

# Was Uber driver an employee or not? Gig economy job faces the employment test, 02 March 2021

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In a recent judgment, the Employment Court has considered the contentious issue of whether an Uber driver had employee status under the Employment Relations Act (the Act): *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230.

The status of Uber drivers has been the subject of a great deal of attention and litigation in many jurisdictions worldwide. This case represents the first time New Zealand's Employment Court has grappled with this issue.

## Background

Uber operates two smartphone applications: one for passengers (the Uber App) and one for drivers (the Driver App). Anyone can download either or both Apps. However, before a driver can use the Driver App they must enter into a services agreement with Uber. Under the standard services agreement, Uber agrees to provide drivers with services to enable them to receive on-demand requests for transportation services, and with a licence to use the Driver App.

Mr Arachchige originally drove for Alert Taxis under a franchise agreement. In 2015, he entered into a services agreement with Rasier NZ and Uber BV (both members of the Uber group of companies, collectively referred to as Uber). That services agreement relevantly provided:

- (i) Mr Arachchige was “*an independent provider of peer-to-peer passenger transportation services*”;
- (ii) By providing transportation services to passengers, a legal and direct business relationship was created between Mr Arachchige and the passengers;
- (iii) Rasier NZ's provision of the Uber services created a legal and direct business relationship between Rasier NZ and Mr Arachchige. Uber BV's licence to him of the Driver App created a legal and direct business relationship between Uber BV and him; and
- (iv) Neither Rasier NZ nor Uber BV was deemed to direct or control Mr Arachchige generally in his performance under the agreement, including in connection with his provision of transportation services.

Between May 2015, when Mr Arachchige started as an Uber driver, until June 2019, he logged into the Driver App at varying times of the day, on different days of the week, for different amounts of time — some days on multiple occasions and other days not at all. He provided a varying number of trips each time he logged into the Driver App, including providing no trips on some occasions. In total, he accepted 5,623 of the trip requests sent to him via the Driver App, rejected 448 trip requests, and cancelled 156 of the trip requests he had received and accepted.

In June 2019, Uber deactivated Mr Arachchige's access to the Driver App. Uber claimed that the deactivation followed its investigation into a passenger complaint about Mr Arachchige. Mr Arachchige said he had no knowledge of the details of the complaint and was given no opportunity to respond prior to the deactivation.

Mr Arachchige subsequently raised a personal grievance for unjustified dismissal under the Act. The Employment Court first addressed whether he was in fact an employee for the purposes of the Act, and thereby capable of bringing a personal grievance claim.

In considering this issue, the Employment Court noted that the question of the employment status (or otherwise) of Uber drivers had arisen in high-profile cases in other jurisdictions, particularly the UK, US, Canada, Australia and France. The Court noted that while certain cases in those jurisdictions had some similar facts and had identified factors that would likewise be relevant in New Zealand, ultimately Mr Arachchige's case needed to be determined on the evidence before the Court and pursuant to the appropriate legal tests under New Zealand law.

## Legal Test

The meaning of "employee" is defined in s 6 of the Act. It provides:

### **6 Meaning of employee**

*(1) In this Act, unless the context otherwise requires, employee–*

*(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*

*...*

*(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

*(3) For the purposes of subsection (2), the court or the Authority–*

*(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*

*(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship ...*

When conducting an analysis under s 6, the Court must examine the "real nature of the relationship" between the parties. The test is an intensely factual inquiry and requires the Court to consider "all relevant matters". The Court cited the Supreme Court judgment *Bryson v Three Foot Six Ltd*, in which it was held that "all relevant matters" includes:

- (i) the written and oral terms of the contract, which usually contain indications of the parties' common intention concerning the status of the relationship;
- (ii) any divergences from, or supplementation of, those terms and conditions, which were apparent in the way in which the relationship had operated in practice;
- (iii) the behaviour of the parties in implementing the agreement between them — how the relationship operated in practice is crucial to a determination of its real nature;
- (iv) features of control and integration, and whether the person has been effectively working on his or her own account; and
- (v) industry practice.

## The Court's Conclusions

Applying this legal test, the Court reached the following conclusions:

- (i) The services agreement did not require Mr Arachchige to work exclusively for Uber. He was not required to display any Uber logo or other signage and could work in competition with Uber if he wished.
- (ii) While some matters in the services agreement (such as qualification requirements and performance expectations) may be seen in employment agreements, such matters may be present in other types of agreements where the performance of the contract may reflect on the principal's reputation (such as franchise agreements).
- (iii) Even though Mr Arachchige had no power to negotiate terms over the standard services agreement, he was not particularly vulnerable or lacking comprehension of what he had agreed to.

(iv) Uber did not direct Mr Arachchige in connection with the provision of the transport services. Mr Arachchige determined whether, where and for how long he undertook services and provided his own equipment (including his vehicle, subject to Uber's basic licensing and Warrant of Fitness requirements).

(v) Mr Arachchige was responsible for his own tax obligations.

(vi) The Court stated that "*[n]otwithstanding Uber's characterisation of its business as a technology business, it would be artificial not to describe Uber as a passenger transport business in the wider sense. The requests from passengers for transportation come to Uber, which then passes those requests on to drivers. The drivers are integral to the way in which Uber's business operates – without the drivers there is no business*". Even so, Uber had very little control over the way in which its drivers like Mr Arachchige carried out their part of the undertaking.

(vii) There was no established industry practice that assisted in determining the status of Uber drivers.

The Court therefore found that the services agreement and how the relationship between Mr Arachchige and Uber operated in practice did not suggest there was an employment relationship. As a result, Mr Arachchige was not entitled to bring a personal grievance claim under the Act.

### **Comment**

The status of Uber drivers is a subject of significant legal interest internationally with different jurisdictions reaching different conclusions. While the outcome of this case is undoubtedly of interest to drivers affiliated with Uber or other ride-sharing platforms, as well as the industry and employers more generally, the Court stressed from the outset that the inquiry was "intensely fact-specific and only deals with Mr Arachchige's situation". The Court has taken a similar stance in recent "driver" cases involving s 6 issues, such as *Leota v Parcel Express Ltd*.

Counsel for Mr Arachchige has publicly confirmed that his client has decided not to seek leave to appeal, meaning this judgment offers the best available guidance on how these issues will be decided under New Zealand law. Time will tell if this decision provides clarity and certainty for the status of Uber drivers in New Zealand, and whether this case will be persuasive in any future litigation on such matters.