a problem?

MR CRANNEY:

Yes, they would. Well not, maybe not, it depends a little bit on how long it was, and whether this was a repeat offence, or whether the person was close to the edge anyway.

MILLER J:

Okay.

MR CRANNEY:

And could be out the door, but also the other thing that happens is the, I think the evidence was that the arrival time actually alters if the driver is having problems meeting it. So if the driver runs into traffic, they give you a later arrival time on your application. So that can be adjusted. So you can see there this notion of the city rating, the average rating in each city, and you can't fall below the average rating in each city if they're having problems, is also a rather strange phenomena. An average rating in the city, which we'll come onto. Then the last paragraph there: "If you're a driver and you lose access to your

Uber account, you may have the opportunity to get back on the road if you meet eligibility requirements…". This is the reinstatement mechanism, and we'll go through the three steps, the three warnings. "… if you meet eligibility requirements and provide proof that you've successfully taken a quality improvement course offered by third party experts." So they've got a contracted retraining person, and you gain reinstatement. You do have to pay for it but.

Then across the page, 303.1111, how do we enforce the guidelines, and then the paragraph, the second sentence: "If you violate [the terms] of your contractual agreement… or any other applicable policies, any one of these Community Guidelines or any additional policies and standards that are communicated by Uber to you from time to time, you can lose access to all or part of the… Platform."

Then at the end of the second paragraph: "We may, at our sole discretion, put a hold on your account or turn your account inactive until our review is complete."

Then the next one, the third, the second sentence: "This can include reported violations of our Community Guidelines and certain actions you may take outside of the Uber Marketplace Platform," that we've already referred to, "including but not limited to other platforms, if we determine that those actions threaten the safety of the Uber community, our employees and contractors or cause harm to Uber's brand, reputation or business. And if the issues raised are serious or a repeat report, or you refuse to cooperate, you may lose access to the Uber Marketplace Platform."

WINKELMANN CJ:

That's suggesting control when they're not.

MR CRANNEY:

Yes, there is some control suggested, and when they're not driving, including dismissible offences.

So the next topic is what we call acceptance rates, and just to, these are very important concepts to Uber, acceptance rates and cancellation rates. They're both different. Acceptance rates are every 15 or so seconds a trip comes across your screen, the default position being that you, or you might be waiting for a while to get a trip, but the default position being that it doesn't contain a price or anything like that. If you decline that, and you go above certain levels of declining it, you've got problems with Uber, and we'll come onto that. If you look, for example, at 304.2400 which is: "What happens if I decline a delivery request?" You can choose to accept or decline a request, but if –

GLAZEBROOK J:

So what is the, what does the driver see at the time a trip comes up?

MR CRANNEY:

We do have, I think, one example of that but…

GLAZEBROOK J:

If you can just – you said "does not contain the price" does it contain the place they're going to or…

MR CRANNEY:

No.

GLAZEBROOK J:

So it's just there is a trip?

MR CRANNEY:

Not in the default. Under the Uber Pro system –

GLAZEBROOK J:

Yes, no, I understand there's a difference.

MR CRANNEY:

Yes. I can just check. We don't have one. I'm sure we've got something somewhere on that topic Ma'am.

GLAZEBROOK J:

Because I'm just thinking, you know, if you're in, I don't know, Rongotai, and the trip was, the trip you're offered is in Eastbourne, presumably there's something that stops that happening?

MR CRANNEY:

Yes, there's not, and that's one of the problems. You can be sent to Porirua to pick up a trip. You can turn it down but you don't really know what you're turning down.

GLAZEBROOK J:

No, no, that's why I was asking.

MR CRANNEY:

Yes, exactly yes, and we'll come onto the Uber Pro system, but if you look at that document 304.2400, which is the – so it says that you can decline, you accept or decline a trip request. So this isn't cancellation, this is accepting or declining.

GLAZEBROOK J:

Sorry, so 304…

MR CRANNEY:

It's 304.2400, you can accept or decline. We recommend – but it goes on and says: "Declining a trip may impact your acceptance rate." And we'll come later on to the consequences of that, and: "we recommend that you only go online when you are ready to accept delivery requests. The App functions most optimally and efficiently for both delivery partners and their customers when delivery partners actually intend to be online." Then the next one is 304.2401 –

GLAZEBROOK J:

When they say "delivery" they mean…

MR CRANNEY:

That's Eats.

GLAZEBROOK J:

This doesn't, it's not just Uber Eats it's…

MR CRANNEY:

Well it's mainly Uber Eats. We've got no evidence or knowledge about the courier side of it. It's only Eats and food really I think – Eats and passengers.

GLAZEBROOK J:

Yes, okay. But delivery times includes Eats and passengers, does it?

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MR CRANNEY:

Yes, yes, this one – that one does, yes. And then the next one: "What are delivery acceptance rates?" That's 304.2401 and that will be popping up. This is, this one is just Eats: "Your acceptance rate is the percentage of delivery trips you accept. For example, if you accept eight out of 10 ... your acceptance rate is 80%. It is important to maintain a high acceptance rate to provide a reliable service to restaurants and customers." And this is an important sentence: "Plus, certain promotions may have minimum acceptance rate or completion eligibility requirements." And then: "To keep delivery turnaround times quick, we ask that you only go online [if] you want to take requests."

Then there is a "Pro tip" which is a reference to professional or to Uber Pro: "To ensure you can readily accept delivery requests and maintain a high acceptance rate, you can: make sure the volume is turned up on your phone so you can always hear ... request sounds. Press accept the accept button when you see the request come through."

WINKELMANN CJ:

So what does the, what is the sentence: "Plus certain promotions may have minimum acceptance rate or completion eligibility requirements"?

MR CRANNEY:

That's referring to the Pro and we're going to come onto that in some detail, a separate programme.

WINKELMANN CJ:

So is that the main implication of low acceptance rates, ineligibility for Pro?

MR CRANNEY:

Yes, they don't seem to dismiss just for non-acceptance, but the consequences of non-acceptance are severe. If you fall below 85% which means you must accept more than eight or nine out of 10 coming through, then you have problems because you lose very important rights under Uber Pro which are distance and direction, which is the most lucrative, and also –

WINKELMANN CJ:

Sorry, which are what?

MR CRANNEY:

Distance and direction.

WINKELMANN CJ:

So it's Pro, really, you'll lose Pro?

MR CRANNEY:

You lose, you lose certain benefits under Pro.

WINKELMANN CJ:

Okay.

MR CRANNEY:

And one of them is distance and direction which is "look, there's a northward facing trip, it's 15 kilometres, there's a southern facing trip which is half a kilometre", it's a really important aspect and the other thing you lose is – I'll come onto it, what's the other thing you lose under Uber Pro for 85%? Oh, just the most important one. So you're –

WINKELMANN CJ:

Distance and direction.

MR CRANNEY:

Yes, distance and direction. And then the next one is 304.2402 and that's the same, you're sent the trip, this is a delivery request in this case, but it's the same: "... the app will wait 15-30 seconds [and then it will go] to someone else." And the Pro tip is accept it as soon as you see it, when you see it coming up.

WILLIAMS J:

So is the offer made one driver at a time?

MR CRANNEY:

Yes. But it doesn't stay long.

GLAZEBROOK J:

And that's determined by Uber in the sense of it being determined by the app –

MR CRANNEY:

Yes. And then if you look at –

GLAZEBROOK J:

– i.e., who is, who gets the offer is.

MR CRANNEY:

Yes, I think it's probably the one closest to the...

GLAZEBROOK J:

One would hope so.

MR CRANNEY:

But that can be quite a long way away, depending. So can you look please at 302.0926 which is a spreadsheet and this is Mr Ang just after he started, and just while that's coming up, just to make one point about this, that the unusual thing about Uber cases is that we have got complete evidence. We know every

communication that was sent to and from the parties. We know every detail of every trip. We know every trip when it was asked for, when it was responded to, when the pick-up took place, what the price was, et cetera, and we have every – we have telephone communications tape-recorded of every call for these drivers to the telephone centres that they have in the Philippines for Uber drivers. So there is no dispute about anything in terms of evidence in Uber which is an interesting –

WINKELMANN CJ:

Mr Cranney, can you just repeat that number, because I can't see it on the screen?

MR CRANNEY:

Oh, sorry, is it on the screen now? It's on ours.

WINKELMANN CJ:

Yes, but no, I see the document, it's just for my notes, 302?

MR CRANNEY:

Oh, I beg your pardon, 302.0926.

WINKELMANN CJ:

Thank you.

MR CRANNEY:

And if you look at that, you'll see the third message is: "Not Accepting Enough Accepted Trips," and you've got, see the time and the date of that, the 28th of August 2016. And then another one the 30th of August: "Not Accepting Enough Accepted Trips." And then if you look at –

GLAZEBROOK J:

And the consequence of that is Uber Pro will not, or actually thrown off the app or not?

MR CRANNEY:

It can be thrown off the app. In this particular case, there were probably no consequences because it was before Uber Pro.

GLAZEBROOK J:

Okay.

MR CRANNEY:

But you can have a look at, there's a – they had a programme then of just sending these pressurising messages, so if you look further down at A11 and A12, there's another two there. And then if you go further down to A16 to A18, there should be another three there: "Not Accepting Enough Accepted Trips." And then A29, A38, and they're regularly through the – A76, A82, A93, A98, A118, A123, there's about 60 of them in there in that period, saying: "Not Accepting Enough Accepted Trips."

WILLIAMS J:

What's: "Penalty Box Enabled," at line 6?

MR CRANNEY:

Nobody knows, I don't think, your Honour, at this stage. I think it's Uber may know.

MILLER J:

I'm not sure where all of this is taking you.

MR CRANNEY:

I'm just trying to give –

MILLER J:

It seems to me these features which you are describing tend to show that Uber is in the transport services business because they effectively put it on the same basis as taxi companies. If you go out that door there and get into a Wellington Combined car, that driver has to take you where you want to go, even though

you may just go around the corner and then the driver has to – so that's their internal rules. What Uber is doing here is effectively the same thing.

MR CRANNEY:

Yes.

MILLER J:

Although the driver has the right to not accept a trip, you don't know, you accept it first, and then you're told the destination, that has exactly the same effect as not having the choice to do – turn down a trip on the grounds that it's too far or too cheap or something like that. In other words, what it does is it delivers for Uber a ubiquitous service. That's the objective.

MR CRANNEY:

Yes, yes, it's a little bit more subtle than that and you'll see it when we get to Uber Pro.

MILLER J:

Yes.

MR CRANNEY:

It's a system where because of the technology available to the employer, to the company, sorry, the employer is able to – the company is able to use –

GLAZEBROOK J:

You seem to be disappearing, I think – yes, thank you.

MR CRANNEY:

I beg your pardon. The company, because of the nature of the technology, the company is able to use the – its knowledge of the trips and so on in order to control the workforce in a way which is enables them to achieve them working when that company wants them to work and how the company wants them to work and at the times and days the company wants them to work.

MILLER J:

Right. So, so far, that makes them an independent contractor to a company that's in the transportation services business.

MR CRANNEY:

Yes.

MILLER J:

Yes.

MR CRANNEY:

Unless, of course, they're an employee.

MILLER J:

Right and that's why I say –

MR CRANNEY:

And that's –

MILLER J:

– it only takes you so far, because I'm not sure that it's taking, so far, it's taking you any further than that.

MR CRANNEY:

Well, in terms of control, I think it does, if...

GLAZEBROOK J:

Perhaps it's, because, well, it seems the difference between Uber Pro and otherwise was something that was very important for the Court of Appeal, perhaps, I don't know, at some stage at least –

WINKELMANN CJ:

We're going to come to it, aren't we.

GLAZEBROOK J:

Are we coming to the differences?

MR CRANNEY:

We're going to come now to Uber Pro but I just want to deal very briefly with rating first and then –

WINKELMANN CJ:

But your point on this is – oh, you.

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ELLEN FRANCE J:

So, there's – no, sorry, I was just going to check. In terms of Justice Miller's question, what was your answer then as to where you say this takes us?

MR CRANNEY:

It takes you to an intensive system of control.

WINKELMANN CJ:

Economic control?

MR CRANNEY:

Yes.

WINKELMANN CJ:

Well, actually, it's messaging.

GLAZEBROOK J:

Well, that was why I thought that the main argument seems to be the difference between Uber Pro and otherwise, doesn't it, or is there…

MR CRANNEY:

Well, there is no rating system in the taxi world anything like this rating system.

WINKELMANN CJ:

Well, if this isn't a workplace, that'd be your supervisor coming over and saying: "You're not working hard enough. You're not working hard enough." Once every couple of days.

MR CRANNEY:

Yes. Well, perhaps if I can skip over – I've explained rating a bit already, that you've seen Mr Harvinder who had a rating of 5, 4.9 or 4.8 or whatever after so many years. If that drops down to the average of the city he's in, he loses his job, and –

GLAZEBROOK J:

How is that controlled by Uber, because that's all to do with the customer, isn't it? I mean there can be unfairness in ratings by customers and – which I presume is why they do an average.

MR CRANNEY:

Yes. The Supreme Court dealt with it in *Aslam* by saying that it was a perfect example of employment subordination, the rating system.

GLAZEBROOK J:

Well, I don't quite get why that would be the case.

MR CRANNEY:

Well, because of the nature of it. So every time there's a trip with a passenger, the passenger is asked to rate the driver through a system which is totally controlled by Uber and is never told by Uber what the passenger did or clicked or said but begins to get warnings if his or her rating falls below a certain undisclosed average for the city. It's absolutely crucial to Uber's control of the…

GLAZEBROOK J:

Well, I'm just thinking every time you book a hotel through one of those booking agencies you come back and rate the hotel. Every time you go to a restaurant these days they come back and ask you to rate them.

MR CRANNEY:

Yes, but as the – it's dealt with –

GLAZEBROOK J:

So is it the control of the rating? What is it about the rating system?

MR CRANNEY:

It's the nature of it. It's mentioned in the *Aslam* judgment that those –

WINKELMANN CJ:

Isn't it your point that it's an Uber-created rating system? Uber asks the passenger to rate and Uber sets up the framework within which that rating is used to assess how good or bad it is and the consequences of it for the driver and then uses it to manage – so it's a tool to manage performance?

MR CRANNEY:

Yes, and while all the time claiming that it's got nothing to do with it, that it's actually not even a transport company, and yet it's got an intensive system of control of behaviour of thousands of people, all automatically managed by Uber and none of which is transparent. It's quite different than a rating company for a hotel in which you've got visibility of other hotels' ratings and you can then choose on these sites which hotel to go to. This is simply – this is nothing other than a method of control.

WINKELMANN CJ:

So the passengers don't actually use that rating system to choose Harvinder?

MR CRANNEY:

No, no.

GLAZEBROOK J:

Well, they can't because they're given the person, so it doesn't matter what rating the person has for the…

MR CRANNEY:

They're given the person. Yes, and that's dealt with I think in *Aslam*, and just to give you an example, if the cut-off rate is 4.6, which is quite high, before you start hitting the average of the city, and if you've got 450 fives over the last 500 trips and 50 fours, you've managed to drop down to a rating of 4.7 which is close to being out the door, and each one of them's been filled in without any knowledge to you about why they did it or what they complained about. It's totally intensive control of thousands of workers by a company. They're the ones that set it up and run it. It's got nothing to do with the passengers.

GLAZEBROOK J:

So they set it up, it's non-transparent and the drivers have no control over it? Is that the…

MR CRANNEY:

Yes, and it's control, and probably integration as well.

WINKELMANN CJ:

Probably what?

MR CRANNEY:

Probably integration as well. It's a crucial part of the control of the driver, and it's dealt with at *Aslam* at 99 of the judgment.

WINKELMANN CJ:

Are you going to tell us why Mr Wicks is wrong that *Aslam* is not authority for us?

MR CRANNEY:

Why Mr Aslam is?

WINKELMANN CJ:

Not authority for us because he makes the point about the statutory difference.

MR CRANNEY:

I think the reasoning applies with equal weight to whether it's an employment argument or a (b) argument.

GLAZEBROOK J:

So it's not a tool for the passenger and it's – yes, I understand it, I think.

MR CRANNEY:

At 99 it says: "This is a classic form of subordination that is characteristic of employment relationships," in *Aslam*, and distinguishes from hotel-type rating systems. "It is of course commonplace for digital platforms to invite customers to rate products or services. Typically, however, such ratings are merely made available as information which may assist customers in choosing which product," et cetera. The way Uber uses this system of customer ratings is materially different. "The ratings are not disclosed to passengers to inform their choice of driver," and passengers are not offered a choice of driver or a higher price. They're used plainly "as an internal tool for managing performance" and on the basis of making termination decisions. That's employment, that's control, in my submission, and to come now at last to –

WILLIAMS J:

Well, is it the best – perhaps the way to put that is that it's an effective way of co-opting the customer as supervisor.

MR CRANNEY:

Yes. Yes, it's a – now if we come to Uber Pro and we've got one more video to play also. Now this is document 302.0788, and if we can get that on the screen. So this is the Uber Pro terms and conditions, and if you go first of all to 1.2, now you'll see there a hierarchy of agreements. The higher the document is on the list, the higher document will prevail over lower documents. So the Uber Pro prevailed over the services agreement and the technology services agreement, and it applies to you unless you have opted out, and that is on page 302.0790 (v).

WINKELMANN CJ:

If you're eligible.

MR CRANNEY:

If you're eligible, and everybody is eligible.

WINKELMANN CJ:

So the disciplinary side of it advises it?

MR CRANNEY:

Yes, that's built into it. We'll see it. Everyone is automatically put into the system unless they opt out.

GLAZEBROOK J:

Into what system?

MR CRANNEY:

Uber Pro system. It's a system of –

WINKELMANN CJ:

So you're going to come onto that?

MR CRANNEY:

Yes. It's a system of rewards for certain types of behaviour. So everybody is in the system unless they opt out, and you opt out under clause 2.3 by requesting to be released from it and allowing seven days for the opt-out request to be processed, and then over the page on 302.0791…

GLAZEBROOK J:

But given the advantages, and would you opt out?

MR CRANNEY:

Well, you wouldn't opt out. No one ever does. It's a system where –

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GLAZEBROOK J:

No, I understand, but that doesn't – I mean you're allowed to opt out of the whole system if you want but…

MR CRANNEY:

Yes, but it makes no difference. Being on the bottom of the system is the same as opting out anyway. It makes no difference.

So coming to 302.0791 you'll see there there are four different tiers: Blue, Gold, Platinum and Diamond. Now each tier has requirements for that tier. One of them is a number of points. One of them is a driver rating, and this is important, what I've just been saying to your Honours, at least 4.7. So if you fall below the 4.7 you plummet from Diamond to Blue, or if you fall from Platinum, if you fall below 4.7, you plummet from Platinum to Blue and the same with Gold.

WINKELMANN CJ:

So all of them are 4.7?

MR CRANNEY:

That's right.

WINKELMANN CJ:

But the maximum you fall is one level?

MR CRANNEY:

No, no, you fall all levels.

WINKELMANN CJ:

You fall out?

MR CRANNEY:

You fall down to Blue.

WINKELMANN CJ:

Okay, so Blue is everybody who's not…

MR CRANNEY:

That's right.

WINKELMANN CJ:

A person who's Blue then is not getting distance and destination?

MR CRANNEY:

No, no. We'll come onto that. So the next criteria, I've mentioned the rating, the next thing is the number of points. Now how do you get points? You get points, if you go to 302.0794, by working – for doing trips in these hours. You get an extra four points for doing a trip in those hours. You get one point for every trip that you do but get an extra four per trip if you work on these hours: seven to nine on a Monday to Thursday; five to seven on a Monday to Thursday; seven to nine on a Friday; and on Friday night four till midnight; midnight till 5 am; and 9 am to 11.59. That's how you get points, by working in those hours to stay on these different Gold, Platinum and so on, and the last criteria is less than 3% cancellation rate. If your cancellation rate goes above 3, then you plummet down to Blue.

Now how does it work? It works on the basis that after you achieve the points level you remain on that level for 90 days after you've achieved it. So first of all the points are reset down to zero after you've achieved it, you retain your benefits but in that next three months you must earn the points again to remain in that position. You must keep your cancellation rate at no greater than 3% and you must not fall on the driver rating.

WINKELMANN CJ:

Cancellation rate no greater than what?

MR CRANNEY:

3%. So if you fall below 3% you're back in trouble – if you go above 3%, sorry. Now each of the –

WINKELMANN CJ:

Sorry. Do you also have to do, in that 90 days, do you have to do points?

MR CRANNEY:

You have to do the points again. To stay where you are, you have to repeat. So you go back to zero, and then you must retain the same points level to retain where you are. So if you're a Diamond employee, you keep the benefits for the 90 days but you must earn another 2,800 points as well as retaining your 4.7.

GLAZEBROOK J:

Was there information on how difficult that was to do or how many trips do you…

MR CRANNEY:

You can work out the number of trips by –

GLAZEBROOK J:

By just the points? I realise that. But just in terms of difficulty of doing that within the periods they're talking about.

MR CRANNEY:

I think it's manageable but you have to work in those hours to do it. That's how it works. So you don't –

GLAZEBROOK J:

Okay, I understand.

WINKELMANN CJ:

So to keep your rating the reality is that you'll be working in the times that are indicated as high priority by Uber?

MR CRANNEY:

Yes, if you want to retain your Diamond status or your Platinum or Gold status. Not only that, you must not under any circumstances fall below 4.7 performance.

GLAZEBROOK J:

No, I understand.

MR CRANNEY:

And you must not go above the cancellation rate. Now in return for being on these different levels there are certain benefits which are available and those are set out at – they're called rewards – and these are set out at page 302.0803, starting with a petrol discount, and the discount differs, at 302.0805, depending on what level you're on.

The next thing is tyre, reduction in the cost of tyres. The next one is reduction in telephone charges from various suppliers, and then at 302.0808 we start the rubber begins to hit the road. These are "Priority Airport Rematch" and "Trip Duration and Direction". So these are the ones that give you an economic advantage over other drivers if you can achieve these levels and keep at those high levels of performance, and you get priority rematch and trip duration and direction.

GLAZEBROOK J:

What's an "airport rematch"?

MR CRANNEY:

You basically jump the queue. If you drop someone at the airport you get to jump the queue.

GLAZEBROOK J:

If you drop them at the airport? Right, I see. Yes, I understand.

MR CRANNEY:

Now "Trip Duration and Direction" as well, but the important thing about trip duration and direction, as your Honours will see in the second line, you lose that any time that you drop below an 85% acceptance rate.

So your Honours have heard a lot about how do they get them to work these hours. This is how you do it, by setting up a system where people are actually working for points and the employer controls how you get them and the employer controls how you lose them and the employer controls the consequences of the loss, and the losses are the thing is set up in such a way as that you must not fall below 85% acceptance rate, you must not under any circumstances fall below 4.7, you must not go below 3% in rejection rate, and you must meet those other requirements of the –

WINKELMANN CJ:

So it's never a capital, this state is never kind of banked capital? It's something that's constantly you're having to re-earn and re-earn and re-earn?

MR CRANNEY:

You get brought to zero every three months and –

WINKELMANN CJ:

You'd say this is not – although it may not be Uber directing a person in a controlling sense "work now, work then", it's kind of herd management, isn't it, through prods and –

MR CRANNEY:

Yes, it's much worse than ordinary control. I'm going to play your Honours now a video. It's very short.

WILLIAMS J:

It's kind of understandable though. Basically they're saying you have to perform at this level of excellence and you have to keep doing it. That's no surprise.

MR CRANNEY:

That's right. That's why it's employment.

GLAZEBROOK J:

But you're more saying that they're controlling the timing that you're working and the trips not by telling you to do it but providing these incentives that are so important, which is why I want to know what you don't get under Blue compared to the others.

MR CRANNEY:

Right. Under Blue you get nothing. There are a few discounts that you get under Blue.

1240

GLAZEBROOK J:

Well, I'm not really so worried about the discounts because you would – well, that's sort of a normal incentive, possibly both for independent contractors and employees, but it's more the information that you get that therefore forces you economically to behave in a certain way. So you can't say I'm not controlling it because it's done automatically by points, and it's their choice. Is your argument. Sorry, I'm not saying –

MR CRANNEY:

Yes, my argument is the same, it's worse than a direction in a way, because it's also set up in ways which are also problematic. For example, if you fall below 4.7 in your behaviour through a system which they totally control, and you don't even know about it.

GLAZEBROOK J:

You seem to be disappearing again.

MR CRANNEY:

Sorry your Honour. If you fall below that behaviour you're in big trouble. If you don't have an 85% acceptance rate, which means that all of them, except for one and two out of 10, you have to accept them all at all times, and you can't reject more than 3% at all times, and you must have almost perfect behaviour, or at least face the possibility of very serious consequences if the car was

smelly, or wet, or you said something out of kilter, but most importantly you must work these hours to get the points. The midnight and so on, and all of that.

WINKELMANN CJ:

And also you must have to work quite a lot of hours, because those points are like 2,000 or something…

MR CRANNEY:

Yes, they're very, quite high. So that's if you were getting a point a trip, which you, if you didn't work –

MR CRANNEY:

No some, if you work the trips outside of the hours it's a point a trip.

WINKELMANN CJ:

Yes, so if you're just working outside the hours getting a point a trip, that's 2,000 trips.

MR CRANNEY:

Exactly.

WINKELMANN CJ:

But if you're working, you can divide that in four if you're working inside those hours that's 500 trips.

MR CRANNEY:

Yes, in theory you can retain the system without working that out. You'd be working thousands of trips a month. So I want to now show you a short video of an actual person who, at the time this video was taken, was Blue, but who very recently was Platinum, maybe two or three weeks ago, and you'll see the way in which it works in practice. I think I have to use the computer for this part of my…

WINKELMANN CJ:

Hopefully not you Mr Cranney.

MR CRANNEY:

Sorry, it's 304.2439.

UBER VIDEO PLAYED

MR CRANNEY:

Okay, it's going now. You're online. You're in a busy area. Pick trip soon. This is a person who has got 4.97 performance, Sioliaga.

WINKELMANN CJ:

4.97, wouldn't they be on one of the higher – oh.

MR CRANNEY:

Yes.

WINKELMANN CJ:

Not necessarily unless, if they haven't got the points.

MR CRANNEY:

So this person has got a 90% acceptance rate but has got a 4% rejection rate, and she's on Blue at the moment. Sorry 4% cancellation – well, rejection rate's the same thing. She's bubbly, happy, and reliable, she's done 16,000 trips, you see that your Honours, over 3.5 years, and she's got a 4.97 performance score. Acceptance rate of 644 requested, and she's accepted 582 and declined 62. How is it calculated. Acceptance rate is a percentage of trips you accepted over the last 30 days. Uber promo trips are excluded, and we'll come onto that, from your overall acceptance rate. Why does acceptance rate matter, it means shorter wait times for customers, and shorter pickup times for all drivers so you can spend more time on the trip earning. Learn about Uber Pro. Cancellation rate of 4%. That's 22 trips cancelled out of 560 for this worker. Yes, this is cancelled after –

GLAZEBROOK J:
That means cancelled after you've been given the trip?

MR CRANNEY:
Yes, that's right, cancellation after acceptance.

GLAZEBROOK J:
But you initially accept and then you say, no I don't want to do it.

MR CRANNEY:
That's right, yes, cancelled after acceptance. So she's cancelled 22 of them after acceptance. You see that there. Why it matters.

WILLIAMS J:
I see it says there that if you had a good reason to cancel it won't count.

MR CRANNEY:
That's right, you can protest it, you can get it reversed if there's a good reason. Share your story, why I drive.

GLAZEBROOK J:
And a good reason might be that the passengers drunk or something of that nature?

MR CRANNEY:
Exactly, yes.

WILLIAMS J:
Or didn't turn up.

MR CRANNEY:

GLAZEBROOK J:
Well yes, I suppose.

MR CRANNEY:

Or whatever. Well cancellation, I don't know if they're not turning up, but there are methods of getting it altered. You ring up the line in the Philippines. She was a top driver last month. Priority queue access redeemed, so she's been given a priority queue access some time ago, and there's another one that's expired, and then she's become Platinum again, you see there, three weeks ago she was Platinum. She's got a priority queue access.

WINKELMANN CJ:

Why is the priority queue access expiring in six hours?

MR CRANNEY:

Well there's a time limit on them to be used, otherwise you lose them.

WINKELMANN CJ:

Was that, so you don't have priority queue access throughout the time that you're on Platinum?

MR CRANNEY:

No, no, only if they're available – you get given them and then you can use them, if you don't use them in time you lose them. I think. Now these are $10 extra by completing two trips. So this is Uber paying money, or making an offer to pay money for, if she completes two trips. That's the first one. The second one's three consecutive trips, that's $11 extra. This is money paid by Uber for consecutive trips, and you'll see another one, $11 extra for three consecutive trips, and this is an example of $11 extra for three consecutive trips within that blue zone, or it must start within the blue zone, and we'll just go back –

WILLIAMS J:

So this is Uber taxing itself?

MR CRANNEY:

Yes, this is paying money, yes, paying money to them. The money is paid for being part of –

WILLIAMS J:

For being on the job in the high volume zone?

MR CRANNEY:

Yes, three consecutive trips, and you see how it works on the next screen. Start trip 1 in the outlined zone between midnight and 2 am. The first trip locks in your dollar amount for the series. Stay online and start trips 2 and 3 at any location at any time –

GLAZEBROOK J:

Does, this depends on your tier, is that right?

MR CRANNEY:

Well, this is a separate offer.

WINKELMANN CJ:

Not tier-dependent?

MR CRANNEY:

Yes, not tier-driven.

WINKELMANN CJ:

It's just incentivising drivers to be out there in the middle of the night in the central city picking people up?

MR CRANNEY:

That's right, yes. So you can, next three trips, but you can't turn off your, you'll see in the third point there, going offline or declining trips will break the series. So you won't get the $11 under that particular promotion, and there's some more rules there. Every pool leg, pool leg ride delivery is eligible. Rider cancellations will not break the series. If you're participating in a Quest, which is another one, that will break the series, I think, whatever it is, I can't remember.

1250

In the middle of it, her husband rings up, Vaa, who is in the room with today with us, so we can ignore that, he didn't think it would come up in the Supreme Court. Earning, so this was like a pay, payments. This is going back to the early, you're no longer Platinum but you can get your rewards back with a cancellation rate of 3%. So that's the only thing that she has to get, because she's at Blue. If she was higher, she'd have more. Then there's upcoming promotions –

WILLIAMS J:

So, can I just –

WINKELMANN CJ:

We can't go back to that previous screen, can we?

MR CRANNEY:

We can, yes, no problem.

WINKELMANN CJ:

Which shows pay and the number of trips, the one that shows the pay and the number of trips, earnings.

MR CRANNEY:

Right, 72 trips, you see she's picked up points as well, 156 points to get her up the scale, and also the number of hours online, 24 hours online at $754. Can I go forward now, Ma'am, yes? Oh, there's another one, I'll just go back, that's to recruit someone else to this, to Uber, there's a $500 payment.

WILLIAMS J:

The Blue colour, or any of them actually but in this case Blue, apart from the more limited or even no discounts, what are the implications of Blue rating?

MR CRANNEY:

You're not closer to the door by having a Blue rating, you're not punishable by dismissal, it's perfectly acceptable to be Blue but the implications are that you are kind of like a second class person in the system, because –

WILLIAMS J:

So it's more a thermometer than – and, of course, you get more limited rewards.

MR CRANNEY:

Yes, but no discipline. But you have to try and get out of it in order to get rewards or to get direction and duration or other benefits.

WILLIAMS J:

As against Diamond, for example, I was under the impression, this might have changed now with this system, I was under the impression that Diamond meant you got access to better rides and you are aware of destinations?

MR CRANNEY:

Yes, as long as you can maintain your accept rate at 85%.

WILLIAMS J:

Sure, sure, if you stay at the appropriate speed on the machine, you do get better work.

MR CRANNEY:

Yes.

WILLIAMS J:

But only at Diamond level.

MR CRANNEY:

Yes and you also need to keep re-earning your points every three months.

WILLIAMS J:

Of course.

GLAZEBROOK J:

And in a way though, you might have access to destination but you've still got to keep your acceptance and cancellation rates at the acceptable level, so –

MR CRANNEY:

Yes, it's – that's right, there's a number of different pressures on you.

GLAZEBROOK J:

Which and it looks like that's where this driver fell –

MR CRANNEY:

Yes, that's right.

GLAZEBROOK J:

Fell over, because of acceptance rates.

MR CRANNEY:

It looks like it, and –

GLAZEBROOK J:

So it might be a slightly illusory advantage to say –

WILLIAMS J:

It was cancellation rates.

MR CRANNEY:

We're at the cancellation rate, rejection rate, or cancellation rate. Because she was above 3%.

GLAZEBROOK J:

No, no, that's what I mean.

MR CRANNEY:

Oh, yes, yes, cancellation rate.

GLAZEBROOK J:

So it might be a slightly illusory advantage to say that you can do those things, because you can't actually without losing status.

MR CRANNEY:

Yes, that's right, it's a multi-faceted system and then we have here, there's only a minute or two to go, you're no longer Platinum but you can get your rewards back, this comes up all the time as a message, you can get your rewards back and then you can see her points is 2,748, so she's not doing too bad on the points. So she must have done some night work or – but and her star rating is fine, 4.9, but it's marginal actually, 4. – no, 4.7, it's not marginal, it's fine, but the cancellation rate is problematic.

WILLIAMS J:

Do you have any data about the spread of ratings, gradings, colours, across the fleet?

MR CRANNEY:

No, unfortunately not, your Honour.

WILLIAMS J:

Right.

MR CRANNEY:

But I think the evidence seems to show that people go up and down quick, pretty quickly, if they can slip, slip down.

GLAZEBROOK J:

Well, you're presumably not sort of calculating as you go along your acceptance rate or –

MR CRANNEY:

No, it comes up all the –

GLAZEBROOK J:

And it's a very low, the 3% is very low.

MR CRANNEY:

No, it continually –

MILLER J:

It's not an acceptance rate though, is it, it's a cancellation after acceptance, yes.

GLAZEBROOK J:

No, no, the, but the –

MR CRANNEY:

Yes, it continually reminds you if you are problem, regularly, that you've got 4% and above, you can get back to Blue, you're – depending, so this is the Blue rewards your Honour were asking me about. Partner support is ringing the hotline, everybody can still ring the hotline but if you're on Blue it takes longer for the phone to be answered, you don't get priority treatment on the hotline. And then $20 off tyres, you still get that on a Blue, and eight cents off on the – and then it's this is what you'll get if you move up to Gold, you'll enjoy the following. Trip duration and direction, and off fuel.

MILLER J:

Do you get that at Gold level?

MR CRANNEY:

Yes, but it doesn't tell you on this screen that you also have to maintain 85 –

GLAZEBROOK J:

It doesn't – sorry?

MR CRANNEY:

85%, you have to maintain 85%.

GLAZEBROOK J:

No, no, I understand that, but –

MILLER J:

I thought it was only at Diamond level you got those.

MR CRANNEY:

No, no, you lose the – you lose that duration and direction if you go below 85% acceptance rate.

MILLER J:

Right.

MR CRANNEY:

But it doesn't say that here and there's a call in the record of the case of Mr Abdurahman in calling them and saying "well, it didn't say that on the record, it didn't say that and yet you're telling me now I have to maintain 85% acceptance rate", and more, complaining about it.

GLAZEBROOK J:

But just so I understand, if you're Blue you get told "there's a trip, accept or not"?

MR CRANNEY:

Well, you can decline the trip.

GLAZEBROOK J:

No, no, I know you can, but you're –

WINKELMANN CJ:

Yes, that's what you get told, isn't it, Mr Cranney.

GLAZEBROOK J:

Yes, you get told –

WINKELMANN CJ:

You don't get direction or distance.

MR CRANNEY:

Yes, that's right, yes, you just get told there's a trip, you don't get told the –

GLAZEBROOK J:

And then you only get told where it is once you accept.

MR CRANNEY:

No, usually at the end of the trip.

GLAZEBROOK J:

Well, no, that can't be at the end of the trip, because you must know.

MR CRANNEY:

Well, after you start the trip.

GLAZEBROOK J:

I mean, you must be told where to go, and –

MR CRANNEY:

After you start, after they get into the –

WILLIAMS J:

Don't get a job at Uber, Mr Cranney.

MR CRANNEY:

Well, actually, believe it or not, your Honours, there's a thing in the record where they actually, during the course of the case, they offered me a job as a driver, they sent me an email, $33 an hour. It's in there. And I have to tell your Honour, I actually considered it.

WILLIAMS J:

Luckily for Uber you decided not to.

WINKELMANN CJ:

Well, what kind of a job was – oh, that, we won't ask.

MR CRANNEY:

It was a driver's job, Ma'am. Anyway, we're nearly there. Platinum is, so then you've got this Platinum benefits. Extra destination is another Platinum benefit which is, if you're out, well out of Auckland and you want to get back in, you can tell them where you are and they might be able to pick you up a job on the way in. And then Diamond.

WINKELMANN CJ:

So is this all in that, you know, the earlier document you referred us to?

MR CRANNEY:

No, no, this is just the, this is different, all the information will be in there.

WINKELMANN CJ:

So in the document 302.0788 Uber Pro Terms, will we find that there or do we have to watch this video?

MR CRANNEY:

No, no, we're nearly, we've just got, we're 30 seconds to go, I'll just let it run, Ma'am.

WINKELMANN CJ:

All right, but I want to read it back.

MR CRANNEY:

Yes.

WINKELMANN CJ:

I can find it.

MR CRANNEY:

Yes, yes, most of it. I'll just let it run.

UBER VIDEO CONTINUES

WINKELMANN CJ:

Where's the button you push to go online?

MR CRANNEY:

I've never seen that button. I think, in effect, you – it's opening the app, I suppose.

WINKELMANN CJ:

Mr Wicks can tell us later. I think you might be wrong.

MR CRANNEY:

I'm no expert on it, Ma'am. So I think possibly that might be one.

WINKELMANN CJ:

Oh, yes it is, it's 12.59, right, we'll take the luncheon adjournment. How are you going for time?

MR CRANNEY:

I think it will take me an hour. I'll go pretty quickly Ma'am.

WINKELMANN CJ:

Okay and Mr Wicks won't take long in reply.

MR CRANNEY:

I've got to deal with discipline, three warnings, one or two other little topics, but I'll try and do it quickly. This is not an easy thing to explain.

WINKELMANN CJ:

No.

MR CRANNEY:

Which is why it's taken longer than what might be ideal, but important, nonetheless.

WINKELMANN CJ:

Thank you.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.19 PM

MR CRANNEY:

If the Court pleases, your Honours, you were asking me before the break to give you a reference to the evidence about the 20% reduction in fares in 2016. It's the evidence of Mr Ang and the page number is 201.1058 which we'll put up in a minute, but before I do, just in terms of the description I gave to you about how the rating system works and that the pressing of a star leads to the populating of different squares, you'll see on the screen there, which is page 304.1815, which is an example of what comes up if you give a rating of four as a passenger, and you'll see there the different options that come up, and there's an option also for "Other", and that's what the passenger indicates to Uber. Now those do not come to the driver and the driver only gets knowledge of a failing when their rating drifts down lower as in a consolidated way so that they fall or come near the average rating for the city, which is referred to in the guide –

GLAZEBROOK J:

When you say – you said earlier that there's consequences if you're four and get something or other ticked, because the rating is going to be – the rating, presumably, is different if you get a one to a two to three to four, one would have thought.

MR CRANNEY:

Yes, it means that your average will fall quicker.

GLAZEBROOK J:

Yes, but you said there were consequences because you get to tick why you've given a rating of four and that's the same as one, two and three. But what are the consequences of that?

MR CRANNEY:

There are no consequences about the actual thing that you've chosen unless it's a certain type of thing, such as a sexual assault or whatever. The only consequence is your average score goes down.

GLAZEBROOK J:

But only because they've done the four, not because they've ticked "bad music".

MR CRANNEY:

No, no, but the only point is that only "bad music" is available, on four –

WILLIAMS J:

It is in my car.

WINKELMANN CJ:

It was a joke waiting to be made.

MR CRANNEY:

On four, three, two or one you get "bad music". On five you get "no music". You're happy. But if you do a four, three, two or a one these are the boxes that come up.

GLAZEBROOK J:

Well, I understand that, but what's it matter if the driver doesn't see them and they don't have any effect on the driver?

MR CRANNEY:

Well, it simply matters that your score goes down for anything above perfect, anything above five, you're –

GLAZEBROOK J:
But that makes sense though, doesn't it?

WINKELMANN CJ:
Users don't really know about this, do they? The passengers don't know about the implications of their scoring system.

MR CRANNEY:
No, no, they don't. But Ma'am, in a normal employment scenario, and you're asked to mark somebody out of 10 and you mark them nine, that's not a negative. That's nearly perfect, except in this system it doesn't work that way.

GLAZEBROOK J:
Explain to me why?

MR CRANNEY:
Because if you mark, if you tick, if you press the fourth star it's a negative. It pulls down the score.

GLAZEBROOK J:
But it would do anyway even in any rating system because if it's not a 10 it will be something less than a 10.

MR CRANNEY:
Yes, but the trouble is that the way in which they judge performance is you have to be at 9.7.

WINKELMANN CJ:
Your point is that it's a scale which is unfair because most people would think a rating of four out of five is an excellent rating but it's regarded, a rating by Uber of four stars is regarded as a fail rating effectively?

MR CRANNEY:
Yes.

WINKELMANN CJ:

So there's an unfairness in it. It's a harsh rating system.

MR CRANNEY:

It's a classic form of subordination. So you go to your – you're asked by a hotel, let's say a hotel did it to mark the cleaner, and anything below 10 has got serious consequences for her score.

GLAZEBROOK J:

But I don't understand what the serious consequences are.

MR CRANNEY:

Because if they drift below 4.7 on average they get dismissed.

GLAZEBROOK J:

Well, no, I understand that, but…

WINKELMANN CJ:

I think you're asking about the comments, the negative comments?

GLAZEBROOK J:

Well, I was sort of, but I'm also saying that a four, it's just obvious that anything less than a five is going to bring your score down presumably.

WINKELMANN CJ:

I don't think you're saying anything other –

GLAZEBROOK J:

And then you're just not allowed for it to go down below a certain amount. But I don't understand how many you need to get below the certain amount. I mean the answer might be that no, neither do you because Uber doesn't tell you how they calculate it.

MR CRANNEY:

We did. It's 4.5 or thereabouts, probably. We don't know the exact figure. So if you get 500 scores of five and then if you end up with 50 scores of four within that out of 500 trips, you've got four, 50 scores of 80% and 450 scores of 100%, you're close to 4.75, and you get dismissed if you fall below the average score.

MILLER J:

The amount of time you're putting into this suggests the drivers feel very keenly about it. Is that a fair inference?

MR CRANNEY:

It's a fair inference, but it's also the system itself, your Honour.

MILLER J:

I appreciate you're describing the system itself.

MR CRANNEY:

Yes.

WINKELMANN CJ:

Is your point that it's really actually operationally a very harsh system so that in itself is quite a level of pressure on drivers?

MR CRANNEY:

It's a system of intense control under which people are monitored carefully by a system they've got no control over, they don't know what the complaint is, it's anonymous, it's put in there at the request of Uber of passengers anonymously to make these scores, and it's got serious consequences for dismissal, and it's in the –

WINKELMANN CJ:

And your rating system.

MR CRANNEY:

And the rating system and Uber Pro, and it's in the community guidelines as being if you fall below the average for your city you are dismissed, or, as we call it, disconnected. That's the – these are intensive control mechanisms by what we would normally consider to be an employer. Intense performance control.

WILLIAMS J:

What does "wrong driver" mean?

MR CRANNEY:

Wrong driver was someone who's an imposter who shouldn't –

WILLIAMS J:

How would the customer know?

MR CRANNEY:

That's a good question. I suppose they could look at the face on the licence, if it's hanging from the mirror, and the face of the driver, I suppose.

WILLIAMS J:

And "wrong car", is that it's not the car that was promised to me?

MR CRANNEY:

Could be, could be.

WILLIAMS J:

But why would another driver pick it up?

MR CRANNEY:

Why would another driver?

WILLIAMS J:

Why would another driver turn up if they haven't accepted the ride?

MR CRANNEY:

Well, they might be illegally driving the car when they shouldn't be. What Uber does is that they do identity checks on drivers over the Internet to check they've got the right person driving the car because the licence is not transferable. The arrangement is not transferable. So it's a system of that. So at the end of 500 trips you'll have some negative scores with Uber which you won't know why they were given or who gave them or when they were given, and you're under possible disciplinary investigation because of them, as we're about to come to.

WILLIAMS J:

And "traffic" just means heavy traffic, I presume, or is there some other significance to it?

MR CRANNEY:

I'm not sure. It's just gone off my screen now. I'm not sure why "traffic" –

WILLIAMS J:

It just says "traffic". It's got a box that says –

MR CRANNEY:

I think if you press it, it'll give you further options.

WILLIAMS J:

You can explain what you mean by…

MR CRANNEY:

Yes, yes, you can – well, not so much explain but you can choose options, further options.

WILLIAMS J:

Well, it's just traffic can have nothing to do with the driver.

MR CRANNEY:

Yes, there are some things that Uber won't hold against them either. For example, if the app has stopped working at the wrong time or something which was Uber's fault, they won't hold it against you.

WILLIAMS J:

So these things are checked and if the traffic is traffic that occurred on the most efficient route and the customer is just grumpy about being stuck in traffic for so long, that won't be counted against you?

MR CRANNEY:

I don't think they're check. I think that some of them would be checked, for example, the more serious ones would be checked. If there was an allegation, for example, of sexual assault, then sometimes that would be – not always – sometimes it will be checked. But the point is the surveillance of each driver by each passenger for Uber under the system and they must press to start to take their next trip. That's how it works. And then –

ELLEN FRANCE J:

Sorry. Are you saying a passenger has to rate the driver? I don't think that's right.

1430

MR CRANNEY:

It comes up before you can do the next trip the screen shows, I'm not saying you have to do it, but it asks you to do it, from your previous trip.

WINKELMANN CJ:

It prompts you to do it?

MR CRANNEY:

It prompts you to do it.

WINKELMANN CJ:

But you don't have to do it?

MR CRANNEY:

No, you don't have to do it, no. The disciplinary process for the system is set out in some of the documents, and in particular 304.1852, and at page –

WINKELMANN CJ:

What is that document?

MR CRANNEY:

I beg your pardon your Honour, it's –

WINKELMANN CJ:

We've got the number, but what is it?

MR CRANNEY:

This is an internal system document of Uber about the quality management system. If you look at page .1855 you will there see the three notification system, three-step notification system. Starting at the bottom with an early morning, early low ratings alert on the 24th in that case of March 2018. Driver has a lifetime rating of 4.49 after 25 trips. Then there's an active trigger above it to force offline.

Then above that there's a second notification created by Australia New Zealand quality management system on driving ratings. Then there's a further trigger above that.

Then there is at the top a third notification which is the low rating notification 2. Less than 4.49 is the rating figure, and consequences follow from that. You'll see above that, if you go above the table you'll see there the phrase, at the end of the first, second line that: "The notes will help you to easily understand where in the QMS the driver is and provide them with support."

GLAZEBROOK J:

Can you just scroll down a bit on that document. There was something about customer low ratings or…

MR CRANNEY:

At the bottom?

GLAZEBROOK J:

No, a bit further. I'm not sure because when, as it's being scrolled through I thought there was something…

MR CRANNEY:

Sorry, what was the question Ma'am.

GLAZEBROOK J:

If you just scroll through the document a bit and I'll see.

WINKELMANN CJ:

What happens with the third notification, it doesn't say there.

MR CRANNEY:

Look at the third notification please.

GLAZEBROOK J:

I can look at it later.

MR CRANNEY:

Low rating notification 2, L500 rating less than 4.49, for the second time.

WINKELMANN CJ:

"Trigger to force offline", but then the third notification, they give a notification.

MR CRANNEY:

They give a notification, and you'll see a notification actually at 304.1857. "Tim, since our last email, your average rating has remained low. You'll need

to improve your rating if you want to keep getting trip requests." Then 304.1859 you'll see there the first bullet point. "You've received this email because you're rating from riders has dropped below the minimum for your city." Then over the page you've got at 304.1860 you've got the third party training, first of all, yes, we've seen that, and then you'll see the third party training over the page. In Sydney the cost is $70. In Melbourne it's been pushed off, sometimes before you've been pushed off, 20 and 10, 20 in New Zealand, and 70 in Melbourne and Sydney.

Then at 304.1862, you'll see there in the third and fourth bullet point: "You'll then be given a limited amount of time to improve your average rating, so that you can keep accepting trips… if you choose not to complete this training you will not be able to continue using the Uber app." These things are quite common.

Then over the page .1863, you'll see in the first bullet point somebody's completed the training. "Great job on completing your training. The relevant team will be notified and your account will be reviewed…".

Then over the page .1864 you'll see someone that's not to be reactivated, someone who's been dismissed. Then over the page again, .1865, you see what happens if my rating drops again, and over the page at the bottom of the page there, you'll see two bullet points. "If rating has improved (above city minimum)," at the bottom of the page, "Explain – Rating has improved." But if no changes have been made, hasn't been improved, then it's dismissal.

I could go on with it, and for example 304.1868: "…you are only able to complete the training once." It's the first bullet point at the bottom of the page, and so on. So a comprehensive system of discipline, warnings, dismissals, retraining in some circumstances, reinstatement, all at the behest of the employer, which is a classic feature of employment, and which is very, very unusual outside of employment.

Then if you look at page 304.1895 you'll see the same system in place, or similar system in place for the Uber Eats, 304.1895. The first page of it is

304.1878. So .1895, you'll find the equivalent to Uber Eats. Similar disciplinary process.

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Now the next topic is promotions, so if we go to 304.2389, or .2388, and the next page, this is Quest. We saw some of this on the video. This is money being paid by Uber direct to drivers for meeting: "... certain trip goals in a set amount of time. For example: Get an extra $50 for completing 10 trips between 4am on Monday and ... Friday." And telling you how to go about this promotion.

GLAZEBROOK J:

What test is this related to?

MR CRANNEY:

This is simply related to the fact that Uber is not what it says it is, it's running a business.

GLAZEBROOK J:

Well, I think you can probably assume at the moment that we're onboard with that.

MR CRANNEY:

Yes. Yes and they're also paying money for labour. You've got – they're paying direct money outside of their own theory. They're paying –

WINKELMANN CJ:

Well, that's an important point, isn't it. This is them paying money.

MR CRANNEY:

Yes. They're paying money for driving around at night, extra money. The same for consecutive trips which is 30...

WINKELMANN CJ:

The one you took us to earlier?

MR CRANNEY:

Yes, 304.1675 which is the internal Uber document on consecutive trips, and if you look at 304.1679, you will see the description.

GLAZEBROOK J:

And why does that make it an employee relationship rather than independent contractor?

MR CRANNEY:

Well, Ma'am, it's part of the picture. Uber has consistently said they're not an independent contractor and here we have the – this is an additional part of the system where they are paying people directly for labour.

MILLER J:

But the real question is whether they're an employee.

MR CRANNEY:

Yes.

MILLER J:

And I'm with Justice Glazebrook on this. Assume for now that the question is independent contractor or employee, this is where the more subtle issue arises and I, for my part, am looking for assistance on that.

MR CRANNEY:

Oh, yes, well, the answer to that question, Sir, is the common law tests and paragraph – in the Court of Appeal judgment, the matters which the Court of Appeal relied upon when dealing with the issue of intention. If the employees are under the control of Uber, if they're integrated into Uber and if they're not in business on their own account, then I say we're there. And it's very – it's almost difficult, apart from the very exceptional point that my friend's made is they don't have to work on particular days, it's difficult to imagine a more intensive control, form of control, a more intensive form of integration and a more intensive example of the fundamental test. I'm not saying that every single factor is 100%

on, or for those three factors, but the control one is, I would say, or 95 or pretty close, and the integration one is.

WINKELMANN CJ:

So what do you say about the fact oh, well, they can log in when they like, they've got control, they can log in when they like, they can log in, in those hours, if they want to get this higher money and your point is the system is set up that, really, if they don't log in those hours they're not going to get the points and not going to get to the position where they can actually run a business off this thing, or make a living off this thing.

MR CRANNEY:

Even if, even without that, if I say, if I'm running a large kindergarten association for example, and I employ 400 extra people and say to them "we will call you because we have a lot of sick and a lot of gaps to fill in, we will call you to work and you will be entitled to say 'no' whenever you want, we don't care, because we've got enough of you to fill the work", that person is an employee. The fact that they're not – that they're entitled to say no to particular work is neither here nor there, the question is what happens if they say yes? And if they say yes, what is the relationship? And it's that, Uber has grasped onto that factor while at the same time setting up a system of total domination and control even to the extent of having elements of servitude in it, or servility at least, in the way in which these people have to relate to it.

You know, this, it's all based on, as your Honour's have said, probably not convinced, it's all based on a fictional fairytale story that is not real and if that bit falls down then we fall back to the common law tests and also to the, what the Court of Appeal said at paragraph 218 of its judgment: "The most illuminating indications of the parties' common intention ..." in the written provisions, this is in the written provisions, are the: "... provisions that preclude ... meaningful decisions about the terms on which they provide services to riders, from differentiating their services in a way that influences rider decisions, from establishing any form of direct relationship with riders ...". That is prohibited.

Then in the second tranche of those illuminating indications at paragraph 218, those which: "... reserve a high level of unilateral control to Uber over [Uber driver] terms ... the terms on which [they] provide services to riders ... the terms of the ... agreement itself, over supplementary agreements and addenda, over fares, over fees ... deductions from fares, over policies (including the Community Guidelines) ..." and lastly and very importantly: "... what information is provided to drivers about the rides offered to them before the ride begins."

Then you could add to that, the right to change a fare, the right to reduce a fare, the right to consequences if there's a failure en route. So really, in summary, we are really relying on the list of matters which are set out in our submission taken from the *Aslam* judgment, because it's an identical system, it's a materially identical system and we have set them out in our submission and we rely on all of them and they are all present here and there is no difference between what's described in the *Aslam* judgment or the French judgment or the other judgments to what's happened here and there is also no difference in the law.

WINKELMANN CJ:

Well, there was one difference on the facts, wasn't there, that Mr Wicks pointed out during that *Aslam* judgment? Didn't he say there was some change to do with logging off, not answering, responding, I think there was a difference?

MR CRANNEY:

Oh, yes, yes, the difference was that in *Aslam* there was a time where you couldn't log on for a few minutes, whereas here you get, like, you can log on straight away. But what difference –

WILLIAMS J:

Yes, you get taken off, said 10 minutes.

MR CRANNEY:

Yes, or something like that. But what difference does it make? If you log straight back on, you'll be logged straight back off if you don't take the trips, your thing stops working. So there's a tiny distinction. We're talking here about 11,000 workers, most of whom are, at least from the names, immigrant workers, working throughout New Zealand including delivering food day and night, with absolutely no form of any protection and under total control of a large corporation in every aspect of what they do, including their prices, their disciplinary, their whether they get dismissed or not, and they've got no basis or no rights to do the things which are designed to actually counter employer control which is –

WILLIAMS J:

What do you say about the key difference which Mr Wicks refers to which is that *Aslam* was focused on the middle mixed category, if you like, the dependent contractor as opposed to the strict employee?

MR CRANNEY:

Well, first of all, I say that it really on the facts of the case made no difference because every employee is a 2(b) worker.

WINKELMANN CJ:

Explain?

MR CRANNEY:

Well, one is a subset of the other, a 2(b) worker is – sorry, anyone that is an employee is fits also within 2(b). It doesn't work the other way around.

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WILLIAMS J:

But isn't 2(b) an extension of the ordinary contract for service definition of "employee"?

MR CRANNEY:

It is but in order – if you're an employee you are within the description of 2(b).

WILLIAMS J:

The obvious –

WINKELMANN CJ:

No, Mr Wicks' point is that the description, that the English legislation has expanded the concept in a way that ours hasn't.

MR CRANNEY:

Yes, but the way in which the decision is decided is – there's no doubt about that. It would have satisfied the employee position, the employee definition, certainly in terms of our law anyway.

WINKELMANN CJ:

The way in which it's reasoned?

MR CRANNEY:

Yes, the way in which it reasons the real nature of the test, the control test, the integration test and the fundamental test. That's the problem which my learned friends have with Uber, with France, with *Aslam*, with Holland, with all of these other places, and the fact that we ourselves are a real-nature jurisdiction. It's a fact case. There's no delicate points of law in it. Although there's been a manufacture of one about whether or not because you don't have to work at a particular time and you've got the choice not to work, that's a very small part of the picture. You've got people here doing 40,000 trips, six years service with these people, and you've got 11,000 workers in the country or whatever it is, the figures I gave you before, delivering food to make money for a transport company under total control of the transport company, with no control at all over the price, over anything to do with it, and they're benefiting from the fact that they're able to not be caught by New Zealand employment law, and that's what I think the Supreme Court in the United Kingdom did and saw, and it worked, and it won't stop is my other point. If this sort of practice, if these kind of

processes are able to become lawful, why wouldn't you have six cleaners who are the employer of their boss who is providing them a service?

WINKELMANN CJ:

Part of this business model depends upon aggregating people using an app into a sort of herd that you can, as you say in a kindergarten, a herd of kindergarten teachers that you can provide incentives to move in this way or the other?

MR CRANNEY:

Yes, and they can use it. For example, there have been examples of caregivers, people trying to set up caregiver apps with actual photographs of the caregivers on the Internet and you choose which one you want and the model is the same as Uber's which is that: "We're not really the employer; we're really serving you."

WINKELMANN CJ:

"We're just a platform enabling and facilitating your access to the caregiver"?

MR CRANNEY:

These people driving round in the middle of the night between mid-am and 4 am are the masters under Uber's model, not the servants. They're the masters and Uber is providing a service to them. It's complete fairy-tale stuff and there needs to be a Homeric response, a robust answer from the courts, not just here but in other places, to these sorts of practices. It's a turning point, in my submission, and most places where it's been argued the workers have been successful.

The exception is Australia, and in Australia it's because, as I've said in my submission, they've got a different approach at the moment to the categorisation terms which has become binding on the Fair Work Australia, the body that decides these things, but other places where it's gone to appellate courts, the answer has been "yes". The answer has been "yes". I can

understand why Uber opposes it, because it saves them at least 24% or whatever in wages, in holiday, extra entitlements.

If your Honours have a look at just one document here which is – your Honours asked is there an aggregate, is there evidence about how many drives people did and so on, which is page 201.0071. So the…

WILLIAMS J:
Have you got a page in the reply evidence?

MR CRANNEY:
Yes, it's page 73 but it's 201.0071. It's on the screen now. So if you look at that table, perhaps if you go the next page as well, Mea'ole will do, so the first column is the number of hours online, 7,376.8. The second is the number of hours on trip. Now "trip" means you've got a passenger in the car. 43%. The third one is number of hours en route and the last one…

GLAZEBROOK J:
Is that en route to the job?

MR CRANNEY:
Yes. So there's three categories, and the last one is the number of hours spent driving around waiting for delivery jobs, waiting for – so there are three categories: en route, on trip or online. Then we've also got the payment figure somewhere…

MILLER J:
So is the real point of difference that the drivers want to be paid for the period they're on app, not just for the period they're taking trips?

MR CRANNEY:
Yes, and that's –

MILLER J:

So you can see there's a big difference.

MR CRANNEY:

Yes, and that's what the Court of Appeal found, that –

WINKELMANN CJ:

You're away from your microphone. It's more than a 24% difference then, isn't it? It's a 50% difference almost.

MR CRANNEY:

Yes, it is. In terms of the income, those figures are set out later on in the same document, page 0073 and 74. Mr Rama earned $14,000 in that year to 31 March 2021, $106.50 from tips. His total Uber income was therefore 14,838 out of which fees and expenses were charged. Uber takes 3,700 and also deducts charges of 545 and leaving him with 9,881.69. Then to 53.

GLAZEBROOK J:

How many hours was that?

MR CRANNEY:

451.85 online. This is paragraph 53, giving him an average of $21.87 an hour.

WINKELMANN CJ:

Before expenses?

MR CRANNEY:

Before expenses. So it's a very interesting system.

WINKELMANN CJ:

Do we have any evidence about the extent of expenses?

MR CRANNEY:

Well, his tax, I think his tax expenses – I think it's at paragraph 55. If you take 25% off as expenses – so we've made an estimation here.

WINKELMANN CJ:

It says there 25 to 50%.

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MR CRANNEY:

Yes, based on. So we take the lowest figure. He's on $18.90 an hour, and then trying to compare that to the minimum wage. This is the sort of thing that's now been sorted out in Uber in London by what's happening there, and just for completeness, your Honours, I just would make some comments about the issue of route. You will recall that the drivers' terms reserve to Uber the right to adjust the fare because of an inefficient route and the right to cancel a fare. That's at clause 8.3. Now, the basis of the calculation which Uber applies is at 301.0271.

WINKELMANN CJ:

What is that document?

MR CRANNEY:

This is an internal Uber document. Oh, sorry, no, it's a Bliss ticket. So the basis upon which Uber calculates it, if you go down to page 2 of this document, you'll see there an explanation by Uber of how it's done, "Upfront Fares", this is the bit highlighted by Ms Liu: "Upfront Fares are calculated taking into account the estimated time and distance to complete the trip, traffic patterns, extra surcharges, tolls and [demands] ... of the request." Then at 304.1571. Sorry your Honours...

WINKELMANN CJ:

What is the document?

MR CRANNEY:

This is a document showing how they calculate the estimate if somebody challenges a fare. That's it, the next page, that's it, and you'll see there that the call centre is told: "Do not disclose [this]." So there's an argument about the fare and the call centre do not disclose the calculation.

And then at page 304.1597, and your Honours will recall I mentioned the 1,090 metres, the 1,090 metres and the 21 minutes, 304.1597 you will see at the bottom of this page. I beg your pardon, your Honours.

WINKELMANN CJ:
That's all right.

MR CRANNEY:
That last sentence in the small print at the bottom of the page: "Was the actual pickup or drop-off location of the trip different to the initially specified location? Or was the rider dropped off more than 1090 metres ..." and if the answer is "yes" there's a payment payable.

Then the next one is over the page and you'll see there at the end of the first box, you'll see a reference to: "Was the actual time of the trip 21 minutes greater than estimated time?" Proceed to the next step. Those are the criteria for adjusting the fare, if it is below that there is no adjustment, one or the other, but again, that is not disclosed.

Now, this is all evidence that the system is employment. That it is totally under the control of the employer. That there is full integration of the employees into the employer's business and that there is no evidence at all of the workers being in business on their own account in any significant way whatsoever. Every aspect of the business is controlled by Uber. Every single aspect of it.

WINKELMANN CJ:
The only thing that isn't is when drivers log on and log off.

MR CRANNEY:
That's right.

WINKELMANN CJ:
And you say that's really controlled anyway.

MR CRANNEY:

And that's controlled by different methodologies, and quite severe ones.

GLAZEBROOK J:

Controlled by what, sorry?

MR CRANNEY:

By other methods and quite severe ones which is the obligation to gain points, penalties if the behaviours required by the points system is not followed, the worker is penalised by losing access to these things and by finding themselves in a worse position.

Now, at the moment, at the moment the only way in which a driver can raise these issues with the company is individually, usually through a call centre, usually with some other poor person in the Philippines who reads these things such as you've got on in front of you at the moment word-for-word. For example: "We've reviewed your trip that started at [such and such] has been charged correctly. However ..." et cetera, those requirements are read out and you have got some tape recordings of those, your Honours.

And people are told, not all the information, they won't be told box 18 information, but these things are read out to them by people who are also employed by Uber – or I won't get into their employment status, they're in other places – and you'll hear tape recordings of that.

What we want to do with, as unions, we want to engage with Uber and have some discussions with them as a collective group, in particular about issues of human rights of the workers, and we want some legal foundation to be able to do that.

Now, I don't say that Uber has totally refused ever to talk to us. We have had some unjustified disconnection at discussions with them about different things, but we need some legal rights for the employees, given that the whole structure of our employment law is based on giving workers who are under control, who

are integrated and who are not in business of their own account, certain rights under the law, and in terms of the issue of section 3 I would say there is an overlap to the extent that the notion of integration and control substantially overlaps with the notions of inherent inequality in the relationship. In –

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WINKELMANN CJ:

Are you going to take us to section 3?

MR CRANNEY:

Yes, your Honour. Can you put section 3 up, please?

GLAZEBROOK J:

At some stage can you – do you say *TNT* would be decided differently under the law now and, if so, why? It's really just what's the difference between courier drivers and Uber drivers in this context. What is it about the particular arrangements with Uber or just the whole idea of Uber that distinguishes from, say, courier drivers which – and the reason I put that is that's probably about the closest analogy in terms of business model. I think the labour hire is more problematical.

MR CRANNEY:

Yes –

GLAZEBROOK J:

In terms of comparison, sorry, I meant.

MR CRANNEY:

Yes, yes. Well, can I first of all answer two –

GLAZEBROOK J:

I'm not saying you do that now. I'm just saying at some stage can you.

MR CRANNEY:

No, no, I'll do it now because otherwise I'll just –

WINKELMANN CJ:

Because you were saying the notion of integration and control overlapped with ideas. Was it of equality of bargaining or fairness in bargaining?

MR CRANNEY:

Inherent inequality of –

WINKELMANN CJ:

Inherent in –

MR CRANNEY:

– which is section 3(a) inequality of power inherent. So there's something about an employment relationship which I think, in my submission, is the notion of integration and the notion of control that makes the relationship one of inherent inequality. Indeed, the whole purpose of it is to set up a relationship of inherent inequality. It's to deal with that issue where one person is using the labour of another and to monitor the rules under which that is done. So in some way section 3(a)(v) may well be kind of definitional – sorry, I'm talking about (ii), maybe also have a nominative definitional importance within the Act.

WINKELMANN CJ:

Well, because I want to – after we've dealt with or not section 3 helps us, because Uber's submission is it's irrelevant, it doesn't bear upon section 6, I'd also like to hear – and this can come after Justice Glazebrook's question – about your response to, as I described it, the pooh-poohing of Chief Judge Inglis' discussion of vulnerability and how that's factored into this whole thing.

MR CRANNEY:

Okay. Well, can I start with *TNT*, your Honour? I think there are two answers to the question and one of them is if you were to apply section 6 to *TNT* would the result have been the same or different?

GLAZEBROOK J:

Sorry, if you would apply section 6?

MR CRANNEY:

To the *TNT* case, would the result have been the same or different?

GLAZEBROOK J:

Yes, that's what I asked.

MR CRANNEY:

Yes. So the *TNT* case is difficult to this extent, that the thing that the case, I think, is taken to have decided is that the label is a game breaker if other matters are all equal, in the absence of sham. That's how I take it. At least that's what people have said it means. Now I don't think that was right.

GLAZEBROOK J:

No, because I think they said on the totality of the contract the label was correct, didn't they?

MR CRANNEY:

Yes, yes.

GLAZEBROOK J:

So using the sort of test that one would use.

MR CRANNEY:

Yes. I think there are dicta in *TNT* which emphasise that in the absence of sham the label will not be, will be relied upon more heavily. Now I don't think that sham's an issue in these cases. It's either taking into account all the relevant considerations, what is the real nature of the relationship, what is the evidence, and I think that to some extent section 6 is therefore clearer. In terms of the courier, the difference between courier and this case, they are quite different. There is, I think, far greater examples of courier drivers employing other drivers, actually employing them to replace them, and certainly a right to

do so. I can't remember whether there was one in that case but I think there was a right of substitution, a real right. Some of these courier cases at the moment, there are some employees who are claiming employee status, some drivers who are claiming employee status who are themselves employers, which I think is probably problematic.

The second big difference, of course, is things have developed so substantially in this area and the world is moving so quickly that we're now able to have a system of 10 or 15,000 people all governed by a foreign app, and it works and it completely controls the entire workforce from top to bottom. It's an astonishing achievement that there's not a human being in New Zealand that runs that outfit, and so there are some differences, I think, between the matters. The degree of control here is far greater than *TNT*. If you look at some of these spreadsheets, for example.

GLAZEBROOK J:

I mean surely in courier cases though they'd have exactly the same things. You've got to pick them up and deliver them properly. You can't soil them on the way. If you don't deliver properly you're taken off the route. I mean I'm just imagining.

MR CRANNEY:

They may have now.

GLAZEBROOK J:

I can't imagine that you've had a system where people don't get sanctioned for not doing what has been promised, i.e., that something will be delivered within a certain timeframe.

MR CRANNEY:

Yes. I think the degree of – yes, true. There may be elements of control there, but the degree of control here is really, really –

GLAZEBROOK J:

So it's the – if we're looking at a continuum, you say Uber is at that stage –

MR CRANNEY:

Extremely intense –

GLAZEBROOK J:

– and the courier drivers may or may not be because we're doing this in the abstract.

MR CRANNEY:

Yes, that's right.

WINKELMANN CJ:

Well, there is a slight difference too, isn't there, which is that there's actually more of something else in New Zealand in those cases? There's more of a business. You have people you actually deal with who aren't the courier drivers whereas in fact you could say the only business here is the drivers.

MR CRANNEY:

Yes, that's another aspect to it. It's an astounding reality, and when we actually –

MILLER J:

Courier drivers are always, almost always uniformed, I think, and drive badged vehicles, and you can see why the courier company would want that, so…

MR CRANNEY:

Yes, although the anonymity of Uber drivers is – it's imposed by the driver –

MILLER J:

I'm just looking at differences rather than commenting on what it means for Uber but are we all considering are they the same and I'm just accepting there's differences.

WINKELMANN CJ:

Mmm, and do we know the status of all courier drivers in New Zealand either? That's another question.

MR CRANNEY:

If you're –

GLAZEBROOK J:

Well, my understanding is that *TNT*'s been taken as allowing people to be independent contractors in courier driver situations. Whether that's changed or it's now been challenged I don't know.

MR CRANNEY:

There are the occasional – mainly at New Zealand Post. None of them have been successful yet.

WINKELMANN CJ:

There's challenges, none of them have been successful?

MR CRANNEY:

No, no –

GLAZEBROOK J:

No, well, that's what I mean, so that's why I was asking because just to be able to work out the difference between those cases and you say it's just the degree here?

MR CRANNEY:

Yes. I think –

GLAZEBROOK J:

I'm sorry, I'm putting words in your mouth –

MR CRANNEY:

No, no, I –

GLAZEBROOK J:

– but I think that's what you said.

MR CRANNEY:

I am saying that, and I think also that the Court of Appeal here got it right about this flow-on issue which really said it's got no flow-on, right? That each of these things has to be carefully examined in each case, including apps, as were mentioned in the judgment, including app businesses. That it's not enough, it's not just a general rule that because it's an app, et cetera, that you can somehow win the case.

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This is a particular state of affairs, a particular issue and, you know, to be fair to Uber, it took advantage of an ideal industry, being taxis, which is universal around the whole world, and in a stroke of genius managed to transfer all of the park – all of the taxi metres into their own computer, and all of the taxi drivers into their employees, it's incredible. Or "employees" in inverted commas. What they managed to achieve and become one of the most powerful corporations in the world with no staff in New Zealand, or in many other countries, Africa, everywhere, it's an astonishing thing, and they have run in, now, to this *Aslam* case, the France case and other cases, and I think one of the consequences of these powerful entities is that the Supreme Courts and that are moving into a very important historical role, one way or the other, a historical role, which is why *Aslam* was so important. It was, if you like, a judicial confrontation with a large, powerful corporation.

In terms of the second question, I think, vulnerability, Ma'am, I don't think I can go any further that what I've said about the overlap between integration and control and the concept of vulnerability. I tend to underplay her Honour's vulnerability comments because, as I submitted in the Court of Appeal, I read those comments as being a response to Uber's attempts in the Employment Court to narrow the question and Uber's submission was and it's recorded in the judgment that section 6 is only about traditional disputes between contracts for services and contracts of service and it did not have a

broader function and the Chief Judge thought it did have a broader function, much as what we are doing now, and this has been –

WINKELMANN CJ:

Sorry, what was Uber's submission?

MR CRANNEY:

Uber's submission was that it's got, it's really there are occasionally disputes between whether someone – about whether someone is an employee or a contractor for services and that's what Uber's about, that's what section 6 is about, and it's not about this using it to challenge this whole structure of Uber and all we are as a market place, et cetera, and that the Employment Court said, well, it's got that broader function and –

MILLER J:

Is she doing anything more than pointing to what section 3 says? There's an inherent inequality of power in employment relations and that's apparent on these particular facts.

MR CRANNEY:

Yes.

MILLER J:

It's not intrinsic vulnerability, it's in connection with employment relations, that's the topic she's addressing.

MR CRANNEY:

Yes, yes, I think that's probably right. I –

WINKELMANN CJ:

And what do you say about section 3? Because Mr Wicks says it doesn't – oh, it wasn't Mr Wicks, was it, it was Ms Dunn who said that section 3 doesn't apply to the section 6.

MR CRANNEY:

Well, my submission would be that if employment relationships exhibit an inherent inequality of power, which is what the Act says, then if you have inherent inequality of power that may be a factor in deciding whether or not it's an employment relationship. I go no further.

WINKELMANN CJ:

Well, your submission is that section 3 applies throughout the whole Act so it applies when you're deciding whether there's an employment relationship.

MR CRANNEY:

Yes, it has to be interpreted in accordance with that section. Section 6 has to be interpreted in accordance with the other parts of section 3 including –

WINKELMANN CJ:

Has no one ever addressed whether section 3 applies when you're undertaking a section 6 assessment of what the nature of the relationship is?

MR CRANNEY:

I don't think so. I think it came out in this particular case only. The same could also be said about section 3(b) which is freedom of association.

GLAZEBROOK J:

Can I just check that I've understood that submission on inequality. What you're saying is if the type of control or integration shows an inequality of bargaining power then that that might be an indication that that type of control isn't an independent contractor type of control but an employee type of control, is that –

MR CRANNEY:

Yes.

GLAZEBROOK J:

– just in terms of using our actual dichotomy that we're now talking about?

MR CRANNEY:

Yes, I do, that is the –

GLAZEBROOK J:

And I understand that's not Uber's position, so...

MR CRANNEY:

Yes, it's a –

WILLIAMS J:

Why is that not any more difficult than the control test in the – that's clear in the law anyway, this there is inherent in the employment relationship an element of subordination of the one over the other, why do we need to think any harder than that? Otherwise you're using an effect as if it is a cause, which is probably not going to help.

MR CRANNEY:

Yes, my submission is that I think that there's been too much made of the point in 3(1)(b). I have to say it, I don't like to disagree with any aspect of the Employment Court's judgment, but I think that it's been a bit overplayed. I mean –

WINKELMANN CJ:

You mean by the Court of Appeal saying it was wrong?

MR CRANNEY:

Over making a bigger point of it than necessary.

WINKELMANN CJ:

Than what the Judge was making?

MR CRANNEY:

Yes and he did say "well, look, Mr Cranney said this, Mr Cranney said that" but aspects of the –

WINKELMANN CJ:

Who's "he"?

MR CRANNEY:

The, I beg your pardon, did I say "he"?

WINKELMANN CJ:

You did.

MR CRANNEY:

That was a bit naughty, the Court, the Court said "Mr Cranney said this and that" and, but, and it could be that, but it could be that –

WINKELMANN CJ:

But are you talking about the Chief Judge or are you talking –

MR CRANNEY:

Yes.

WINKELMANN CJ:

– about the Court of Appeal? Okay.

MR CRANNEY:

Yes, the Court of Appeal, but it could be that –

WINKELMANN CJ:

The Court of Appeal?

MR CRANNEY:

Yes, it could be that the Judge was affected by this wrong approach in the Employment Court so that's what he said, even used in one of the footnotes that the judgment had a "vibe". If you do a search on the word "vibe" you'll come to a funny footnote in it. I...

MILLER J:

They're both being very circumspect because of *Bryson*, aren't they?

MR CRANNEY:

Yes, they are.

MILLER J:

They're both navigating around it, you can see that.

MR CRANNEY:

Yes.

MILLER J:

And we're not so constrained.

MR CRANNEY:

And I think *Bryson* does need a bit of tidying up, but not much.

WINKELMANN CJ:

Well, what do you mean by that?

MR CRANNEY:

Well, I think the phrase that my friend has initially relied upon but kind of has now abandoned which is agreement as to status, I think the word "status" has been misunderstood by him. When I say that we don't disagree with *Bryson*, we don't – it doesn't mean we agree with the, with Uber's interpretation of it.

So I think two points. One of them is I would rather the word wasn't – I've forgotten what it is now –

WINKELMANN CJ:

Status?

MR CRANNEY:

Status, I would rather it was the nature or something like that, something from the statute, "the agreement will give some light on its real nature" which is what I think the Judge probably meant.

The second thing is this thing about the order of attack. There's been far too much made of that for years by everybody and if I can just say one other thing, there's been far too much made of industry practice. There's some weird cases where because this issue of industry practice was argued in *Bryson* every single judge for the last 25 years has had to bow to some kind of industry practice analysis even when it's not really appropriate.

But basically, I don't think there's anything wrong with it. The things right, it talks about supplementation, additional terms, and how it works in practice is crucial, and so on, and intention is a mandatory consideration and it happened here in the Court of Appeal judgment.

I basically think the Court of Appeal judgment is correct. I am also puzzled, in terms of the result, but I am puzzled about their comment about integration and also control, but I can understand why the fundamental test is so important, because these people are not in business in their own account, they're –

MILLER J:

Well, the conclusion about integration rests very much on one's prior definition of "what is Uber's business".

MR CRANNEY:

Yes.

1530

MILLER J:

If we accept your premise that Uber is in the transport services business –

GLAZEBROOK J:

I think you're fading there sorry.

MILLER J:

If we accept your premise that Uber is in the transport services business, and put to counsel before the, we've got a situation where the drivers supply most of the capital in the form of their cars, but if one thinks of it as a platform then well Uber's got no employees in New Zealand really because no one here wears its uniform or has its insignia. So it seems to follow from how one looks at what is the business that's being carried on here.

MR CRANNEY:

Yes but on the question of uniform and insignia, it's a bit of a contradictory position, because they're forbidden by the company from wearing it. So how does that plan to control integration and fundamental test if they're sufficiently powerful to tell the Uber drivers you will be sacked if you wear it, which is what the community guidelines would allow, and the services agreement would allow. It's a very sort of weak point to say, well, they don't wear it. Because we've told them not to wear it, we've forbidden it, and the reason why they've done it, of course, is because they don't want somebody coming to a court and saying, well, they wear our uniform. They even sometimes have in other cases overseas changed their paper bags in Uber Eats to take off the signature, to take off the advertisement. So I don't put much on the uniform. Anyway, people do know what an Uber is. They've got three stickers on the right-hand side of the window, that's what marks them out.

WILLIAMS J:

Really?

MR CRANNEY:

Yes.

WILLIAMS J:

There is something striking about the fact that in the London case Uber argued that it was a transport company, it had to of course, and didn't the House of Lords, sorry, the Supreme Court didn't take much convincing on that point.

MR CRANNEY:

No, no. It's been, here in this Court talking about it as if it's a platform, whatever that means, as if it's some kind of sacred entity separate from the company or the human beings that make it up, and the corporate interests that make it up. It's almost as if it's got its own spirit, in the religious sense.

WINKELMANN CJ:

I referred to it as the anthropological view of the business entities. Sort of, it's more anthropomorphising actually, I suppose.

MR CRANNEY:

Yes, yes.

WINKELMANN CJ:

Well that's giving animals human characteristics but…

MR CRANNEY:

It is.

WINKELMANN CJ:

We'll have to come up with a new one for giving business entities human characteristics.

MR CRANNEY:

Exactly, yes. However, I mean this is a case, and it's really on the edge of history in many ways in all places where it's happened, and it has to be dealt with, and there are two paths, I think. You know we can say, well there's a third path, Parliament can do this, but as we all know that's not our game.

We're stuck with statutes and legislation and we have to deal with it, and that also has an effect on what happens elsewhere. I think.

WINKELMANN CJ:

Are you hand over to Mr Wicks?

MR CRANNEY:

I could. I could talk to you about cleaning products and so on but I think I'm, as they sometimes say, running out of steam.

WINKELMANN CJ:

Well what about cleaning products.

MR CRANNEY:

Oh no, about cleaning mechanisms.

WINKELMANN CJ:

Okay, this is who has to pay for cleaning.

MR CRANNEY:

Yes.

WINKELMANN CJ:

That's covered in your submissions, though, isn't it?

MR CRANNEY:

Well all I – I can tell you that the evidence clearly sets out the extremely rigorous company controlled mechanism for, whether it should be paid, and what, the three different categories of mess, or four that you can claim for, the different prices for each one, the need to file photographs et cetera, but I don't think it's going to take us much further at this stage. So unless I've missed one of your Honour's questions?

WINKELMANN CJ:

No, you haven't.

MR CRANNEY:

I can leave it there.

WINKELMANN CJ:

Thank you Mr Cranney.

MR WICKS KC:

Your Honours, I've got six brief points in reply. Firstly, Mr Cranney took you to the Uber Pro terms and conditions and the include matters such as points for logging on and accepting trips at certain times of the day or week, and that's really the crux of it. Uber cannot direct drivers when to drive like employers can. So Uber, as I said yesterday, has to incentivise drivers to drive at particular times to ensure supply meets demand, and there are real material advantages to making the most of those incentives. There has to be for Uber Pro incentives to actually incentivise but it doesn't, in my submission, mean it is control.

The second point Mr Cranney in his submissions has made some broad generalised statements about Uber drivers as a whole economic position, or their immigrant status, but of course there's no evidence beyond the four drivers involved in this case.

Thirdly, in relation to *Aslam*, a very short brief point just to emphasise the important distinction is that *Aslam* was only reasoned against the "extended worker" definition.

The fourth point, and if I could have document 201.0073, and this was the evidence, I can't recall the witness, Ms Rosentreter I think, who took one of the four drivers as an example and set out an analysis through to about paragraph 52 down, number of hours, how much they were paid, and then reached a conclusion based on her, I would describe as back of the envelope analysis, that his earnings with Uber were less than the minimum wage. At this point in time I just want to say that first of all the hourly rate initially reached, or the gross rate of $21.87, ultimately is going to be affected by whatever the tax rate applies after deductions et cetera –

WINKELMANN CJ:

But you don't have any evidence that can point to us to suggest that a competent driver will earn the minimum wage, or above?

MR WICKS KC:

Well there's no, the only evidence analysing what a driver is said to earn, or this driver is said to earn, is this passage in the evidence. But there are a number of factors in this analysis that we don't know exactly what his expenses were. There's a broad range of between 25 to 50% applied.

WINKELMANN CJ:

Has Uber ever – because this is an international organisation that's all over the world – has Uber ever said this is what our drivers earn?

MR WICKS KC:

Yes it has, and there's some evidence in this case if I remember rightly that in Uber's advertising, if you like, to attract drivers, it refers to its assessment that drivers can earn, I think it was on average, the number that rings a bell is 30-odd, I'd need to find…

WILLIAMS J:

Mr Cranney was offered $33 an hour.

WINKELMANN CJ:

For employment though, anyway.

MR WICKS KC:

No, it wasn't employment, no.

WINKELMANN CJ:

Oh, it wasn't employment?

MR WICKS KC:

Mr Cranney referred to it as employment, which is his wish, but in reality that Uber in advertising for drivers to sign up to the platform –

WINKELMANN CJ:

Is that before expenses?

MILLER J:

There is some evidence of that, and then there's evidence that they then cut the rates. Part of the problem the drivers were complaining about in their evidence is they kept having to keep the treadmill going faster and faster in order to get anywhere near what Uber had originally promised them.

MR WICKS KC:

And in that same document that Mr Cranney took you to, Uber also put up the fee it charges a rider for cancelling a trip by something like $5. So it swings both ways. Document 304. –

WINKELMANN CJ:

Wasn't that just the same way? If the fee that a driver is charged for –

MR WICKS KC:

No, no, that's the rider.

WINKELMANN CJ:

Oh the rider, okay.

MR WICKS KC:

So if a rider's charged a cancellation fee in that same –

WINKELMANN CJ:

Not the driver. So the driver is not charged anything when they're cancelling, okay.

MR WICKS KC:

No, no, in that same document it also said that Uber was doubling the cancellation fee to a rider from $5 to $10.

WILLIAMS J:

It does sound like a big swing and a little roundabout though.

1540

WINKELMANN CJ:

Marginal?

MR WICKS KC:

And we don't know what the impact of the changes to the rate were either, but…

WINKELMANN CJ:

No, we don't.

MR WICKS KC:

The document I have was referring to that I recalled seeing, which is perhaps unusual for me finding something so deep in the case, but 304.2392, and this I think must have been the offer Mr Cranney got: "You could earn NZD 33 per hour in Wellington. Get behind the wheel," and I'll leave your Honours to…

WILLIAMS J:

That included tips, I see.

MR WICKS KC:

I see that, yes. The minimum wage –

GLAZEBROOK J:

An hour what? Driving? Sitting on the app? Waiting? Driving to get someone?

MR WICKS KC:

And that's another issue, of course. The calculation in the evidence of Ms Rosentreter you were taken to is based on working from the moment a driver logs onto the app, and there's –

WINKELMANN CJ:

Well, that's fair enough, isn't it, since they haven't – they're constrained to be able to drive off at a moment's notice?

MR WICKS KC:

Well, if they will accept a job, but there are a number of potential variables that come into play, for example –

WINKELMANN CJ:

Well, they have to accept a job unless they're going to –

GLAZEBROOK J:

Well, they have to be offered it in the first place.

MR WICKS KC:

They have to be offered it in the first place.

WINKELMANN CJ:

And accept it.

MR WICKS KC:

They've got to log on but the circumstances in which they log on could be wide and varied. They could log on at home and be doing other things while they wait to see if a job comes through in their area. They could be doing another job –

WINKELMANN CJ:

But they've got 15 to 30 seconds to accept a job, haven't they?

MR WICKS KC:

They do but they could also be out working on another ride-share platform.

WINKELMANN CJ:

So if they were working on another ride-share platform they'd have to log off or else they'd be at risk of losing points because they've turned down a job?

MR WICKS KC:

Well, I think if your Honours will recall we went to yesterday a document that I took you to where a driver talked about multi-apping. In that same, just above that in that same document, there is a discussion by whoever authored the document about the choice whether you want to follow Uber's preferred path that you do more work for it or not, and the reality is –

WINKELMANN CJ:

But if you multi-apped you would be at risk of – you'd have to be signed in and you'd be at risk of turning down a job and you only have so many job turndowns before you become in peril of losing your status.

MR WICKS KC:

Yes, but you may also have made a decision because you want to be available across different apps or perhaps even work as a taxi driver, sitting on the side of the road, waiting for – you've got your own transport licence so you want to take hails or – I can't remember what you call now when a taxi's sitting in a rank – but you could also at that time have your Uber app on.

WINKELMANN CJ:

Yes, you're doing quite a good job of persuading me that you really couldn't do that at the moment, Mr Wicks, because if you have your Uber app on and you've got another job, you can't take the job that's offered to you.

GLAZEBROOK J:

Well, you'd have to log out of Uber.

WINKELMANN CJ:

Turn your app off, yes, exactly.

MR WICKS KC:

But you'd make the choice: "I'm going to log out of Uber now and I'm going to take this ride," or: "I'm going to log out of Uber and do my massage business." The point I'm making is that there are a number of circumstances that may arise

where a – because the drivers are, unlike *TNT* and *Leota*, the people in those cases were required to provide exclusive service to one entity. Here there's choice, and also, of course, Mr Rama was working part-time as a chef, so we've got –

GLAZEBROOK J:
Well, he's just not going to log on when he's in the kitchen, is he?

MR WICKS KC:
I don't know.

GLAZEBROOK J:
Well, one assumes, because he'd have to turn it down or say: "Sorry, I'm not going to give you your" –

MR WICKS KC:
I would be surprised if he's employed part-time as a chef because it was employment that he would be able to sit on the app while he's in the kitchen.

WINKELMANN CJ:
Well, no, he'd have to leap out the door and take a ride. There would be –

GLAZEBROOK J:
"Sorry, I'll just stop frying the steak."

MR WICKS KC:
I'm not suggesting that, but what the evidence was for Mr Rama was that he performed trips and deliveries around his cheffing commitments, custody of his son and rugby training. He also had the benefit with the Uber Eats, he could deliver meals while his son was in the car as well, and he drove three different cars and he was also at Platinum and Gold status at various times. So that was the evidence for Mr Rama which your Honours will find at 201.0279 and on…

WINKELMANN CJ:
201?

MR WICKS KC:

201.0279 to 201.0281. Another reference in relation to delivering meals while his son was in the car which was suitable for him was 201.0284, and driving three different cars is 302.0624. The point I wanted to make was that there just needs to be some, with great respect, caution with how Ms Rosentreter's analysis of what the hourly ended rate ended up being is in fact.

That's four points; two to go. The fifth point I wish to make just in relation to *TNT*, if section 6 was applied to that case we would accept that a different result is likely to arise, but there are key factual differences in that case and they are in *TNT* the company directed the route, there was branding on the vehicle and uniform worn. It required exclusive service so the individual, Mr Cunningham, was not to be engaged in the operation of any other goods or passenger services and he was also subject to a restraint of trade to enforce that.

The more recent courier case is *Leota* of 2020 and that's the case, your Honours will recall, we discussed yesterday and I don't think I need to go back to that, and there were some important factual distinctions in that case too.

Then the final point just picks up on one of the last exchanges with Mr Cranney around the order of the tests and I'd make this point: common intention is assessed at the time the parties entered into their relationship and so it's logical to start with common intention for that reason.

Unless your Honours have any questions of me, those are the six brief points in reply.

WINKELMANN CJ:

Thank you Mr Wicks for your brevity and succinctness and thank you counsel for your very helpful submissions. We will reserve our decision and now retire.

COURT ADJOURNS: 3.48 PM