IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA645/2022
[2024] NZCA 403

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

Hearing:	19 and 20 March 2024
Court:	Goddard, Ellis and Wylie JJ
Counsel:	P F Wicks KC, K M Dunn and N L Walker for Appellants P Cranney and G Liu for First and Second Respondents P T Kiely and A M Kamphorst for Business New Zealand as First Intervener S R Mitchell KC and G V A Iddamalgoda for the New Zealand Council of Trade Unions as Second Intervener
Judgment:	26 August 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay costs to the respondents for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Goddard J)

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Overview — are Uber drivers employees?

[1] Are Uber drivers employees of one or more of the Uber companies[1] for the purposes of New Zealand employment law, as the Employment Court concluded?[2] Or are they, as Uber contends, independent providers of transportation services to "riders" and "eaters", with whom they enter into contracts using software and facilitation services provided by the Uber companies?

[2] The test for whether a worker is an employee for the purposes of the Employment Relations Act 2000 (ERA) is set out in s 6 of that Act. An employee is defined as a person "employed by an employer to do any work for hire or reward under a contract of service".[3] In deciding whether a person is employed under a contract of service, a court is required to determine the real nature of the relationship between them.[4] The court "must consider all relevant matters, including any matters that indicate the intention of the persons".[5] The court must not "treat as a determining matter any statement by the persons that describes the nature of their relationship": labels used by the parties in a written agreement (or in other contexts) are not decisive.[6]

[3] Uber operates two platform businesses in New Zealand, which it refers to as its "Rides" and "Eats" businesses. The "Rides" platform enables members of the public (riders) to obtain transportation services using the Uber app.[7] The Rides platform connects riders using the Uber app with drivers who use Uber's driver app.[8] The "Eats" platform connects members of the public, restaurants, and drivers to enable members of the public to use the Uber app to order food from a restaurant; a driver collects the food from the restaurant and delivers it to the "eater".

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1 The appellants are companies registered in either New Zealand or the Netherlands. They are members of a group of companies in which the parent company is Uber BV (the third appellant). We refer to the appellants as the Uber companies, and refer to the Uber group collectively as "Uber" or "the Uber group".

2 *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192, (2022) 19 NZELR 475 [EC judgment].

3 Employment Relations Act 2000, s 6(1)(a).

4 Section 6(2).

5 Section 6(3)(a).

6 Section 6(3)(b).

7 The Uber app is an application that runs on mobile devices, in particular mobile phones.

8 The Uber driver app, which we also refer to as "the driver app", "the Uber app" or simply "the app", is an application that runs on mobile devices, in particular mobile phones.

[4] Uber is one of a growing number of businesses that use online platforms to provide, or facilitate the provision of, services. The platforms provide information about and/or connect prospective purchasers and prospective providers of the relevant services.

[5] The platform economy[9] can involve new ways of working. As we explain in more detail below, there are many different ways of structuring interactions between a platform provider, service providers, and customers. The test in s 6 of the ERA must be applied with a realistic appreciation of how those new ways of working operate in practice. But the test remains the same. The courts cannot modify the test to respond to concerns about the vulnerability of platform workers who are not employees as defined in s 6. It is for Parliament to decide whether categories of workers who may be vulnerable, but who are not employees, should have some or all of the protections that employees enjoy under the ERA.

[6] Conversely, if a worker is properly classified as an employee having regard to the real nature of the relationship between that worker and their employer, it is not possible to contract out of the protections the ERA provides for employees merely because that employee is employed by or through an online platform provider. A platform economy worker who is properly classified as an employee is no less in need of the protections for which the ERA provides than any other employee, and no less entitled to those protections.

[7] The prohibition on contracting out of the ERA necessarily extends to contracting out by attaching inaccurate labels to an employment relationship. For the same reason that an employer cannot exploit an imbalance of power to require an

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9 The term "platform economy" is typically used to describe the various commercial activities associated with platforms, including both the provision of platform services and the provision of goods and services using online platforms. The term is almost always used in relation to online platforms. Platforms are not new — securities and commodities exchanges are longstanding examples of platforms to facilitate dealings between buyers and sellers. Such exchanges are now mostly online, and can be seen as forming part of the platform economy. A farmers' market — bringing together buyers and sellers of farm produce and related products — is another example of a platform, though not usually thought of as part of the "platform economy". The term "gig economy" is sometimes used to describe the provision of services by a worker to multiple customers, often on a one-off basis, through a platform. The worker is engaged by multiple people for separate "gigs" (like a musician playing gigs on a casual basis for different bands or venues), rather than having a single long-term employer.

employee to expressly contract out of the ERA protections, the employer cannot require an employee to impliedly contract out of those protections by agreeing to describe what is in truth an employment relationship as something else, or by agreeing to a contract that contains "window-dressing" terms designed to paint a picture of the relationship that differs from how it works in reality. That is why s 6 of the ERA requires a court to determine whether a person is an employee by reference to the real nature of the relationship between that person and the principal for whom they work.

[8] We accept Uber's submission that the approach adopted by the Chief Judge to determining whether four Uber drivers were employees differed in certain respects from the approach required by s 6 of the ERA, as explained in the authoritative guidance provided by the Supreme Court in *Bryson v Three Foot Six Ltd*.[10]

[9] As the Supreme Court explained in *Bryson*, s 6 of the ERA requires the court to focus on the realities of the parties' mutual rights and obligations as discerned from all relevant matters, including all written and oral contractual terms and divergences from or supplementation of those terms which are apparent from the way in which the relationship operates in practice. The real nature of the relationship, ascertained in this way, must then be assessed against the indicia of a contract of service as explained in *Bryson*. Those indicia include the extent of the principal's control of the worker, the degree of integration of the worker into the principal's business, and the "fundamental test" of whether the worker is carrying on their own (independent) business.[11]

[10] The Chief Judge's approach emphasised the vulnerability of the drivers. She asked whether s 6, construed purposively, was intended to apply to the parties' relationship when viewed realistically.[12] She gave less emphasis to the parties' contractual documentation than *Bryson* suggests is appropriate. She did not begin with the parties' mutual rights and obligations set out in that documentation, then consider any divergences from or supplementation of those terms and conditions which are apparent from the way in which the relationship has operated in practice. She did not

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10 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
11 At [32].
12 EC judgment, above n 2, at [17].

then proceed to the second stage of the inquiry and apply the common law control, integration, and "fundamental" tests affirmed in *Bryson*.

[11] The respondent unions argued that the *Bryson* approach was applied by the Chief Judge, albeit using a different structure and framed in different language. But we have concluded Uber is right to say that the Chief Judge's approach to s 6 was, in some respects, novel. It is difficult to escape the impression that the vulnerability of drivers vis-à-vis Uber, and a perceived need for them to enjoy the protections available to employees, played a significant part in the Chief Judge's conclusion that the drivers were employees. That approach risks eliding the role of the courts — interpreting s 6 in light of the guidance provided by the Supreme Court in *Bryson* — with the role of Parliament in determining whether some or all of the ERA protections should be extended to vulnerable workers who are not employees.

[12] At the urging of both Uber and the respondent unions, we have gone on to apply the s 6 test ourselves, guided by *Bryson*. We are satisfied that the four drivers were employed by one or more companies in the Uber group to do work for hire or reward under a contract of service at times when they were logged in to the Uber driver app. That is, they were employees of Uber companies at those times. Our reasons for this conclusion are set out in more detail below. Uber has been successful in its challenge to the approach adopted by the Chief Judge, but we agree with the result that she reached. The appeal must therefore be dismissed.

The issues for determination on appeal — an overview

[13] The respondent unions applied to the Employment Court for declarations of employment status on behalf of four Uber drivers: Mr Abdurahman, Mr Keil, Mr Rama, and Mr Ang (the four drivers). Five Uber companies were named as defendants.

[14] At the time this proceeding came before the Employment Court there had been one previous decision of the Employment Court in which an Uber driver, Mr Arachchige, was held not to be an employee.[13] As already mentioned, the

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

Chief Judge reached a different view. She concluded that the four drivers were employees of one or more companies in the Uber group.

[15] The Uber companies sought leave to appeal to this Court under s 214 of the ERA. Leave to appeal was granted on three questions of law:[14]

(a) Did the Employment Court err by misdirecting itself on the application of s 6 (the meaning of "employee") of the ERA?

(b) Did the Employment Court err by misapplying the test in s 6, or in the alternative was the Court's conclusion so insupportable as to amount to an error of law?

(c) Did the Employment Court err in finding that joint employment may arise in New Zealand simply as a result of a number of entities being sufficiently connected and exercising common control over an employee?

[16] Business New Zealand (Business NZ) and the New Zealand Council of Trade Unions (NZCTU) sought leave to intervene in the appeal. This Court accepted that both organisations might be able to assist the Court in considering how s 6 operates in the context of new ways of working involving online platforms. Leave to intervene was granted.

[17] The parties and the interveners filed written submissions on all three issues. However shortly before the hearing the appellants abandoned their appeal in respect of the third question concerning joint employment. We need say no more about that topic.

[18] The issues that remain to be determined are of great practical importance for Uber and for many thousands of Uber drivers in New Zealand. As the Chief Judge observed, employment status is the gate through which a worker must pass before they can access a suite of statutory minimum employment entitlements, such as the

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[14] *Rasier Operations BV v E Tū Inc* [2023] NZCA 216 at [14].

minimum wage, minimum hours of work, rest and meal breaks, holidays, parental leave, domestic violence leave, bereavement leave and the ability to pursue a personal grievance. Employment status is also the gateway to union membership and collective bargaining, and the gate through which a labour inspector must pass before taking action on behalf of a worker, or against a workplace.[15]

[19] We understand that some 900 Uber drivers who are members of First Union Inc have filed minimum entitlement proceedings in the Employment Relations Authority, all of which depend on the employment status of Uber drivers.

[20] The issues before us also have broader implications for how the s 6 test is applied in relation to new ways of working facilitated through online platforms.

Employment Court judgment

[21] Uber mounted a broad challenge to the analytical framework adopted in the Employment Court judgment (EC judgment), arguing that both the general observations made by the Chief Judge and the way in which she went about applying s 6 of the ERA involved misdirections and/or errors of law. The unions responded that Uber had misconstrued or taken out of context the aspects of the EC judgment that Uber was criticising, and that other sections of the judgment reflected an orthodox approach to the interpretation and application of s 6 of the ERA. Read as a whole, the unions submitted, the EC judgment was consistent with s 6 and the reasoning in *Bryson*.

[22] The nature of those arguments means that we need to set out in some detail the Chief Judge's reasoning.

The Chief Judge's approach to the s 6 ERA test

[23] The Chief Judge began by identifying the challenges for employment law posed by fast-moving changes to the way in which work is done. She observed that, although the New Zealand Government is giving consideration to legislative options

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15 EC judgment, above n 2, at [4].

for dealing with some of these issues, the present case must be addressed within the current parameters of the law.[16]

[24] Whether a person qualifies as an employee is a question that has, the Chief Judge said, assumed increased importance in light of the growing fragmentation, casualisation, and globalisation of work and workforces in New Zealand. New ways of working have generated a degree of uncertainty about the continued utility of the established tests for determining employment status.[17] The Chief Judge framed the issue in these ways:

> [6] Ultimately the issue comes down to statutory construction — to what extent does the definition of employee contained within s 6 of the Employment Relations Act 2000 capture new ways of working? If, as I understood the defendants to say, the definition is simply designed to ensure that traditional employees are not deliberately miscategorised as independent contractors, it is likely that the gateway will become increasingly narrowed over time. If the definition, properly interpreted, has a broader purpose, the gateway will likely admit a more diverse range of workers.
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> [7] As the Court of Appeal has stated in the context of interpreting relationship property legislation [in *Reid v Reid*]:[18]
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> > Although the Act operates upon "property" as a subject-matter the law it lays down is not a part of the law of property in any traditional sense. Instead it is social legislation aimed at supporting the ethical and moral undertakings exchanged by men and women who marry by providing a fair and practical formula for resolving the obligations that will be due from one to the other … In that respect it can be regarded as one facet of the wider legislative purpose of ensuring the equal status of women in society.
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> [8] The Employment Relations Act, within which s 6 sits and plays a gatekeeper role, is similarly social legislation, serving a purpose well beyond the particular parties to the particular relationship. As the Court of Appeal made clear in *Reid v Reid*, such legislation must be approached in a way which recognises and supports the broader legislative purpose, rather than undermines its place within the fabric of society. Section 6, and the satellite provisions conferring minimum entitlements which sit around it, are designed to be protective; to regulate the labour market and ensure the maintenance of minimum standards. They reflect a statutory recognition of vulnerability based on an inherent inequality of bargaining power, that certain workers are unable to adequately protect themselves by contract from being underpaid or not paid at all for their work, from being unfairly treated in their work and from being overworked.

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16 At [3], citing Tripartite Working Group on Better Protections for Contractors *Report to the Minister for Workplace Relations and Safety* (December 2021).

17 EC judgment, above n 2, at [4]–[5].

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

> [9] It is this purpose which must be looked to when assessing whether an individual is or is not an employee, a point underscored by s 5 of the Interpretation Act 1999 and the Supreme Court's observations in *Commerce Commission v Fonterra Co-Operative Group Ltd* as to the relevance of legislative social objective to the interpretative exercise.[19] In other words, the task for the Court for the purposes of s 6 is to ascertain whether the individual is within the range of workers this social legislation was intended by Parliament to extend minimum worker protections to, including in the context of a rapidly evolving labour market.

[25] The Chief Judge noted that the Supreme Court decision in *Bryson* is the leading authority on s 6. She considered that although the Supreme Court set out a number of common law indicia for assessing employment status (control, integration, and the fundamental nature of the relationship), those indicia were not prescriptive. The Chief Judge did not consider that *Bryson* requires a narrow approach to be adopted when construing s 6, or relegates its application to more traditional workplace relationships.[20]

[26] The Chief Judge summarised her approach to the application of s 6 to new ways of working as follows:[21]

> [16] In summary, differentiating between workers who are employed and those who are not is not susceptible to a bright line test. Returning to fundamentals is, in my view, particularly helpful when dealing with new and developing ways of working, in the context of the increased fragmentation of workplaces and the growth of atypical working arrangements. Employment relations legislation calls for an interpretative approach which acknowledges and advances the underlying social purposes of the statute. The Employment Relations Act recognises and protects employment relationships and provides a gateway to the constellation-like suite of minimum standards legislation, via s 6. It is these features which determine the prism through which any particular relationship is to be assessed.
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> [17] In a nutshell the question to be asked and answered is whether s 6, construed purposively, was intended to apply to the relationship at issue when viewed realistically.

[27] The Chief Judge referred to decisions about the status of Uber drivers in overseas jurisdictions, including the United Kingdom Supreme Court decision in

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

20 EC judgment, above n 2, at [13]–[14].

21 Footnotes omitted.

Uber BV v Aslam.[22] She considered that those authorities provided a useful perspective. But the Chief Judge noted that the Supreme Court decision in *Bryson* is binding and must be applied. And each case must be decided on its own merits by applying the applicable law to the facts.[23]

[28] The Chief Judge proceeded to apply the law as she had explained it to the facts of the present case. She considered that the following matters were relevant to assessing the real nature of the relationship in the present case (with "features of direction, control and integration … infused in each"):[24]

> (a) the nature of the Uber business and the way it operated in practice;
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> (b) the impact of the Uber business model and its operation on the [four] drivers;
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> (c) who benefitted from the work undertaken by the [four] drivers;
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> (d) who exercised control over the [four] drivers' work, the way in which it was conducted and when and how it was conducted;
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> (e) any indications of intention, including what can be drawn from the nature, terms and conditions of the documentation between the parties; and
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> (f) the extent to which the [four] drivers identified as, and were identified by others as, part of the Uber business.

[29] In our summary of the Chief Judge's analysis we adopt the headings used in her judgment, which broadly correspond to the six topics listed above.

The nature of the business

[30] The Chief Judge accepted that the way in which the Uber business model operates meant that a number of the classical hallmarks of a traditional employment relationship were missing.[25] So, for example, the drivers were not obliged to be present in a physical workplace at particular times to undertake their work on demand, or on stipulated days. They could log in and out of the driver app, take time off, and work any number of hours they chose (subject to regulatory limitations). However the

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22 *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209.
23 EC judgment, above n 2, at [18]–[20].
24 At [25].
25 At [32].

Chief Judge considered that although the Uber companies were not operating a traditional employment model, Uber's characterisation of its role as "merely-a-facilitator" was not supported by the evidence — in particular, evidence about the high level of control and subordination which characterised Uber's relationship with drivers.[26]

Impact of Uber's operating model

[31] The Chief Judge considered that the evidence was clear that it is Uber which dictates the contractual terms under which the drivers perform services. Drivers could not use the driver app unless they agreed to the terms and conditions that Uber had set, which Uber can and does vary. "Those terms and conditions reinforce the high degree of control and subordination in the relationship between Uber and each of the drivers."[27] The Chief Judge identified a number of features of the relationship that shed light on this issue:

(a) Access to the driver app is non-transferable. The drivers were obliged to provide personal services, and were not permitted to share their accounts.[28]

(b) Uber decides the cost of each trip and charges that to the rider. The rider pays Uber the fare for the trip. Uber pays the driver the fare minus a service fee which Uber determines, and which it deducts before payment is made to the driver. Uber sets each of the various components that make up the fare. The driver has no control over setting the fare, or determining the calculation methodology. Uber retains the right to change the fare calculation at any time in its sole discretion, to review or cancel a fare, and to make a full or partial refund to a rider.[29]

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26 At [32].
27 At [33].
28 At [34].
29 At [35].

(c) Fare adjustments may be made by Uber if a trip has been "significantly different" from the route it has estimated. It is Uber that decides whether a trip is significantly different, and adjusts the fare charged accordingly. If a driver wishes to have a fare reviewed, that has to be done via Uber and is dealt with in Uber's discretion.[30]

[32] The Chief Judge considered that Uber's hands-on involvement in fare setting and review, and retention to itself of the ability to decide outcomes (and accordingly how much a driver would earn from a particular transaction), stands in contrast to its characterisation of the rider as being in a direct contractual relationship with the driver.[31] The theoretical ability of a driver to charge a lower fare was not relevant to the s 6 analysis: it did not reflect a driver's ability to build their own business, because drivers are constrained in their ability to establish an ongoing relationship with riders, and the reduction comes out of what would otherwise be paid to the driver.[32]

[33] The Chief Judge noted that Uber applies a pricing system called "dynamic pricing", also referred to as "surge" and "boost" for rides and meal deliveries respectively, during certain times when Uber increases the fare or delivery fee prices by applying a multiplier. Uber determines when dynamic pricing applies, and determines the multiplier applied. Drivers have no control over this aspect of the business.[33]

[34] The Chief Judge summarised the central role played by Uber's "Community Guidelines" in the performance management system for drivers. The Guidelines set out standards of behaviour with which drivers are required to comply. Uber drafted the Guidelines and amends them from time to time in its sole discretion. Uber has the right to discipline drivers for any breach of the Guidelines, including by revoking access to the app.[34]

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30 At [36].
31 At [37].
32 At [38].
33 At [39].
34 At [41].

[35] Uber can and does deactivate drivers, logging them off the system (in some cases without warning), including if they have not accepted rides for a period. Reinstatement is at Uber's complete discretion and requires attendance at a training programme (at the driver's expense) and then successfully maintaining appropriate ratings for a period of time (determined by Uber) after training has been completed. Uber also reserves to itself the right to issue warnings, which operate in a three-strike manner.[35]

[36] The Chief Judge considered that it was clear that Uber exercises significant control via its "reward" schemes, incentivising work during peak times and the acceptance of rides. The top tier, "Diamond" status, is achieved by accepting a certain number of rides and achieving a particular rating record. It is only when a driver has achieved Diamond status that Uber discloses to the driver where a rider wishes to travel to before the driver accepts the ride. Drivers below Diamond status are not told by Uber where the destination is until they arrive at the pick-up point. As the Chief Judge noted, knowing the journey that a rider wants to take in advance has financial advantages for a driver, as they are able to predict how profitable the ride is likely to be before they accept it.[36]

[37] The Chief Judge considered that against this backdrop it is difficult to accept the Uber companies' submission that "encouragement" did not equate to control, and that the incentives offered provided access to benefits which a driver was free to take or leave. The reality, the Chief Judge said, was that Uber exercised significant control over each of the drivers. While the means through which control was exercised are not generally associated with the traditional workplace, the underlying point remained the same: Uber was able to exercise significant control because of the subordinate

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35 At [41].

36 At [42]. The driver app also has a feature called "driver destinations" that drivers can use, which allows them to only receive ride requests in the general direction of where they want to go. For example, a driver could use this feature at the end of a driving session if they want to go home and be matched with a ride request to a location nearby. Drivers can use this feature twice a day.

position each of the drivers was in. Uber's operating model was designed to facilitate, and did facilitate, that control.[37] So, the Chief Judge said:[38]

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

In whose interests is the work done?

[38] The Chief Judge considered that it was helpful to stand back and consider "who was working for whose interests", which she described as "effectively the fundamental test referred to in a number of cases over the years".[39]

[39] The Chief Judge said that the proposition that drivers were working in their own businesses and were able to increase their earnings by working longer hours (subject to driving hour regulations) did not survive scrutiny in light of the evidence.[40] Uber sets the fares, collects the money, and pays the drivers an amount it determines. Drivers have no ability to set their own rates or charge more than the amount set by Uber. They exercise no control over the fare for individual trips. They are prohibited from contacting any passenger or using personal passenger information made available via the driver app or otherwise. They have little or no ability to improve their economic position through professional or entrepreneurial skill. The opportunity to grow their own business is effectively non-existent. The Chief Judge considered the only way they could increase their earnings is by working longer hours while meeting Uber's requirements.[41]

[40] The Chief Judge considered that the connection between Uber and the driver, and Uber and the rider, is reflected in the way in which soiling of a vehicle is dealt with. If a rider soils a vehicle during a ride, a driver can claim a cleaning fee. A cleaning fee is not recoverable by the driver directly from the rider. Rather the

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37 At [43].
38 At [44].
39 At [45], citing *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (CA); *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 184–185; and *Bryson*, above n 10, at [32]–[33].
40 EC judgment, above n 2, at [46].
41 At [47].

driver must seek recovery from Uber, which in its sole discretion determines whether to make such a payment and, if it does, charges the fee to the rider.[42]

[41] There was no evidence before the Employment Court that drivers advertised or promoted their own businesses via the work they did while logged into the driver app. They were not free to organise their work other than in respect of when and if they logged into the driver app and the rides they accepted or declined, which the Chief Judge observed were choices made under the shadow of significant adverse consequences determined and unilaterally imposed by Uber.[43]

[42] The Chief Judge summarised her conclusions in relation to whether drivers operate their own businesses as follows:[44]

> [50] These features of the relationship stand in marked contrast to those that usually apply to a person who operates their own business. A person who operates their own business is generally able to run it as they see fit, including, for example, by setting prices, marketing, service standards, the way in which complaints are dealt with and bringing in substitute labour.
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> [51] Stripped back to its fundamentals, Uber is the only party running a business. It is in charge of marketing, pricing and setting the terms and nature of the service provided to riders, restaurants and eaters. The Uber business is reliant on drivers providing personal labour for the benefit of its transport service, to be performed as dictated by Uber. The [four] drivers were required to provide their labour with due skill, care and diligence, and to maintain high standards of professionalism, service and courtesy — all set and enforced by Uber.
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> [52] In other words, the [four] drivers worked for Uber's business, not their own, transporting passengers (and food) for Uber. Uber does not simply connect individuals (the driver and the rider; the driver, the restaurant and the eater). It creates, dictates and manages the circumstances under which *its* business is carried out, and driver labour is deployed in order to grow that business. All of which points firmly towards an employment relationship.

Flexibility and choice

[43] The Chief Judge noted that drivers were not required to log into the driver app at any particular time, and could work as long or as little as they liked. There was no

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42 At [48].
43 At [49].
44 Footnote omitted. Emphasis in original.

obligation to offer and accept work. The Uber companies submitted these factors pointed away from an employment relationship.[45]

[44] The Chief Judge did not see the concepts of "flexibility" and "choice" as particularly helpful in the present case. Flexibility is a feature of modern employment relationships. The evidence disclosed that the degree of flexibility and choice said to be enjoyed by the drivers under the Uber operating model was "largely illusory".[46]

[45] The Chief Judge considered that the way the model works in practice effectively increases the level of control (by Uber over the drivers) and the degree of subordination (of the drivers to Uber), including in terms of psychological impact.[47] She did not see the argument that Uber was a mere facilitator as persuasive. While it is possible to be merely a facilitator, it is also possible to be a facilitator *and* an employer: being a facilitator does not necessarily affect the application of the s 6 ERA test.[48]

[46] The reason why control was exercised by Uber was not material. The focus of the control test is on whether or not control is able to be exerted and is exerted, not why it is exerted.[49]

[47] The Chief Judge considered that although drivers could decline or accept work offered by Uber at will, those decisions were not truly free: they came with consequences unilaterally imposed by Uber that, among other things, limited the driver's pay.[50]

[48] In summary, the Chief Judge said, the evidence reflected that each of the drivers was in a relationship with Uber characterised by a significant degree of subordination and dependency. Uber exerted strict control, and effectively managed the way in which and when work was done, through various performance processes

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45 EC judgment, above n 2, at [53].
46 At [54]–[55].
47 At [55].
48 At [57].
49 At [58].
50 At [59].

and techniques, and via the tight restrictions placed on communications drivers can have with riders.[51]

Integration into the Uber business

[49] The indicia of integration seen in some more traditional employment relationships, such as uniforms, vehicle signage, or business cards, were absent. The drivers did not work in an office with other workers. But each of the drivers identified themselves as being drivers for Uber, and part of the Uber business, when they logged into the driver app and carried out their work.[52] The Chief Judge accepted the drivers' evidence that the riders they interacted with identified them as Uber drivers, and that they saw themselves in the same way.[53]

[50] The Chief Judge noted that each of the drivers provided their own vehicle. They paid their own running costs, including insurance, warrants of fitness, and fuel. They were also required to have access to a smart phone with mobile internet data in order to use the driver app. In some cases, the provision of capital equipment and the tools of a trade by the worker, rather than the enterprise, may point away from an employment relationship. In some cases, capital equipment represents a significant investment on behalf of the worker which may indicate they are running their own business.[54] But the Chief Judge considered that the reality is that many adults in New Zealand have access to a car and a smartphone, as these are useful in situations outside providing professional transportation services.[55] She was not satisfied that the evidence concerning provision of a vehicle was other than neutral. It did not reflect the sort of investment which might indicate drivers were running their own businesses.[56]

[51] In totality, the Chief Judge said, the relationship each of the drivers had with Uber was very much one of economic dependency.[57] She saw the fact that the four

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51 At [63].
52 At [65].
53 At [66].
54 At [68], n 56, the Chief Judge referred to *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 2 QB 497 as an example of this: the worker had to supply his own truck.
55 EC judgment, above n 2, at [68].
56 At [68]–[69].
57 At [71].

drivers were able to work varied hours as being of limited relevance to the s 6 inquiry. She noted that she had not overlooked the fact that the workers were not solely engaged in work as Uber drivers: some signed up on another ride-sharing app, one worked part-time as a chef, and another did part-time massage work. That did not materially assist the analysis: many workers now work for multiple employers juggling professional jobs, personal and other commitments.[58]

[52] The Chief Judge accepted that each of the drivers was integrated into the Uber business during the times they were driving. When driving for Uber they were dependent on Uber and Uber was dependent on them.[59]

The documentation

[53] The Chief Judged noted that s 6(3)(a) requires the court to consider any indications of the intention of the parties, which may include the written and/or oral terms of any contract or agreement, and any statement by the parties describing the nature of their relationship.[60] The intention of the parties is to be viewed objectively.[61] None of the Uber companies subjectively intended to enter into an employment relationship with any of the drivers. But, the Chief Judge said, "it is not uncommon in employment cases for one or other or both parties to have no idea what sort of relationship they are entering into, or for the drafting party to hope that by characterising the relationship in a particular way the result will follow".[62]

[54] The documentation was prepared by Uber without any input or negotiation with any of the four drivers. It was presented on a take it or leave it basis. The contracts are dense, long, "riddled with legalese", and typed in small font. The drivers were given the documentation to sign in the context of a process which was rushed. They were not advised or encouraged to get legal advice. None of the four drivers had read the documentation before signing it. The documentation was amended from time to time by Uber. Amendments were communicated via the driver app: they arrived on a driver's smartphone on a small screen and the driver was

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58 At [72].
59 At [73].
60 At [74].
61 *Bryson*, above n 10, at [20].
62 EC judgment, above n 2, at [75].

required to press an "Accept" button if they wanted to carry on using the driver app, often within tight time constraints.[63] The Chief Judge considered that the documentation in this case, the way it was drafted, and the way in which it was presented to the drivers as a fait accompli with no realistic opportunity to negotiate the terms and conditions under which they were expected to work, all graphically reinforced the imbalance of bargaining power between the parties and the subordinate position of the drivers.[64]

[55] The Chief Judge accepted that the documentation described the relationship in the way contended for by Uber, but did not agree that the way it is labelled accurately describes the relationship. Rather, the documentation had been constructed in a way that suited Uber's business interests. The Chief Judge considered that the context of the relationship and how it operated in practice painted a different picture.[65] Uber's structural complexity was a matter for it. But, she observed:[66]

> … the applicable employment laws in New Zealand do not allow [Uber] to have its cake and eat it too. If it did the strong social purpose imbedded in the [ERA] would be seriously undermined.

[56] The Chief Judge returned to what she had earlier identified as the question to be asked and answered: was s 6, construed purposively, intended to apply to the relationships at issue when viewed realistically? The Chief Judge's answer was "Yes".[67]

[57] The Chief Judge considered that a close examination of the extensive evidence given in this case led to the firm conclusion that the drivers were employees. Each of them was in an employment relationship when driving for the benefit of the Uber businesses.[68]

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63 At [76].
64 At [78].
65 At [79].
66 At [80].
67 At [81].
68 At [82].

Employer identity

[58] After reaching that conclusion, the Chief Judge considered which of the Uber companies were the employer(s) of the drivers. That turned on the period during which each of the drivers worked for each of the Uber entities, and the different entities with which each driver had contracted. The Chief Judge held that the real nature of the employment in this case, for a number of the drivers, was joint employment by two companies in the Uber group. So, for example, Mr Abdurahman was jointly employed by Uber BV and Rasier New Zealand Ltd (Rasier NZ) between June 2020 and 16 February 2022.[69]

Conclusion

[59] The Chief Judge concluded that each of the drivers was in an employment relationship when carrying out driving work for Uber, and was entitled to a declaration of status accordingly.[70]

The *Arachchige* decision

[60] The Employment Court had, as already mentioned, previously held that an Uber driver was not an employee. In *Arachchige v Rasier New Zealand Ltd* Judge Holden found that the driver agreement was not in the form of, and did not operate as, an employment agreement.[71] The Judge considered that the agreement "is consistent with the assertion by [Uber] that it provides a technology business that connects drivers with [Uber's] lead generation service to enable drivers to receive requests for transportation".[72] She found, on the basis of the evidence before her, that the relationship operated in practice in line with that agreement. It was for Mr Arachchige to determine what vehicle to use, when he would carry out the services, and where he would do so. "None of that is consistent with an employment agreement."[73]

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69 At [90]–[92].
70 At [93]. Their employers for each of the relevant periods were as identified at [92].
71 *Arachchige*, above n 13.
72 At [45].
73 At [48].

[61] The principal argument for Mr Arachchige to be an employee was the lack of control that he had over building a customer base and over determining what fare to charge. Nevertheless, the Judge held that there were other ways in which Mr Arachchige could improve the profitability of his business: "where and when he carried out driving work, so he could choose to make the most of peaks in demand; and what car, phone, data plan, insurance and other business support he might use. [He] could also share the vehicle with another person to reduce outgoings".[74]

[62] The Judge considered that it would be artificial not to describe Uber as a passenger transport business in the wider sense. But the way the business has been structured separates out the services that Uber provides, both to passengers and to drivers, from the way in which the work is undertaken. "[Uber] had very little control over the way in which Mr Arachchige carried out his part of the undertaking."[75]

[63] The Judge concluded that while there are aspects of the relationship that may point to employment:[76]

> … 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.

[64] The decision in *Arachchige* highlights the features of the relationship between Uber and Uber drivers that point away from employee status. We discuss those in more detail below. But as the Chief Judge noted in the present case, each case must be dealt with on its own merits by applying the law to the facts: the factual context disclosed by the extensive evidence in the present case appeared to differ from that in *Arachchige*.[77] Likewise on appeal we must consider the evidence given in the present case. And we must take as our starting point the findings of fact made by the

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74 At [52].
75 At [54].
76 At [56].
77 EC judgment, above n 2, at [20], n 33. The *Arachchige* case occupied three days of hearing time in the Employment Court whereas the present case occupied eleven.

Chief Judge, in the absence of any error of law in connection with those findings. The right of appeal to this Court is confined to questions of law.[78]

Relevance of decisions in other jurisdictions

[65] The employment status of Uber drivers has been considered by courts in a number of other jurisdictions. We will refer to some of the decisions of those courts in our analysis below. But we must answer the questions before us by reference to New Zealand employment law, and the evidence before the Employment Court in the present case about the arrangements in place between Uber and Uber drivers in New Zealand during the relevant period. The arrangements between Uber and Uber drivers, and the regulatory context for those arrangements, differ in a number of respects between different countries. Those arrangements have also evolved over time.

[66] We are also conscious that in some of the overseas cases, the issue for decision was different. In particular, the decision of the UK Supreme Court in *Aslam* was concerned with whether Uber drivers were "workers" under the relevant UK legislation, rather than whether they were "employees".[79] Under the UK legislation, "worker" is an intermediate category that brings with it some but not all of the protections afforded to employees.[80]

[67] We agree with the Chief Judge that *Aslam* provides a useful perspective on some issues.[81] So do some of the other overseas authorities. But for the reasons outlined above, none of the overseas decisions is precisely on all fours with the present case.

Question one: Did the Employment Court err by misdirecting itself on the application of s 6 (the meaning of "employee") of the ERA?

[68] We begin with Uber's challenge to the way in which the Chief Judge approached the s 6 ERA test.

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78 Employment Relations Act, s 214.
79 *Aslam*, above n 22, at [39]–[42].
80 At [34]–[38]. See also Employment Rights Act 1996 (UK), s 230.
81 EC judgment, above n 2, at [19].

Submissions for Uber

[69] Mr Wicks KC submitted that the Judge misdirected herself on how to approach the application of s 6 of the ERA in a number of respects.

[70] He said that the Chief Judge was wrong to focus on the vulnerability of drivers, and whether the underlying social purpose of the ERA extends to workers in their position. The Chief Judge was right to say that s 6 is a "gateway provision". But the only people who should come in that gate are people who are in reality employees. The social purpose of the ERA is to protect people who are properly classified as employees, not to protect vulnerable workers who do not meet that test.

[71] Mr Wicks accepted that the labels in the agreements between Uber and the drivers do not determine the case. Indeed, he said in the course of argument that those labels can be put to one side. But the Chief Judge erred, Mr Wicks submitted, by failing to take as her starting point the agreements between Uber and the drivers, and the substantive rights and obligations for which those agreements provided. To the extent that the contracts did not reflect the realities of the relationship, those realities should be taken into account. But the question the Chief Judge should have asked is whether the contract between the parties is in reality a contract of service, putting labels to one side.

[72] In response to questions from the Court, Mr Wicks reframed the test by submitting that the Court should identify the parties' mutual rights and obligations as a matter of reality, and ask whether those rights and obligations are consistent with the rights and obligations that are characteristic of a contract of service.

[73] Mr Wicks emphasised that the purpose of s 6(2) is to prevent form from trumping substance by stopping some employers labelling individuals as contractors, to avoid responsibility for employee rights such as holiday pay and minimum wages. It is in effect an anti-avoidance provision. That underscores the need to focus on the parties' mutual rights and obligations as a matter of reality.

[74] Mr Wicks went on to suggest that the question the Court should ask is whether the intention of each party was to enter into an employment relationship. In response

to questions from the Court, Mr Wicks accepted that the focus should be on the parties' common intention. He also accepted that the common intention should be inferred from objectively ascertained facts known to both parties. However he added that the authorities suggest that matters such as the education and previous work experience of a driver could be relevant when applying the s 6 test, even if those matters were not known to Uber.[82]

[75] Mr Wicks was also critical of the way in which the Chief Judge approached the assessment of the real nature of the relationship by reference to the six factors listed at [28] above. He submitted that it was an error of law to fail to follow the approach adopted by the Supreme Court in *Bryso*n, which determined the real nature of the relationship by reference to the established tests of control, integration, and the "fundamental test" of whether the contracted person has been effectively working on his or her own account.[83]

[76] Mr Wicks was especially critical of the Chief Judge's reframing of the fundamental test by asking "who was working for whose interests".[84] This, Mr Wicks submitted, was not the fundamental test approved by the Supreme Court in *Bryson*. It failed to engage with the critical question of whether drivers were effectively working on their own account, in their own businesses.

Submissions for respondent unions

[77] Mr Cranney, who appeared for the respondent unions, submitted that the Chief Judge correctly approached the application of s 6 of the ERA as explained in *Bryson*. *Bryson* does not require a court to consider the contracts first, followed by the common law tests and then any additional factors. In this case, he said, the written terms can only be understood by considering how they operate in practice. Thus, he submitted, the Chief Judge did not err in the order in which she addressed the issues, and did not depart in any material respect from the approach approved by the Supreme Court in *Bryson*.

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82 He did not explain how those propositions could be reconciled. We address the evidence relevant to the parties' intention below.

83 *Bryson*, above n 10, at [32].

84 EC judgment, above n 2, at [45].

[78] Mr Cranney said that Uber had misconstrued the Chief Judge's use of the concept of worker vulnerability. Most of the discussion of that topic in the EC judgment was a response to a submission by Uber to the effect that s 6 was designed to ensure that traditional employees are not deliberately miscategorised as independent contractors. In the context in which they were made, the comments were orthodox, and the Chief Judge was right to refer to the vulnerability issue. Even if there was an error, it made no difference to the result.

[79] Mr Cranney accepted that parts of the judgment could be read as suggesting that vulnerability is part of the s 6 test. However the issue of vulnerability was raised in the context of Uber's submission that s 6 is inapplicable to the "gig" economy. The Chief Judge was dealing with, and rejecting, Uber's submission that s 6, construed in light of its purpose, was not intended to apply to new and developing ways of working involving gig and platform work. Her observations about vulnerability should not be understood as extending the scope of the s 6 gateway.

[80] In response to questions from the Court, Mr Cranney accepted that the Chief Judge's inquiry into who was working in whose interests was not the way in which the fundamental test had previously been framed. He also accepted that this formulation of the test would not assist in distinguishing between employees and independent contractors. But he emphasised that in the very next paragraph of the EC judgment, the Chief Judge formulated the inquiry in terms of whether the drivers were working in their own businesses. Her answer was that they were not.[85] So, Mr Cranney submitted, the Chief Judge had asked the right question and had made findings of fact that the drivers were not running their own businesses, and that the only person running a business on their own account was the Uber group.

[81] Mr Cranney accepted that a court will usually start with the documents that record the employment contract, and analyse the terms of those documents. But this is not, he submitted, a rule of law binding on other courts. Moreover in this case there was a multitude of documents with contractual effect, so it was necessary to read all of them together in light of how they operated in practice.

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[85] At [46] and [52].

[82] Mr Cranney submitted that the subjective intention of the parties in relation to employment status is not relevant in a case like this. Rather, the key is objective intention. The individual circumstances of particular drivers are irrelevant. It would be peculiar and unsatisfactory to reach different conclusions about employment status in relation to different Uber drivers.

Submissions for Business NZ

[83] Business NZ submitted that the challenges for the application of s 6 of the ERA posed by new ways of working are not properly met by the Employment Court's purposive approach. Mr Kiely, who appeared for Business NZ, submitted that this approach was an unworkable departure from the established approach to the s 6 test, as explained by the Supreme Court in *Bryson*. It would exacerbate the uncertainties businesses face when seeking to correctly classify gig and platform workers in their workforces. Section 6 does not use the term "vulnerability", or conflate vulnerability with the "inherent inequality of power in employment relationships" recognised in s 3 of the ERA. Rather, a court is required to determine the real nature of the relationship on the facts of each case by focussing on whether it is a contract of service.

[84] Mr Kiely also submitted that another effect of the purposive approach adopted by the Chief Judge would be to displace all other relevant matters, including the opportunity for an individual to exercise self-determination by choosing to enter into an independent contractor agreement.

[85] Mr Kiely invited the Court to provide greater clarity by emphasising industry practice in the wider gig economy, not just a subset of the gig economy such as ridesharing platforms. That would provide greater certainty for employers.

[86] Mr Kiely also submitted that determining the real nature of a relationship requires assessment on a case-by-case basis.

Submissions for the NZCTU

[87] Mr Mitchell KC, who appeared for the NZCTU, submitted that while it is correct that the ERA applies only to employment relationships, it was appropriate for

the Employment Court to take into account the object of the ERA. The Chief Judge was right to find that the purpose of the ERA is to provide protection to employees, including recognising that in the usual course of events, the employer has greater bargaining power.

[88] Section 6 of the Act, Mr Mitchell said, allows the vulnerability of the drivers to be taken into account by the court when determining the real nature of the relationship. Both vulnerability and inequality of bargaining power are "relevant matters" under s 6(3)(a) of the ERA.

[89] Mr Mitchell submitted that although the Supreme Court in *Bryson* said that the first consideration can be the contractual arrangements between the parties, the Supreme Court stressed that it was important to consider how the arrangements worked in practice.[86] The Supreme Court did not say that the written agreement must always be the starting point. The Employment Court may not have carried out its analysis in the same order as the Supreme Court did in *Bryson*, or placed weight on the same matters. That difference in approach reflected the difference in circumstances between the drivers and the employee in *Bryson*. It was not an error of law.

[90] Mr Mitchell added that:

(a) no greater regard is to be had to the written terms of the agreement than any other indication of the parties' intention;

(b) the Employment Court was correct to find no reliable statement of the driver's intention could be taken from the written agreement;

(c) appropriate consideration was given to the agreement by the Employment Court; and

(d) in cases involving employees who sign complex written agreements that are difficult to understand, less weight is likely to be given to the

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86 *Bryson*, above n 10, at [32].

written agreements, and more consideration to how the agreement operates in practice.

[91] Mr Mitchell said that the Business NZ submissions in relation to the gig economy failed to recognise that control in the present case was entirely vested in the platform owner. The Court needs to consider the circumstances of these Uber drivers, rather than take an abstract approach to the gig economy. Mr Mitchell also noted the tension between Business NZ's submission that determining the real nature of a relationship requires assessment on a case-by-case basis, and its submission that this Court should provide greater predictability for the gig economy as a whole.

The test for employee status under the ERA

[92] Section 6 of the ERA provides (as relevant):[87]

> **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.
>
> …

[93] The leading authority on s 6 is the decision of the Supreme Court in *Bryson*, which is binding on the Employment Court and on this Court.

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[87] Emphasis added.

[94] As the Supreme Court observed, s 6 incorporates the legal concept of a contract of service. It defines an employee in terms that largely reflect the common law.[88]

[95] It was well established as a matter of common law, before the ERA was enacted, that in determining whether a contract is a contract of service the focus is on the substance of the parties' mutual rights and obligations, considered objectively and in light of all of the surrounding circumstances, and whether the key substantive features of a contract of service are present.[89] The courts developed three tests to assist in resolving status: the control test, the integration test, and what was often called the fundamental test: was the worker providing services in the course of carrying on business on their own account? There was conflicting authority on the extent to which courts should give effect to a choice ostensibly made by the parties to characterise a contract as a contract for services, rather than as an employment contract. But if a contract read as a whole was in substance an employment contract, it was immaterial that the parties had attached a different label to it.[90]

[96] Section 6 of the ERA responded to a perception that the pre-ERA cases gave too much emphasis to the way in which the parties' contract described the relationship.[91] It directs the courts to determine the real nature of the relationship between the parties, and to consider all relevant matters, when determining whether a contract is a contract of service. Labels used by the parties are not determinative (though it is implicit that they may be among the relevant factors to be considered). This provision did not represent a major departure from the common law — it was, as William Young J put it in the majority decision in this Court in *Three Foot Six Ltd v Bryson*, more in the nature of a nudge.[92]

[97] In applying s 6 it is, we think, helpful to distinguish between two stages in the inquiry. The first stage involves identifying the substance of the parties' mutual rights and obligations as a matter of reality. The second stage involves determining whether those rights and obligations amount to a contract of service. The (modest) departures

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88 *Bryson*, above n 10, at [31].
89 See for example, *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA).
90 For helpful summaries of the New Zealand cases pre-ERA, see *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA) at [5]–[15] and [62]–[70].
91 At [15]–[18] and [70]–[75].
92 At [78].

from the common law effected by s 6 are confined to the first stage of the analysis. Section 6 reinforces the common law requirement to focus on the substance of the parties' agreement when determining their mutual rights and obligations. It emphasises the importance of the real nature of the relationship, ascertained by reference to how that relationship operates in practice. And it emphasises that labels in the parties' agreement, or in other statements by the parties, are not determinative. At the second stage of the analysis, the common law test for what qualifies as a contract of service is applied to the (real) relationship between the parties. That continues to turn on the three common law tests: the control test, the integration test, and the fundamental test. Section 6 did not alter these common law criteria.

[98] Put another way, clarity of analysis is enhanced by distinguishing between:

(a) what is being classified (the agreement between the parties, which s 6 of the ERA requires the court to assess as a matter of reality, not form); and

(b) the criteria for classification (the common law tests for classification of contracts as contracts of service).

[99] Where there is a written contract governing the relationship between the parties, that will usually be the logical starting point for the first stage of the analysis. As the Supreme Court said in *Bryson*, "all relevant matters" in s 6(3)(a) "certainly include the written and oral terms of the contract between the parties".[93] The Supreme Court also referred to "the need to begin by looking at the written terms and conditions which [have] been agreed to".[94] In doing so, the focus is on the substance of the parties' mutual rights and obligations, interpreted objectively, rather than any labels that may have been attached to the relationship in the written contract.

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93 *Bryson*, above n 10, at [32].
94 At [32].

[100] "All relevant matters" also includes any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship operates in practice. As the Supreme Court said:[95]

> It is important that the Court or the authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature.

[101] The common law tests referred to above should also be considered by the court:[96]

> "All relevant matters" equally clearly requires the Court or the authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or authority has examined the terms and conditions of the contract, and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests.

[102] In *Bryson* there was a written agreement that described Mr Bryson as an independent contractor. The Employment Court held that he was an employee. The Supreme Court upheld the Employment Court's decision (and reversed the decision of this Court), saying:[97]

> It was … open to [the Employment Court Judge] to conclude, as she did, that the crew deal memo did not give any reliable indication of the real nature of the relationship. As the Judge noted, s 6(3)(b) requires that the statement in the crew deal memo that Mr Bryson was an independent contractor is not to be treated as determinative.

[103] The rationale for focusing on the real nature of the relationship between the parties, and attaching little or no weight to labels, was explained by the UK Supreme Court in *Autoclenz Ltd v Belcher*:[98]

> [34] The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para [92] as follows:
>
> > 'I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which

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95 At [32].
96 At [32].
97 At [32].
98 *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745.

> commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so …'
>
> [35] So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.

[104] The ERA expressly prohibits contracting out of the protections it provides.[99] It would be inconsistent with that prohibition for an employer to be able to use their superior bargaining power to include in a contract of service, frequently proffered on a "take it or leave it" basis, labels or other terms designed to make that contract appear to be something other than that which it in reality is. As the UK Supreme Court said in *Aslam*:[100]

> [76] … To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.

[105] This rationale is not limited to explicit statements in an agreement about the nature of the parties' relationship — express "labels". It applies equally to provisions in such an agreement that are window-dressing designed to convey the impression that the relationship differs from what it is as a matter of substance and reality. So, for example, a provision in an agreement that a worker is entitled to work for others, including the principal's competitors, may lack reality if the worker is required to work full-time hours under the agreement or if the worker is required to use the principal's

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99 Employment Relations Act, s 238.

100 *Aslam*, above n 22, and see also [77].

branding on a vehicle that they would need to use for such work.[101] Provisions of this kind do not, in the words of the Supreme Court in *Bryson*, "give any reliable indication of the real nature of the relationship".[102] The courts must be astute to identify, and put to one side, window-dressing of this kind.

[106] Section 6(3)(a) provides that the relevant matters which a court must consider include "matters that indicate the intention of the persons". This is sometimes seen as justifying a broad inquiry into the subjective intentions of each party about whether the relationship would be an employment agreement or some other form of contract. In some cases that inquiry has involved consideration of the education and experience of the worker, and whether they understood the meaning and effect of provisions in a written agreement to the effect that they would not be employees.[103]

[107] There are a number of reasons why an inquiry of this kind is inappropriate.

[108] First, s 6 requires the court to determine the real nature of the contract between the parties. This is an objective inquiry. The subjective intention of one party, which has not been communicated to the other party, is not relevant to that inquiry.[104] The reference in s 6(3)(a) to the "intention of the persons" must, consistent with basic contract law principles, be a reference to the common intention of the parties ascertained objectively from their dealings. What would a reasonable person understand the parties to have intended the substance of their relationship to be, having regard to their dealings, including any written agreement and the reality of their relationship in practice?

[109] Second, matters known to one party only, and not communicated to the other party, cannot be relevant to the process of ascertaining the parties' common intention. The background of a worker, and their level of understanding of provisions in an agreement, cannot be relevant if those matters are not known to the other party.

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101 See, for example, *Leota v Parcel Express Ltd* [2020] NZEmpC 61, (2020) 17 NZELR 395.

102 *Bryson*, above n 10, at [32].

103 See, for example, *Rothesay Bay Physiotherapy (2000) Ltd v Pryce-Jones* [2015] NZEmpC 224; *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178; and *Leota*, above n 101, at [58]–[59].

104 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [41] and [68]. See also *Prasad*, above n 103, at [57].

[110] Third, arguments based on the worker's understanding of labels and other terms in a written agreement cannot be deployed to circumvent the prohibition on contracting out of the ERA. This requires a little elaboration.

[111] Where an agreement has been negotiated between a worker and a principal, each of whom has access to legal advice and a meaningful opportunity to engage on what the terms of their relationship should be, it may be appropriate to give some weight (albeit not determinative weight) to statements in the agreement about what sort of relationship they intend to commit to.

[112] But the same is not true of contracts offered on a "take it or leave it" basis: in that context, it is much less likely that labels and similar terms genuinely reflect the parties' intentions about the real nature of their relationship. Where an employer uses their superior bargaining power to include inaccurate relationship labels (or other window-dressing terms) in a contract that is in substance a contract of service, the fact that an employee who accepts that agreement has a good understanding of what the misleading term means is beside the point. An employee cannot expressly contract out of the protections of the ERA, however well informed they may be about those protections and however well they understand the provision excluding those protections, because of the risk of abuse by employers. Similarly, an employee cannot impliedly contract out of those protections by agreeing to an inaccurate label for their relationship, however well they may understand the provision and however informed they may be about the implications of doing so.

[113] Fourth, where a business uses a standard form agreement to contract with a number of workers, all of whom do the same work in the same setting, it is implausible that some are employees and some are not depending on their subjective intentions or their individual background and level of understanding of the provisions of the agreement. In the absence of any material difference in the agreed terms (written or oral) that apply to two workers doing the same work, or some material difference in the way in which the relationship operates in practice as between those workers, it is difficult to see how the s 6 test could lead to a different result.

[114] It is confusing and unhelpful to ask (as Uber's counsel, Mr Wicks, invited us to do) whether it was the intention of each party to enter into an employment relationship. The inquiry this invites into each party's separate intention is misconceived, for the reasons explained above. Moreover the (common) intention in which we are interested is the parties' common intention about the substance of their mutual rights and obligations, viewed realistically, not their intention about how their agreement is to be classified: this way of putting the issue runs together the first and second stages of the s 6 inquiry.

[115] Before leaving this overview of s 6, we note that it is trite to say that legislation must be interpreted purposively. The Legislation Act 2019 provides that the meaning of legislation must be ascertained from its text and in the light of its purpose and its context.[105]

[116] The purpose of the ERA is set out in s 3:

> **3 Object of this Act**
>
> The object of this Act is—
>
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
>
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
>
> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
>
> (iii) by promoting collective bargaining; and
>
> (iv) by protecting the integrity of individual choice; and
>
> (v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
>
> (vi) by reducing the need for judicial intervention; and

[105] Legislation Act 2019, s 10(1). The precursor legislation, the Interpretation Act 1999, included a materially similar provision.

> (ab) to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court; and
>
> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[117] As is immediately apparent, the purpose of the ERA is framed in terms of employment relationships. That purpose does not extend to people carrying out work in the context of other relationships. The function of s 6 in the scheme of the ERA is to determine whether a particular relationship does or does not come within the employment-focussed objects of the ERA. It is legitimate to bear in mind the underlying protective purpose of the ERA when interpreting s 6.[106] For example, that purpose sheds light on why s 6(2) provides that a court must determine the real nature of the relationship between a worker and the person for whom they work, and on why s 6(3) provides that labels are not determinative. But we do not consider that substantial assistance can be obtained from s 3 of the ERA when interpreting s 6: there is an obvious risk of circularity in any attempt to do so.

Did the Employment Court misdirect itself?

[118] As the Chief Judge rightly observed, although new ways of working have generated new issues in relation to the scope and operation of employment laws, this case must be addressed within the current parameters of the ERA.[107] If the issue before the court is whether A is an employee of B, the question that must be addressed under s 6 is whether A is employed by B to do work for hire or reward under a contract of service.[108]

[119] The court is required to determine the real nature of the relationship between A and B. But it bears emphasis that it is required to do so for the purpose of determining whether A is employed by B *under a contract of service*. The requirement in s 6(3) to consider all relevant matters, including any matters that indicate the intention of the persons, applies when determining the real nature of the relationship

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106 See *Attorney-General v Fleming* [2024] NZCA 92, [2024] 2 NZLR 254 at [38] and [41].
107 EC judgment, above n 2, at [3].
108 Employment Relations Act, s 6(1)(a).

between the parties. That in turn sheds light on whether the contract between the parties is (in reality) a contract of service, or is (in reality) some other form of contract.

[120] We consider that there are three respects in which the Chief Judge appears to have misdirected herself about that inquiry:

(a) The framing of the s 6 test, in particular the emphasis placed on vulnerability as a relevant factor and the encapsulation of the test as whether s 6, construed purposively, was intended to apply to the relationship between Uber and the drivers when viewed realistically.

(b) The failure to take as a starting point for the inquiry the express terms of the driver agreement and other relevant contractual documents.

(c) The approach adopted to the common law tests, including reframing the inquiry into control and integration, and approaching the common law "fundamental test" in terms of "who was working for whose interests".[109]

[121] We address each of these topics below.

The framing of the s 6 test

[122] We have some reservations about the Chief Judge's statement that the task for the court under s 6 is:[110]

> … to ascertain whether the individual is within the range of workers this social legislation was intended by Parliament to extend minimum worker protections to, including in the context of a rapidly evolving labour market.

[123] The ERA provides a clear answer to this question: the range of workers to whom the ERA's minimum protections are intended to apply is *employees*. The function of s 6 in the statutory scheme is to clarify which workers are employees for the purposes of the ERA. It does so by reference to a well-understood common

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109 EC judgment, above n 2, at [45].
110 At [9].

law test for employee status, with some statutory refinements. The task of the court is simply to apply the test set out in s 6 as explained by the Supreme Court in *Bryson*.

[124] In applying that test, it is not in our view helpful to begin with, or to emphasise, broad concepts such as vulnerability. It is of course true that many (though not all) employees are vulnerable. And it is equally true that the ERA responds to that vulnerability. But vulnerability and employee status cannot be equated. Vulnerability does not, without more, establish that a worker is an employee. Some independent contractors in highly competitive and poorly paid occupations are vulnerable workers. Some franchisees are vulnerable workers. A focus on the vulnerability of a class of workers does not determine whether those workers are employees for the purposes of the ERA, and risks distracting attention from the well-established tests that do shed light on the issue.

[125] Similarly, it seems to us that the Chief Judge's question in a "nutshell" — whether s 6, construed purposively, was intended to apply to the relationship between Uber and the drivers when viewed realistically — is too vague and general to be helpful. It is of course always necessary to interpret legislation purposively: as noted above, a provision must be interpreted from its text and in light of its context and purpose.[111] But the way in which the test was framed by the Chief Judge risks causing confusion and distracting attention from the established approach. To the extent that it suggests that s 6 should be construed with a view to providing protection to vulnerable workers, it could be understood as supporting an expansion of the reach of the ERA beyond workers properly classified as employees. To the extent that it suggests that help in applying s 6 can be obtained from the purpose provision in s 3 of the ERA, there is the problem of circularity explained above.

[126] It might be said — and indeed, Mr Cranney did say — that although the language used by the Chief Judge might be read by some as departing from the established tests, when she turned to the facts of the case she did apply those established tests. The problem is that a reader is left unsure what part the references to vulnerability and the need to extend minimum work protections to workers in the

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[111] Legislation Act, s 10(1).

context of a rapidly evolving labour market, and the related observation that s 6 needs to be construed purposively, played in the Chief Judge's subsequent analysis. The glosses placed on s 6 as explained in *Bryson* add uncertainty and unnecessary complexity to the test. That in itself amounts to an error of law.

Lack of focus on the express terms of the agreements

[127] The Employment Court rightly gave little weight to statements about the nature of the relationship in the written agreements. As noted above, Mr Wicks accepted that the provisions in those agreements to the effect that drivers are not employees should be put to one side.

[128] However where there is a written contract governing the relationship between the parties, there is, as the Supreme Court said in *Bryson*, a "need to begin by looking at the written terms and conditions which [have] been agreed to".[112] The substantive terms of the contract setting out the parties' mutual rights and obligations will almost always be the logical starting point for the analysis. It is then necessary to consider any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship operated in practice. That is crucial to determining the proper categorisation *of the contract* in light of the realities of the parties' relationship.

[129] Hence also the observation by the Supreme Court that it is not until the court or authority has examined the terms and conditions of the contract, and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration, and fundamental tests.[113]

[130] In this case, as Mr Cranney pointed out, there were multiple different documents with contractual effect, all issued by Uber, including the driver agreement, various addenda, and guidelines including the Community Guidelines. The logical starting point for the s 6 analysis was, in our view, a careful examination of the combined effect of that matrix of contractual documents.

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112 *Bryson*, above n 10, at [32].
113 At [32].

[131] The Chief Judge touched on some of the terms of the driver agreement and other contractual documents in her review of the matters identified at [28] above. But she did not begin by reviewing the relevant features of those agreements with a view to ascertaining the substance and nature of the contract as it had been recorded. Nor did she address the interplay between the driver agreement and the agreement between Uber and riders. When she did address the documentation, towards the end of her analysis, she did so primarily to discount the labels used in those agreements: she did not systematically review the substance of the parties' rights and obligations provided for in the agreements.

[132] In circumstances where Uber was arguing that drivers operate their own transportation service businesses, and do not provide transportation services to Uber, but rather to riders (and "eaters"), we consider it was necessary to give close consideration to the contractual matrix in order to understand and characterise the relationship between the drivers and Uber.

The common law tests

[133] In *Bryson*, the Supreme Court confirmed that it is appropriate for the courts to continue to apply the longstanding common law tests to distinguish between contracts of service and other types of contract. We think it is more helpful to deploy those tests explicitly, rather than "infuse" them in other inquiries as the Chief Judge did.[114] We would not have seen a reordering of the inquiry as a misdirection in and of itself, were it not for the way in which the fundamental test was framed in terms of "who benefitted from the work undertaken by the [four] drivers", and "who was working for whose interests".[115] It is often the case that an independent contractor does work that benefits their principal, and can be accurately described as working in the interests of their principal. That is why the principal has engaged them. Expressed in this way, the test does not assist in distinguishing between employees and other workers.

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114 See EC judgment, above n 2, at [25], referred to at [28] above.
115 At [25(c)] and [45].

[134] Framed in orthodox terms, the fundamental test serves — as its label suggests — to focus attention on the central issue when identifying the true nature of the arrangements between a worker and the principal for whom they work. Is the worker in business on their own account? Or are they employed in the principal's business? The Chief Judge's formulation was materially different from that fundamental test, and would lead to an overly broad approach to who is classified as an employee.

[135] There is force in Mr Cranney's submission that the Chief Judge went on to frame the fundamental test in more orthodox and more apt terms. But it appears from this that she saw the orthodox formulation and her own formulation as equivalents. We do not share that view.

Summary on question one

[136] Drawing these threads together, we are left with the clear impression that the Chief Judge's approach to s 6 was in some respects novel, and departed from the established approach explained by the Supreme Court in *Bryson*. Arguably her approach involved an expansion of the category of workers properly seen as employees, by reference to concepts of vulnerability and the need for protection, and who was working in whose interests. At the least, her approach added glosses which have the potential to complicate, and distract attention from, the orthodox s 6 inquiry.

[137] We consider that whether one focuses on the specific aspects of the Chief Judge's approach discussed above, or the overall thrust of the judgment,[116] the answer to question one is that there were material misdirections in relation to the s 6 test. The answer to question one is "yes".

Question two: Did the Employment Court err by misapplying the test in s 6, or in the alternative was the Court's conclusion so insupportable as to amount to an error of law?

[138] The second approved question overlaps to some degree with the first. Our answer to the first question means that there is little to be gained from considering whether the s 6 test was misapplied. That formulation of the issue assumes the

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[116] Or, as it was put in *The Castle*, its "vibe".

Employment Court set out to apply the correct test, and asks whether errors of law were made in the course of applying it, or the result reached was insupportable. If the Court misdirected itself on the test, as we have held it did, those downstream questions do not arise.

[139] Formally, our answer to question two is that it is unnecessary to address this question in light of our answer to question one.

[140] The question that does arise — which in some ways is the converse of question two above — is whether, despite the misdirections, the Employment Court nonetheless arrived at the right answer. We turn to that question.

Applying the s 6 test to the four drivers

[141] Both Mr Wicks for Uber and Mr Cranney for the respondent unions urged us to go on to apply the correct test under s 6 of the ERA, if we considered that the Chief Judge had misdirected herself in relation to the s 6 test or erred in law in its application.

[142] We have considered whether it would be more appropriate to refer the matter back to the Employment Court for reconsideration under s 215 of the ERA, in light of the direction in s 216 that this Court must have regard to the special jurisdiction and powers of the Employment Court in determining an appeal. But in the present case we are satisfied that we have the benefit of factual findings made by the Chief Judge, we have all the relevant evidence before us, there is no material contest between the parties about the factual circumstances in which the drivers carried out their work, and it is in the interests of justice that this question be determined without the need for a further hearing. We therefore accede to the parties' request to proceed to apply the s 6 test ourselves.

The driver agreement and other contractual documents

[143] As we have already explained, the logical starting point for the s 6 inquiry is the driver agreement between the parties and the other documents that have contractual effect as between Uber and a driver. We start with those agreements because we are

inquiring into the real nature of the parties' mutual rights and obligations. The matrix of documents with contractual effect is at the heart of that inquiry. In doing so, our focus is not on labels attached to the parties' relationship in those documents: what we are concerned with is the substantive rights and obligations for which those documents provide.

[144] We will focus on the "Rides" business: it was not suggested by either party that a different result might be reached as between the "Rides" and "Eats" businesses. The form of driver agreement that applied to the four drivers at all relevant times is attached as an appendix to this judgment. We summarise some of its salient features below.

[145] The driver agreement is on its face an agreement by Rasier NZ to procure and facilitate the provision of lead generation services[117] via the driver app. Uber BV agrees to licence the app to the driver, and to facilitate payment of fares.

[146] The driver agreement provides that these "Uber Services" and the driver app enable the driver to seek, receive and fulfil requests for transportation services from riders using the Uber App. The driver agreement describes the driver as "an independent provider of peer-to-peer passenger transportation services". It goes on to provide that a driver's "provision of Transportation Services to Users creates a legal and direct business relationship between [the driver] and the User".

[147] Despite that "legal and direct business relationship", drivers are expressly prohibited from contacting riders, or making any other use of the information provided to them by Uber via the driver app or otherwise, other than for the purpose of providing transportation services through Uber.

[148] The driver is required to provide, at their own expense, all necessary equipment, tools, and other materials to perform transportation services, including their own vehicle, mobile phone, mobile data, and insurance. The vehicle must meet then-current Uber requirements and must be authorised by Uber for use by the driver.

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[117] That is, the provision of "leads" or potential opportunities to provide services to riders.

The driver agreement sets a number of requirements in relation to the suitability and appearance of vehicles.

[149] The driver agreement provides that a driver is entitled to determine when and for how long they will use the driver app and Uber's services. The driver also decides when to accept, decline, or ignore a "User request". User requests can be cancelled by a driver, subject to the Community Guidelines and other policies set by Uber.

[150] The driver agreement expressly provides that drivers retain:

> … the complete right to engage in other business or income generating activities, and to use other ridesharing networks and apps in addition to [the driver's] use of the Uber Services and the Driver App.

[151] The driver agreement goes on to provide that the Uber companies shall not be "deemed to direct or control [the driver] generally or in [their] performance [under the driver agreement], including in connection with [the driver's] provision of Transportation Services".

[152] Drivers agree that they will not use any Uber branding on their vehicles or clothing.

[153] Uber has the right to restrict a driver from using the Uber platform if a driver breaches the driver agreement or any relevant Uber policy, or commits certain other acts causing harm to Uber. Uber also retains the right to restrict a driver from using the Uber platform "for any other reason at the sole and reasonable discretion of [Uber]". Uber can log a driver out of the driver app, and prevent the driver using the app, for a wide range of discretionary reasons.

[154] The driver agreement provides for riders to rate drivers and for drivers to rate riders. Uber has the right to use ratings of drivers for any business purpose. We discuss below the purposes for which the ratings are used.

[155] The driver is required to agree to provide transportation services "with due skill, care and diligence" and to maintain high standards of professionalism, service, and courtesy.

[156] The driver agreement provides for the driver to charge a fare to riders. Uber provides what is described as a "recommendation of the [f]are". Uber calculates that fare, and reserves the right to change fare calculations at any time in its discretion. Although the agreement describes the fare calculation as a "recommended amount", and elsewhere as a "default [f]are", drivers are expressly prohibited from charging more than the fare calculated by Uber.

[157] A driver has the right to charge a fare less than Uber's calculated fare. However it is difficult to see why a driver would ever do so, in circumstances where they cannot build a relationship with particular riders, or establish goodwill of their own. It would make no business sense to do so. This is a good example of a dimension in which the reality of the relationship between Uber and drivers differs from the theoretical position set out in the driver agreement. The way in which the driver agreement deals with setting fares is window-dressing designed to strengthen an argument that drivers operate their own business, making their own pricing decisions. But even on the face of the agreement, without looking to the evidence about how the agreement operates in practice, it is plain that drivers have no real-world control over the fares that they receive — those fares are determined solely by Uber.

[158] The driver agreement provides for Uber to receive payment from riders: Uber is authorised to accept such payments, which "shall be considered the same as payment made directly by the User to [the driver]". Uber passes on to drivers, on at least a weekly basis, fares received less the applicable service fee and other fees charged by Uber. The service fee is not a negotiated amount: it is set by Uber in its sole discretion. If a driver charges a fare less than the fare calculated by Uber, that comes off the driver's share of the fare: the service fee payable to Uber does not reduce.

[159] Uber can, in its sole discretion, charge a driver other fees in addition to the service fee.

[160] Uber reserves the right to adjust payments to drivers in relation to particular rides for reasons such as inefficient routes or technical errors. So, for example, if a rider complains about a route, it is Uber — and not the driver — that decides whether

to adjust the fare paid by the rider, and (as a result) determines the payment received by the driver.

[161] Uber agrees to prepare and issue receipts from drivers "to Users for Transportation Services rendered". The receipts are described as being prepared and issued by Uber on the driver's behalf.

[162] The driver agrees to meet all relevant tax obligations relating to provision of transportation services, including GST registration where applicable.

[163] The driver agreement purports to require drivers to indemnify Uber from certain tax liabilities and other obligations that may be imposed on Uber in the event that the relationship described in the driver agreement is, "contrary to the intention and meaning of the parties", held by tax or social security authorities to be an employment agreement between Uber and the driver.

[164] The driver agreement expressly excludes both employment and independent contractor relationships, and agency relationships:[118]

> 28.1 Rasier NZ and Uber are providing the limited payment services set out in clause 1 above, except as otherwise expressly provided herein. *This Agreement is not an employment agreement, and does not create an employment, independent contractor or worker relationship (including from a labour law, tax law or social security law or insurance perspective), joint venture, partnership or agency relationship.* You have no authority to bind Rasier NZ, Uber and/or their Affiliates, or hold yourself out as an employee, independent contractor, worker, agent or authorized representative of Rasier NZ, Uber and/or their Affiliates. Uber's facilitation of Fare payments from Users to you does not alter this relationship at all.
>
> 28.2 Where, by implication of mandatory law or otherwise, you may be deemed an employee, worker, agent or representative of Rasier NZ, Uber or any of their Affiliates, you undertake and agree to indemnify, defend (at Rasier NZ's, Uber's or the applicable Affiliate's option) and hold Rasier NZ, Uber and any of their Affiliates harmless from and against any claims by any person, entity, regulators or governmental authorities based on such implied employment, agency or representative relationship. The indemnity set out in this clause 28.2, insofar as it relates to a finding by a judicial body or legislative authority of competent jurisdiction that there is an employment relationship between you and Rasier NZ, Uber or any of their

[118] Emphasis added.

> Affiliates, applies only to that proportion of Rasier NZ's or Uber's liability that directly or indirectly relates to you holding yourself out to be an employee of Rasier NZ or Uber or any of their Affiliates, or any other act or omission by you that is not expressly authorised by Rasier NZ or Uber and would reasonably suggest to a third party that you are an employee of Rasier NZ or Uber or any of their Affiliates. You expressly agree that where required or implied by applicable law or otherwise, you may be deemed an employee, agent or representative of Rasier NZ, Uber or an Affiliate of Rasier NZ or Uber, any payments made to you will be taken to be inclusive of (i) superannuation contribution amounts; and (ii) amounts equivalent to all taxes (including but not limited to income taxes) payable by you in respect of those payments, in each case that Rasier NZ or Uber (or any of their Affiliates) may otherwise be required to pay under applicable law.

[165] Uber retains the right to modify the terms and conditions of the driver agreement at any time, by publishing an updated version of the agreement on the driver app. The evidence before the Employment Court confirmed that amendments are notified to drivers through the driver app, and they are required to accept those amendments (without any opportunity for reflection or seeking advice, or for negotiation) before they can log on and begin work.

[166] Similarly, Uber can issue "Supplemental Terms" and "Addenda" to the agreement. These are issued by notifying the drivers through the driver app. Drivers must accept these in order to log in.

[167] The driver agreement has been supplemented by various addenda and policies. So, for example, there was a service fee addendum updated on 1 December 2018 that provided for upfront fares, and set the percentage service fees applicable to different categories of drivers.

[168] The Community Guidelines issued by Uber, which also have contractual force, provide for a wide range of matters. They expressly prohibit "off-app pickups", street hails or "touting" while using the Uber platform. They contain various provisions in relation to ratings, and the way in which those ratings may be used by Uber. A driver may lose access to their Uber account for low ratings that fall below the minimum average rating in their city. A driver who loses access to their Uber account for low ratings may be permitted to drive using the Uber platform if they "meet eligibility

requirements and provide proof that [they have] successfully taken a quality improvement course" at the driver's expense.

[169] The Guidelines provide that not following any of the Guidelines may result in loss of access to the Uber platform.

[170] The Uber companies are entitled to assign or transfer the driver agreement. The driver is expressly prohibited from doing so; the agreement is personal to the driver, as is the login for the driver app.

[171] In order to understand the way in which Uber has designed the driver agreement, it needs to be read alongside the agreements that Uber enters into with riders (also referred to as "users"). Uber contracts with riders to provide services which are described as:[119]

> … the provision of a technology platform that enables you, as a user of Uber's mobile applications or websites … to:
>
> (a) arrange and schedule transportation services or delivery services with independent third party providers of those services who have an agreement with Uber or Uber's affiliates ("Third Party Providers"); and
>
> (b) facilitate payments to Third Party Providers for the services and receive receipts for those payments.

[172] A user is required to acknowledge that:

> … Uber does not provide transportation or delivery services or function as a transportation carrier and that all such transportation or delivery services are provided by independent third party contractors who are not employed by Uber or any of its affiliates.

[173] The user agreement goes on to provide that Uber will facilitate payment by users to drivers as their "limited payment collection agent".

[174] The user agreement provides that users are responsible for the cost of repair for damage to, or necessary cleaning of, driver vehicles and property. If a driver reports the need for repair or cleaning, and that is verified by Uber, Uber may

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[119] Formatting altered slightly for readability.

"facilitate payment for the reasonable cost of such [r]epair or [c]leaning on behalf of the Third Party Provider using your payment method designated in your Account".

The agreements in theory

[175] The driver agreement and the associated documents with contractual force are all drafted by Uber, and are put to drivers on a take it or leave it basis with no scope for negotiation. They are complex and sophisticated documents. They reflect Uber's preferred view of the relationship between Uber, drivers, and riders under which:

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

(b) drivers pay Uber for those services via the service fee and any other fees set by Uber;

(c) drivers do not provide transportation services to Uber, and are not paid by Uber. Rather, drivers provide transportation services to riders, who pay the driver for those services (through Uber as a payment intermediary). There is a contract between a driver and a rider, formed when a ride is accepted by the driver, under which the driver provides services to the rider and the rider agrees to pay the driver for those services.

[176] The driver agreement expressly provides that there is no employment relationship between drivers and Uber. Nor, the driver agreement provides, are drivers in an independent contractor relationship with Uber. On the view of the world that the driver agreement seeks to portray, drivers do not do any work for Uber. Rather, they provide services to riders, and riders pay drivers for those services.

[177] Even putting to one side the various express provisions about the nature of the relationship between Uber and drivers, the substantive rights and obligations described in the driver agreement do not on their face appear to give rise to an employment relationship because the driver agreement is not a contract under which drivers do work for hire or reward. A driver has no obligation to provide services to Uber.

Nor does a driver have an obligation to provide services to riders at any particular time, or at any particular place. The driver alone decides whether and when to drive using the Uber app, whether to accept ride requests from riders through that app, and (subject to the Community Guidelines and other policies) whether to cancel rides even after those rides have been accepted. The driver provides all their own business equipment and meets all their own input costs pursuant to arrangements they enter into with providers of their own choice.

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

The operation of the agreements in practice

[179] As the Supreme Court noted in *Bryson*, the "relevant matters" that the Court must take into account under s 6(3)(a) include "any divergences from or supplementation of [written and oral] terms and conditions which are apparent in the way in which the relationship has operated in practice".[120]

[180] As already mentioned, Mr Wicks disclaimed the argument that appears to have been advanced before the Employment Court that drivers provide services only to riders. He accepted that drivers provide services to Uber. We think that concession was realistic. It reflects findings made by the Chief Judge. And it is consistent with findings made by other courts, including the UK Supreme Court in *Aslam*[121] and Dutch,[122] Swiss,[123] French,[124] and European[125] courts.

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120 *Bryson*, above n 10, at [32].

121 *Aslam*, above n 22, at [49]–[56].

122 *Federatie Nederlandse Vakbeweging v Uber BV* [2021] Court of Amsterdam No 8937120 CV EXPL 20-22882 at [19]–[20].

123 *Uber Switzerland GmbH v Office Cantonal de l'Emploi du canton de Genève* [2022] Federal Supreme Court 2C_575/2020 at [6.7]; and *Uber Switzerland GmbH v Service de police du commerce et de lutte contre le travail au noir* [2022] Federal Supreme Court 2C_34/2021 at [10.1]–[10.9].

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

125 Case C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL* [2017] ECLI:EU:C:2017:981 at [40].

[181] In *Aslam*, the UK Supreme Court proceeded on the basis that there could only be a direct contract between a driver and a rider if Uber had been appointed as the agent of the driver to enter into contracts with riders. The Supreme Court did not accept that Uber was the drivers' agent: the driver agreement expressly excludes any agency relationship. This was seen as fatal to Uber's argument that drivers contracted direct with riders to provide services to those riders.[126]

[182] We respectfully disagree: the absence of an agency relationship does not preclude the existence of a driver-rider contract. It is (at least in theory) possible for there to be a direct contract between a driver and a rider formed through an intermediary who is not the agent of either, where the intermediary provides a facility for one party to communicate offers to the other party which can in turn be accepted through the facility provided by the intermediary. That is how many securities exchanges and other market-making platforms operate — the platform enables buyers and sellers to deal on standardised terms, through the platform, without that platform acting as agent for either party. One party makes an offer to the other via the platform (on the platform's standard terms), which is then accepted through the platform.[127]

[183] There may be some difficulties with applying that analysis in the present context. But we did not hear detailed argument on the point, and we need not determine whether a contract does come into existence between a driver and a rider (as Mr Wicks submitted is the position). It is sufficient for present purposes to find that a driver contracts with Uber to provide transportation services to riders, on terms determined by Uber, whether or not there is also a contract between the driver and each rider to whom the driver provides such services. That finding goes no further than Mr Wicks' concession made in the course of argument.

[184] We have already observed that the apparent flexibility in relation to fares contemplated by the driver agreement is a fiction. Fares are in reality determined solely by Uber, as are all adjustments of fares to reflect matters such as departure from

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126 *Aslam*, above n 22, at [51]–[56].

127 The offer may be preceded by an invitation to treat issued through the platform.

Uber's recommended route, or soiling of the vehicle.[128] And Uber determines what fees it will charge a driver, and thus unilaterally determines what proportion of the fee paid by the rider is ultimately received by the driver.

[185] The suggestion in the driver agreement that Uber is merely a payment intermediary for fares paid by riders to drivers also is not consistent with the realities of the relationship. The evidence confirmed that Uber will, in certain circumstances, make a payment to a driver — for example, for returning a rider's lost item, or for cleaning a vehicle — even if the rider does not agree to meet that cost. Likewise, Uber will, in certain circumstances, give a credit to a rider without deducting that amount from the fare paid to the driver. Uber also makes payments to drivers for providing certain services pursuant to "promotions" that it runs from time to time. These unmatched payments to drivers reflect the reality (acknowledged by Mr Wicks) that drivers contract with Uber to provide transportation services to riders.

[186] The statement that the Uber companies shall not be deemed to control or direct drivers is also an example of window-dressing that appears to be intended to support an argument for exclusion of employee status. Under s 6 of the ERA, the extent to which the driver agreement and associated documents enable Uber to exercise direction and control, a topic which we discuss below, must be examined as a matter of reality. That reality cannot be altered by a deeming provision of this kind.

[187] More generally, as Mr Cranney pointed out, every aspect of the driver-rider relationship is determined by Uber. If there is a contract between driver and rider, it is Uber that sets (and can vary) every term of that contract. And it is Uber that determines how the agreement will be applied in practice in the event of differences between a rider and a driver about matters such as the route taken.

[188] The next aspect of the driver agreement that needs to be tested against the reality of the relationship is the flexibility that the agreement contemplates in relation

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[128] A driver who seeks compensation for the cost of cleaning, and the time during which they are unable to drive, has to approach Uber and provide evidence of the kind specified by Uber. Uber determines, in its sole discretion, whether the driver will receive any additional payment. Uber also determines whether to charge a fee to the rider. The evidence established that Uber may on occasion pay a driver a soiling fee without charging it to the rider.

to whether, when, and where the driver works. The Chief Judge accepted that this flexibility was genuine. A driver has the ability to make those choices.[129] This level of flexibility is unusual in an employment relationship. Mr Wicks submitted that even a casual employee, once they have accepted a job, cannot cease working at their option.

[189] However we agree with the Chief Judge's observation that flexible working arrangements are now commonplace, and their existence does not rule out employment status.[130] As the UK Supreme Court said in *Aslam*, "the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the person is … an employee, at the times when he or she is working".[131]

[190] Drivers do, as a matter of reality, have the ability to stop working at their option, without notice to Uber: they can simply log off the driver app. We address the significance of this below.

[191] The driver agreement suggests that even when a driver is logged into the driver app, they have the freedom to choose whether to accept or reject rides offered to them, and to cancel rides even after accepting them. Mr Wicks submitted that this flexibility, and absence of mutuality of obligation, counted strongly against the existence of an employment relationship.

[192] This is another dimension on which the reality of the relationship differs materially from what the driver agreement provides for on its face, largely as a result of the system of incentives and sanctions adopted and applied by Uber. In reality:

(a) Uber withholds from drivers key information relevant to making an informed business decision about whether or not to accept a ride — the destination and the duration — unless the driver has Diamond status.

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129 However failure to maintain a high volume of rides comes at a cost in terms of rewards and status: in order to achieve and maintain higher status rankings, with the benefits that brings, it is necessary for a driver to drive regularly and at the times and places preferred by Uber.

130 EC judgment, above n 2, at [54].

131 *Aslam*, above n 22, at [91].

Uber effectively disables a large proportion of drivers from making these choices on an informed basis. Only those who rarely exercise the choice to decline rides (a prerequisite for maintaining high status) are given the information relevant to such choices.

(b) A driver who remains logged in but fails to accept three consecutive requests is logged out automatically. The driver can subsequently log back in again, but unless and until they do so they will not be offered rides.

(c) Repeatedly declining requests while logged in has implications for a driver's status, and risks loss of the significant benefits associated with higher status.[132]

(d) Cancellation of a ride after acceptance is discouraged by warning messages and status consequences. Cancellation of airport rides (and other forms of what Uber describes as "misbehaviours" in the airport virtual queue[133]) may result in warnings and removal of airport trip access. Cancellation while a ride is under way would almost certainly breach other terms of the driver agreement requiring provision of services with due skill, care, and diligence and high standards of professionalism, service, and courtesy. And it would risk an adverse rating from the rider, which would affect the driver's status.

[193] Similarly, although the driver agreement on its face leaves drivers free to choose their own route to take a rider to a destination, and to determine other facets of the service they provide to riders, the reality is different:

(a) Uber sets minimum requirements for vehicles.

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132 See above at [36].

133 That is, the queue of drivers waiting to provide rides from the airport using Uber's digital platform. The drivers are placed in an online "virtual" queue, rather than a physical queue of the kind that is often found at airport taxi ranks.

(b) Uber sets general standards for the provision of services by drivers to riders. As already mentioned, the driver agreement requires a driver to provide services with due skill, care, and diligence and with high standards of professionalism, service, and courtesy.

(c) Uber specifies to the driver where each rider is to be picked up.

(d) Uber specifies the number of (unpaid) minutes that a driver must wait for a rider after arriving at the pick-up point, before a fare becomes payable despite the rider not turning up for the ride.

(e) Uber suggests a route to take the rider to their destination, and estimates (or fixes, in the case of upfront fares) the fare based on that route.

(f) While the driver is logged on, Uber records the driver's location at all times using GPS tracking on the driver's mobile device. This enables Uber to know where the driver is when they are logged on, and to review the route taken for a ride.

(g) Uber may adjust the fare payable for a ride if a trip has been "significantly different" from the route it suggests and uses as the base for its estimated fare. Uber alone decides whether a trip has or has not differed significantly from the estimated route.

(h) Where a driver wishes to have a fare reviewed, that has to be done via Uber and is dealt with in Uber's discretion.[134] Uber determines all variations of the basic fare payable for the ride including "surge" payments,[135] cancellation fees, waiting time fees, cleaning fees, and fees for returning a rider's lost items.

[194] The driver agreement also on its face permits a driver to engage in "multi-apping": that is, to be logged into the Uber app and at the same time be logged

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134 EC judgment, above n 2, at [36].

135 Also referred to as "dynamic" pricing: see [33] above.

into, and making use of, another ridesharing app. If this provision reflected reality, it would be a strong (though not conclusive) pointer against an employment relationship: employees are not generally free to work for others during a period in which they are working for their employer and being paid to do so.

[195] But there are other features of the contractual matrix that point strongly against multi-apping being an available option for drivers in reality, including the right of Uber (which Uber exercises) to log a driver out of the app if they do not respond to offered rides, and do not accept consecutive rides. It is not easy to see how a driver could be engaged in driving for another company while logged into the Uber app for any sustained period. Or how a driver could be logged into, and making use of, a competitor's app while engaged in driving safely and professionally for Uber.

[196] In any event, we accept Mr Cranney's submission that the evidence did not establish that this theoretical entitlement was a reality. There was no evidence of any driver actually doing this. Mr Wicks submitted that one of the Uber witnesses had given evidence that multi-apping was common, and that she had not been cross-examined on that statement. But she was an Uber executive, not a driver, and the basis for her evidence to this effect was not identified — it was at best hearsay, and quite possibly mere speculation. It is not necessary to cross-examine a witness on such evidence — a court can simply be invited to disregard it. We proceed on the basis that it was not established that the ability to multi-app was a real-world feature of the relationship between Uber and drivers.

[197] Control over how drivers provide services to riders is also exercised through the rating system under which riders are asked to rate drivers after each trip. Failure of a driver to maintain a specified average rating results in warnings, and ultimately in termination of the driver's relationship with Uber. As the UK Supreme Court explained in *Aslam*, this rating system does not operate in the same way as rating systems on most digital platforms. Driver ratings are not made available to riders to inform their choice of driver.[136] Rather, the ratings of drivers are used by Uber as an

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[136] A rider is notified of the driver's rating once a request is accepted by a driver, and the rider can then cancel the ride. But they cannot then choose a replacement based on ratings, or specify the minimum rating they require.

"internal tool for managing performance and as a basis for making termination decisions where customer feedback shows that drivers are not meeting the performance levels set by Uber".[137] As Lord Leggatt said, "[t]his is a classic form of subordination that is characteristic of employment relationships".[138]

[198] The UK Supreme Court concluded, in light of these and other factors, that the transportation service performed by drivers and offered to riders through the Uber app is "very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill".[139]

[199] Control over when, where and how drivers carry out their work is also exercised by Uber through its incentive schemes. We have already set out the Chief Judge's findings in relation to the way that Uber's incentive schemes operate in practice. The top tier, Diamond status, is achieved by a driver who maintains a minimum acceptance rate determined by Uber, and a minimum average rating determined by Uber. Diamond status brings with it a number of advantages including, importantly, Uber disclosing a rider's destination to the driver at the time the ride is offered to the driver.

[200] From time to time Uber also runs "promotions" under which a driver may receive an additional payment where they complete a certain number of rides that comply with criteria determined by Uber. These payments are made at Uber's cost, rather than being charged to riders.

[201] Mr Wicks submitted that Uber's need to use incentives to encourage drivers to make choices that align with Uber's preferences was indicative of a *lack* of control. If Uber was able to exercise control, he submitted, incentives would not be needed. We do not consider that this characterisation of the way in which Uber has structured

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137 *Aslam*, above n 22, at [99].
138 At [99].
139 At [100].

the relationship, and the parties' mutual rights and obligations, reflects the reality of the situation.

[202] Although the driver agreement portrays the reward and incentives schemes as additional benefits for which a driver may qualify, the withholding of those rewards and incentives can equally be seen as a sanction for failure to drive at times and in the manner that Uber prefers. Control can be, and in this case is, exercised through a contractual framework of variable entitlements that materially affect the remuneration received by the worker. If the contract provided that Uber drivers were generally entitled to the favourable treatment currently extended to drivers with Diamond status, but would be penalised by losing those entitlements if they failed to drive at times and in a manner preferred by Uber, those penalties would obviously represent a form of control. This is a difference of form, not substance.

[203] Thus, as the Chief Judge found, the flexibility and choice that the driver agreement portrays drivers as having while logged in is "largely illusory".[140] The reality, she said:

> [55] … is that the way in which the model works in practice effectively increases the level of control (by Uber over the drivers) and the degree of subordination (of the drivers to Uber), including in terms of psychological impact on them.

[204] Our review of the realities of the relationship between Uber and drivers confirms that although the driver agreement has been crafted to avoid the appearance of an employment relationship, many of the provisions designed to point away from employee status are window-dressing. They do not reflect the realities of the relationship any more than the labels that Mr Wicks agreed we should disregard. Uber has structured the overall relationship, and reserved to itself powers of unilateral control over the various documents with contractual force and over the day-to-day operation of the relationship, in a manner and to an extent that render ineffective many of the rights that appear to be reserved to drivers on the face of the agreement. The contractual matrix as a whole confers on Uber a high level of control over the way in which drivers work while they are logged into the driver app.

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[140] EC judgment, above n 2, at [55].

Industry practice does not assist in this case

[205] Business NZ submitted that the employment status of the Uber drivers can be determined having regard to industry practice in a wider "gig economy" or "platform economy". However there was no evidence before the Employment Court to suggest that there are consistent practices across a wider gig or platform economy that could inform the decision in the present case. That is not surprising. Online platforms can be used in a multitude of ways.

[206] There are cases where it is clear that a platform simply provides a matching service between independent contractors and the users of those contractors' services. Consider, for example, a platform that matches tradespeople and homeowners needing work done on their homes, where the tradespeople identify the services they can provide and specify the charges for their work, and homeowners choose the tradesperson to provide services to them based on information provided through the platform (including ratings for previous work done through the platform) and their charges. The platform charges a periodic subscription to tradespeople for its use, and may also charge homeowners a subscription, or a fee for a successful match. The platform provider plainly would not be the employer of the tradespeople, even if they provided standard terms and managed the payment process. The tradespeople are in business on their own account, offering differentiated services and competing on quality and price.

[207] At the other end of the spectrum, an employer may use a platform to match its customers to the employees who are best placed to assist each particular customer, based on the location and requirements of that customer and the locations and skill sets of the employees.

[208] There is no single legal or real-world model for the diverse ecosystem of service provision through online platforms. Because there is no single model, it is necessary to apply s 6 to each platform, paying careful attention to the relevant contractual arrangements and to how those arrangements operate in reality.

The parties' intention

[209] Section 6(3)(a) requires the court to have regard to any matters that indicate the intention of the parties. However as already mentioned, labels placed on the relationship by the parties are not determinative.

[210] The reference to the intention of the parties must, as explained above, be a reference to their common intention about the substance of their mutual rights and obligations, objectively ascertained.

[211] Before the Employment Court there was extensive evidence and cross-examination about the subjective intentions of each driver, and Uber, in relation to whether the driver was to be an employee. That evidence was irrelevant to the inquiry, properly understood. Although the rules of evidence are somewhat relaxed in the Employment Court,[141] it would have been open to the Chief Judge — and, we think, preferable — not to allow this evidence to be given.

[212] Similarly, as explained above, matters that are known to one party but not the other, and that would not be known to a reasonable person observing the parties' dealings, are not relevant to the s 6 inquiry. The qualifications and work experience of individual drivers — matters that the evidence established were not known to Uber when the parties' relationship came into existence — were not relevant.

[213] The mere fact that the driver agreement excludes employment status is not determinative, as s 6(3)(b) confirms. In the context of a unilaterally drafted, take it or leave it, online contract we do not consider that express terms relating to employment status can shed any light on the real nature of the contract, as we have already explained. Mr Wicks did not seek to argue otherwise.

[214] To the extent that Uber and Business NZ sought to argue that more sophisticated drivers with tertiary qualifications or relevant work experience should be held to statements in written agreements excluding employee status, this is in our

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[141] Employment Relations Act, s 189(2).

view an attempt to treat labels as determinative in a manner inconsistent with s 6 of the ERA. We explained above why this argument is misconceived.

[215] Uber's written submissions contended that the drivers in this case knew they had signed a written agreement that said they were not employees, and that this is objective evidence of their intention. This argument is flawed in a number of respects. As already explained, the knowledge of one party is not evidence of the parties' shared intentions concerning the reality of their relationship. Express provisions about employment status are not determinative, and do not become determinative merely because a worker has seen them and understood them.

[216] The irrelevance of such evidence in the present case is underscored by the fact that there were many thousands of drivers employed on identical terms. The written agreements and the real nature of the relationship were the same in the case of each of the many drivers. It is implausible that some were employees and others were not. Evidence about the qualifications, experience and understanding of individual drivers was irrelevant. Again, it would have been better if this evidence had not been given.

[217] In the present case, we do not consider that there are any indications of the parties' intentions that provide material assistance, other than the indications of intention implicit in the objectively ascertained mutual rights and obligations of the parties having regard to the driver agreement and related documents and the realities of the parties' working relationship. The disclaimers of employee and independent contractor status in cl 28 of the driver agreement do not assist, as Mr Wicks accepted. Some provisions in the driver agreement portray a level of driver independence that did not exist in reality. Those also do not assist: the parties' shared intentions are illuminated by the realities of the relationship, not by text unilaterally drafted by Uber as window-dressing.

[218] The most illuminating indications of the parties' common intention are in our view found in:

(a) the provisions that preclude drivers from making any 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, and thus from building up any form of personal business goodwill while driving for Uber; and

(b) the provisions that reserve a high level of unilateral control to Uber over the terms on which Uber deals with drivers, and over the terms on which drivers provide services to riders, including control over the terms of the driver agreement itself, over supplementary agreements and addenda, over fares, over fees debited to drivers by way of deductions from fares, over policies (including the Community Guidelines) with which drivers are required to comply when providing services, and over what information is provided to drivers about the rides offered to them before the ride begins.

[219] The indications provided by these terms are very relevant to the second stage of the inquiry, to which we now turn.

The common law tests

[220] That brings us to the other factors identified by the Supreme Court in *Bryson* as "relevant matters" for the purpose of s 6(3) of the ERA: control, integration, and whether the contracted person is effectively working on their own account (the fundamental test). These were all recognised as important determinants of the real nature of the relationship at common law.[142] As explained above, the second stage of the s 6 inquiry involves applying these tests to the real nature of the relationship between the parties, to ascertain whether that relationship amounts to a contract of service.

[221] Uber exercises some control over when and where drivers log in, and when they log out, through various incentive structures. But drivers retain a high level of control over whether they drive for Uber, and over when and where they work.

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142 *Bryson*, above n 10, at [32].

We consider that the limited extent of control exercised by Uber when a driver is not logged in is inconsistent with employment at those times.

[222] However as explained above, Uber exercises a high level of control at times when a driver is logged in. While a driver is logged in, they do not have the option of repeatedly ignoring requests: that will result in them being logged out, effectively terminating that period of engagement unless and until the driver logs in again. Repeatedly declining requests will result in warnings, suspensions, and ultimately termination of the relationship. And once a request is accepted, Uber reserves to itself the ability to control — and does in practice control — almost every facet of the manner in which the driver provides services to the rider, and of the payment for those services.

[223] The level of control exercised while a driver is logged in is consistent with an employment relationship during those periods. The reasons for that control are irrelevant — it is the nature and extent of control that matters when determining the nature of the relationship, not the regulatory or commercial reasons for exercising that control.[143]

[224] We turn to integration. This test assesses the extent to which the individual is "part and parcel" of, or integrated into, the organisation.[144] Some of the traditional indicia of integration are absent in the present context. Drivers do not wear uniforms, their vehicles do not have Uber signage, and drivers do not congregate in the same place to work together. Drivers provide their own vehicle and other equipment and meet their own driving-related costs. Drivers have no obligation to work for Uber at any time or place, or even to notify Uber about whether, and when, they intend to work.

[225] However the core business proposition of Uber is, as the UK Supreme Court pointed out, to make available to riders a substantially homogenous passenger transport service.[145] The drivers are integral to that business: without them, Uber

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143 See *Aslam*, above n 22, at [97].
144 *Challenge Realty Ltd*, above n 39, at 54.
145 *Aslam*, above n 22, at [101].

would have no service to offer to the public. The drivers are the public face of the Uber brand. As Mr Cranney submitted, the only people working for Uber in New Zealand (apart from one locally employed policy representative based in Auckland) are the approximately 6,000 drivers engaged by Uber in this country. The Chief Judge made a finding that riders identify the drivers as "Uber drivers".[146] So far as the public are concerned the only tangible manifestation of Uber in New Zealand is the drivers.

[226] The Chief Judge made a finding that each of the four drivers was integrated into the Uber business during the times that they were driving.[147] That finding was open to her, on the evidence. However we do not see that finding as a strong indicator of employment status in the present case.

[227] We turn to the "fundamental test": are the drivers carrying on a business on their own account, or are they working in Uber's business? This is in our view the most illuminating inquiry in the present case.

[228] 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. We accept Mr Wicks' submission that the Chief Judge erred in finding that the only way that drivers could increase their earnings was by working longer hours while meeting Uber's requirements.[148] Drivers could increase their net earnings by effectively managing costs, and in particular costs relating to ownership and running of their vehicles. And they could improve their earnings by responding to Uber's incentive structure and working in the places and at times where surge pricing was on offer, rather than in less busy places at less busy times.

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146 EC judgment, above n 2, at [66].
147 At [73].
148 At [47].

[229] However when one focusses on the realities of the relationship, rather than the form of driver agreement designed by Uber, we consider that it is tolerably clear that drivers are not in business on their own account, making the types of decisions that an independent business operator would normally make, and bearing the risks and enjoying the returns of those choices.

[230] As already mentioned, Uber unilaterally determines the terms of the driver agreement, and all addenda and binding policies. It can and does modify those unilaterally. It exercises full control over the terms on which a driver provides transportation services, while logged into the Uber app. In particular, Uber controls performance standards and pricing, including both standard rates and adjustments to those rates in response to customer complaints or to driver complaints and requests for additional fees (for example, for soiling a vehicle).

[231] The agreement with a driver is personal to that driver: they cannot employ someone else to provide the relevant services.

[232] The requirement that a driver provide their own vehicle and phone does not evidence an investment in specialised equipment needed to carry on a business: as the Chief Judge pointed out, these are items owned by many people for personal and household use.[149] We agree with the Chief Judge that the requirement to provide these items is neutral.

[233] The ability of a driver to work for Uber's competitors, and to undertake other employment, at times when they are not logged into the Uber app sheds no light on the status of the drivers while they are logged into the app. The fact that a person who works for business X also spends some time working as an employee for business Y, or carries on another business on their own account at times when they are not working for business X, is not a helpful indication of their relationship with business X. An employed taxi driver might also work some hours as an employed chef (like one of the drivers in this case). Or they might own and operate a small business in some other field altogether. Or both. Precisely the same may be true of an owner-operator taxi driver in business on their own account, using the services of a booking agent.

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[149] At [68]–[69].

They also may work some hours driving for another business as an employee, and/or have another business that they run on the side. As this example illustrates, it is not possible to reach any reliable conclusion about the basis on which a person works for business X by reference to their employment status when engaged in work for others, in the same or different fields.

[234] The critical point is, we think, that while a driver is logged into the driver app that driver has no opportunity to establish any business goodwill of their own, or to influence the quantity of work they receive, the quality of the work they receive, or their revenue from that work except to the extent that Uber agrees to give them some preference in relation to access to ride requests, information about rides, or supplementary payments. They have no opportunity to bargain with Uber for any of these. We do not consider that drivers can, in reality, be said to be carrying on transport service businesses on their own account at times when they are logged into the driver app, providing services to riders referred to them by Uber for the remuneration determined by Uber, and subject to the high level of control and direction that Uber exercises over the provision of services by drivers while logged in.

Summary

[235] In summary, s 6 of the ERA requires the court to determine whether the four drivers were in reality employed by the Uber companies to do work for hire and reward under a contract of service. In doing so we must consider all relevant matters, with the benefit of the guidance provided by the Supreme Court in *Bryson.*

[236] For the reasons given above, we consider that the s 6 test was met. The real nature of the relationship between the four drivers and Uber was that the drivers were employees of the Uber companies at times when they were logged into the Uber driver app. They were not carrying on their own independent transport service businesses during these periods. The conclusion reached by the Chief Judge was correct.

Result

[237] The appeal is dismissed.

[238] The appellants must pay costs to the respondents for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

Solicitors:
Russell McVeagh, Auckland for Appellants
Oakley Moran, Wellington for Respondents
Kiely Thompson Caisely, Auckland for Business New Zealand as First Intervener

APPENDIX A

RASIER NEW ZEALAND LIMITED

UBER B.V.

SERVICES AGREEMENT

Last update: 1 December 2018

1. Recitals. This Services Agreement (***"Agreement"***) constitutes a legal agreement between you, an individual (***"you"***), Rasier New Zealand Limited, a company registered in New Zealand with Company Number 7056276 (***"Rasier NZ"***) and Uber B.V., a private limited liability company established in the Netherlands, having its offices at Mr. Treublaan 7, 1097 DP Amsterdam, The Netherlands, registered at the Amsterdam Chamber of Commerce under number 56317441 (***"Uber"***).

Rasier NZ will procure and facilitate the provision of lead generation services, being on-demand intermediary and related services rendered via a digital technology application that enables transportation providers to seek, receive and fulfil demand requests for transportation services (***"Uber Services"***) to you, an independent provider of peer-to-peer passenger transportation services (***"Transportation Services"***). Uber will license you the Uber Driver App (***"Driver App"***), a mobile application provided by Uber that enables you to access and receive the Uber Services, and will facilitate payment of Fares. The Uber Services and Driver App enable you to seek, receive and fulfil requests for Transportation Services from authorised users of the mobile application provided by Uber (***"Uber App"***), (***"Users"***). In order to use the Uber Services and Driver App, you must agree to the terms and conditions that are set forth below. Upon your execution (electronic or otherwise) of this Agreement, you, Rasier NZ and Uber shall be bound by the terms and conditions set forth below. References herein to "Uber Group" shall be taken as a reference to Rasier NZ, Uber and each of their Affiliates (as defined in clause 32).

2. Provision of Transportation Services. When the Driver App is active, User requests may appear in the Driver App if you are available and in the vicinity of the User. If you accept a User's request for Transportation Services, you will be provided with the User's first name and pickup location via the Driver App. You acknowledge and agree that the Uber App may provide the User with certain information about you, including your first name, contact information, photo, location, your vehicle make, model and license plate number. You shall not contact any User or otherwise use any of the personal information made available to you by Uber or Raiser NZ, via the Driver App or otherwise, other than for the purposes of fulfilling Transportation Services. You acknowledge and agree that you alone will choose the most effective and safe manner to perform each instance of Transportation Services, and, except for the provision of the Uber Services and the licence to use the Driver App, you will need to provide (at your own expense) all necessary equipment, tools and other materials to perform Transportation Services.

3. Your Relationship with Users. You acknowledge and agree that your provision of Transportation Services to Users creates a legal and direct business relationship between you and the User. Rasier NZ, Uber and their Affiliates are not responsible or liable for the actions or inactions of a User in relation to you, your activities or your vehicle. You shall have the sole responsibility for any obligations or liabilities to Users or third parties arising from your provision of Transportation Services. You acknowledge and agree that you are solely responsible for taking such precautions as may be reasonable and proper (including maintaining adequate insurance that meets the requirements of all applicable laws) regarding any acts or omissions of a User or third party. You acknowledge and agree that, unless consented to by a User, you may not transport or allow inside your vehicle individuals other than a User and any individuals authorised by such User, during the performance of Transportation Services for such User. You acknowledge and agree that all Users should be transported directly to their specified destination, as directed by the User, without unauthorised interruptions or stops.

4. Your Relationship with Uber Group. You acknowledge and agree that Rasier NZ's provision of the Uber Services creates a legal and direct business relationship between Rasier NZ and you. You also acknowledge and agree that Uber's licence to you of the Driver App creates a legal and direct business relationship between Uber and you. Neither Rasier NZ nor Uber shall be deemed to direct or control you generally or in your performance under this Agreement, including in connection with your provision of Transportation Services, your acts or omissions, or your operation and maintenance of your vehicle. Except as expressly set out herein, you retain the sole right to determine when and for how long you will utilise the Driver App or the Uber Services. You alone decide when, where and for how long you want to use the Driver App, and when to try to accept, decline or ignore a User request. A User request can be cancelled, subject to Uber's then-current policies (including the Community Guidelines located at www.uber.com/legal/community-guidelines/rides/anz-en/). You acknowledge and agree that you will not: (a) display Rasier NZ's, Uber's or any of their Affiliates' names, logos or colours on any vehicle(s); or (b) wear a uniform or any other clothing displaying Rasier NZ's, Uber's or any of their Affiliates' names, logos or colours, unless you and Rasier NZ or Uber (as applicable) have agreed otherwise or if so required by law. You retain the complete right to engage in other business or income generating activities, and to use other ridesharing networks and apps in addition to your use of the Uber Services and the Driver App. Rasier NZ retains the right to, at any time at its sole discretion, restrict you from using the Uber Services in the event of a violation of this Agreement or any relevant Uber policy, your disparagement of Rasier NZ, Uber or any of their Affiliates, or your act or omission that causes harm to Rasier

NZ's, Uber's or their Affiliates' brand, reputation or business as determined by Rasier NZ in its sole discretion. Rasier NZ also retains the right to restrict you from using the Uber Services for any other reason at the sole and reasonable discretion of Rasier NZ. Uber retains the right to, at any time at its sole discretion, deactivate or otherwise restrict you from accessing the identification and password key assigned to you by Uber ("***Driver ID***") and/or the Driver App, in the event of a violation of this Agreement, any relevant Uber policy, including the Community Guidelines, your disparagement of Rasier NZ, Uber or any of their Affiliates, or your act or omission that causes harm to Rasier NZ's, Uber's or their Affiliates' brand, reputation or business as determined by Uber in its sole discretion. Uber also retains the right to deactivate or otherwise restrict you from accessing the Driver ID and/or Driver App, for any other reason at the sole and reasonable discretion of Uber.

5. Ratings. You acknowledge and agree that after receiving Transportation Services, a User will be prompted by the Uber App to rate you and such Transportation Services, and you will be prompted to rate the User. This can also include comments and other feedback, which, along with the rating, you agree to provide in good faith. Rasier NZ, Uber and their Affiliates reserve the right to use, share and display your User ratings and comments in any manner in connection with the business of Rasier NZ, Uber and their Affiliates without attribution to you or your approval. You acknowledge and agree that Rasier NZ, Uber and their Affiliates are distributors (without an obligation to verify) and not publishers of your ratings and comments, and may remove comments in the event that such comments include obscenities or other objectionable content, include an individual's name or other personal information, or violate any privacy laws, other applicable laws or Rasier NZ, Uber, or their Affiliates' content policies. There is no obligation on you or the User to provide ratings or comments nor is there any consequence for not providing a rating.

6. Requirements. You acknowledge and agree that you may be subject to certain background, driving record and other checks from time to time. You acknowledge and agree that at all times you shall hold and maintain a valid driver's license and all other required licenses, permits, work entitlements, approvals and authority to provide passenger Transportation Services in the city or metro areas within New Zealand in which you are enabled by the Driver App to receive requests for Transportation Services (***"Territory"***). You acknowledge and agree that you have a citizenship, residency or visa status that allows you the right to work in New Zealand. You acknowledge and agree that you will provide the Transportation Services with due skill, care and diligence and that you will maintain high standards of professionalism, service and courtesy. You acknowledge and agree that your vehicle must meet the then-current Rasier NZ requirements for a vehicle to provide the Transportation Services and must be authorised by Rasier NZ for this use, be properly registered, licensed and generally suitable to operate as a passenger transportation vehicle in your Territory, either owned or leased by you or otherwise in your lawful possession, kept in a clean and sanitary condition, and maintained in good operating condition consistent with industry safety and maintenance standards for a vehicle of its kind and any additional standards or requirements in the applicable Territory. You acknowledge and agree that Rasier NZ reserves the right, at any time in its sole discretion to restrict you from using the Uber Services, if you fail to meet the requirements in this Agreement. You also acknowledge and agree that Uber reserves the right, at any time in its sole discretion to deactivate or otherwise restrict you from accessing the Driver ID and/or Driver App, if you fail to meet the requirements in this Agreement.

7. Documentation. To ensure your compliance with all requirements in clause 6 above, you must provide Rasier NZ (or a Rasier NZ Affiliate) with written copies of all such licenses, permits, work entitlements, approvals, authority, registrations and certifications (including renewals) prior to and during your provision of any Transportation Services, and allow Rasier NZ (or a Rasier NZ Affiliate) to review any of this documentation on an ongoing basis (note that Rasier NZ may independently verify your documentation in any way Rasier NZ deems appropriate in its reasonable discretion). You must notify Rasier NZ immediately if you cease to hold any license, permit, work entitlements, approvals, authority, registration or certification or there are changes to the terms of any of those which would alter your ability to provide the Transportation Services in accordance with applicable laws. Rasier NZ shall, upon request, be entitled to review such licenses, permits, work entitlements, approvals, authority, registrations and certifications from time to time. Your failure to meet any of the requirements in this clause or clause 6 shall constitute a material breach of this Agreement.

8. Fare Calculation and Your Payment

8.1 You can charge a fare to Users for each instance of completed Transportation Services that you provide to a User that are obtained via the Uber Services (***"Fare"***). Rasier NZ will calculate a recommendation of the Fare that you can elect to charge Users (***"Fare Calculation"***). As at 1 December 2018, Rasier NZ determines the Fare Calculation as a base fare amount plus distance (as determined by Rasier NZ using location-based services enabled through your mobile device) and/or time amounts, as detailed at www.uber.com/cities for the applicable Territory. You can also charge the User for any applicable road, bridge, ferry, tunnel and airport charges and any other fees (including inner-city congestion, environmental or miscellaneous charges as reasonably determined by the Uber Services) (***"Tolls"***), taxes and/or fees incurred during the provision of Transportation Services, whether charged by a third party or Rasier NZ. Rasier NZ reserves the right to change the Fare Calculation at any time in Rasier NZ's discretion. Rasier NZ will provide you with notice in the event that any such change would result in a change in the recommended Fare. Continued use of the Uber Services after any such change shall constitute your consent to such change.

8.2 To facilitate collection of the Fare, Uber will accept initial payment from a User (and you authorise Uber to do so whether inside or outside New Zealand or via its Affiliates). Uber's role is solely to accept the Fare, applicable Tolls, and, depending on the region and/or if requested by you, applicable taxes and fees from the User.You agree that the User's payment to Uber or any Affiliate shall be considered the same as payment made directly by the User to you. If a User cancels their request for Transportation Services prior to your arrival, Uber or any Affiliate may charge that User a cancellation fee on your behalf, and a Service Fee will be payable to Rasier NZ.

8.3 The parties acknowledge and agree that as between you and Rasier NZ, the Fare Calculation is a recommended amount, and the primary purpose of the Fare Calculation is to act as the default Fare in the event you do not negotiate a different Fare. You shall always have the right to charge a Fare that is less than the pre-arranged Fare Calculation ("***Negotiated Fare***"). Uber or its Affiliate agrees to remit, or cause to be remitted, to you on at least a weekly basis, (a) the Fare less the applicable Service Fee and other fees charged by Rasier NZ; (b) the Tolls (excluding airport charges, if applicable); (c) any incentive payments made under clause 13; and (d) depending on the region, certain taxes and ancillary fees (where applicable). If you have separately agreed to any other amounts being deducted from your Fares (such as vehicle financing, lease payments, government fees and charges, etc), those amounts will be deducted before remittance to you, and Uber, at the direction of Rasier NZ, will determine the order of any such deductions from the Fare (as between you and the parties). Rasier NZ reserves the right to adjust payment in relation to a particular Fare for reasons such as inefficient routes, failure to properly end a particular instance of Transportation Services in the Driver App, or technical error in the Uber Services. In more serious situations, such as fraud, charges for Transportation Services that were not provided or User complaints, Rasier NZ may cancel a Fare entirely or if the Fare has already been paid, require reimbursement of the Fare from you. Uber reserves the right, in its sole discretion, to seek reimbursement from you if Rasier NZ discovers payment processing errors and authorizes Uber to seek such reimbursement. Uber may obtain reimbursement of any amounts owed by you to Rasier NZ by deducting from future Fares owed to you, debiting your card on file or your bank account on record, or seeking reimbursement from you by any other lawful means. You authorise Uber or any Affiliate to use any or all of the above methods to seek reimbursement.

9. Receipts. As part of the Uber Services, Rasier NZ provides you with a system for delivering receipts to Users for Transportation Services rendered. Upon your completion of Transportation Services for a User, Rasier NZ prepares and issues a receipt to the User via email on your behalf. It includes a breakdown of amounts charged to the User for Transportation Services and certain information about you (including your name, contact information, photo and the route taken). Any corrections to a User's receipt for Transportation Services must be submitted to Rasier NZ in writing within 3 days after the completion of such Transportation Services. Absent such a notice, Rasier NZ shall not be liable for any mistakes in or corrections to the receipt or for recalculation or disbursement of the Fare.

10. Service Fee. In consideration of Rasier NZ's provision of the Uber Services to you, you agree to pay Rasier NZ a service fee on a per Transportation Services transaction basis, which as at 1 December 2018, is calculated as a percentage of the Fare Calculation ("***Service Fee***") (regardless of any Negotiated Fare). Rasier NZ will provide you with notice via email or via the Driver App, of the Service Fee that applies to each Transportation Service that you provide. You acknowledge that, unless regulations applicable to your Territory require otherwise, and unless otherwise stated, the Fare Calculation is inclusive of taxes (in particular GST), and Rasier NZ shall calculate the Service Fee on an amount equal to the Fare Calculation. You acknowledge and agree that Rasier NZ may, in its sole discretion: (i) adjust the Service Fee; or (ii) introduce a new model to determine the Service Fee payable by you. Rasier NZ will provide you with at least 14 days' notice in the event of an increase to the Service Fee under (i) above or the introduction of a new Service Fee model under (ii) above. If either of these occurs, you have the right to terminate the Agreement immediately, without notice. Continued use of the Uber Services after any such change in the Service Fee calculation shall constitute your consent to such change.

11. No Additional Amounts. You acknowledge and agree that, for the mutual benefit of the parties, through advertising and marketing, Rasier NZ, Uber and their Affiliates may seek to attract new Users and to increase existing Users' use of the Uber App. You acknowledge and agree that such advertising or marketing does not entitle you to any additional monetary amounts beyond the amounts expressly set forth in this Agreement.

12. Taxes.

12.1 You acknowledge and agree that you are required to: (a) complete all tax registration obligations and calculate and remit all tax liabilities related to your provision of Transportation Services as required by applicable law; and (b) provide Rasier NZ with all relevant tax information requested of you by Rasier NZ, Uber and/or each of their Affiliates (including confirmation of your Goods and Services Tax (GST) registration status, and a valid New Zealand GST registration number under which you provide Transportation Services, if obtaining such a valid GST registration number is required of you by applicable law). You further acknowledge and agree that you are responsible for taxes on your own earnings arising from your provision of Transportation Services, including without limitation, income tax and GST. Notwithstanding anything to the contrary in this Agreement, Rasier NZ may in its reasonable discretion based on applicable tax and regulatory considerations, or as required under the law, collect and remit taxes resulting from your provision of Transportation Services and/or provide any of the relevant tax and other information you have provided

pursuant to the foregoing requirements in this clause 12.1 directly to the applicable governmental tax authorities on your behalf or otherwise.

12.2 Unless expressly stated otherwise in this Agreement, all amounts payable or consideration to be provided under this Agreement by you to Rasier NZ are exclusive of GST. If GST is payable on any supply by Rasier NZ made under this Agreement, for which the consideration is not expressly stated to include GST, you agree to pay Rasier NZ an additional amount equal to the GST at the same time that the consideration for the supply, or the first part of the consideration for the supply (as the case may be), is to be provided. In this Agreement, GST that is payable by Rasier NZ includes GST that is payable by the representative member of Rasier NZ's GST group.

12.3 The parties agree that, for the purposes of the GST law, Rasier NZ supplies to you the Uber Services in sole consideration for the Service Fee. In addition, Uber supplies to you a licence to use the Driver App under clause 19 for no consideration.

13. Incentives. From time to time, Rasier NZ may make an incentive payment(s) to you as consideration for your satisfaction of certain conditions as determined by Rasier NZ in its discretion (***"Conditions"***). These Conditions may be included in promotional materials, and/or may be communicated to you, including via text message and email. You acknowledge and agree that any incentive payment(s) is made to you at Rasier NZ's sole discretion, subject to the Conditions. Any tax payable on such incentive payment(s) is solely your responsibility.

14. Other Fees. You acknowledge and agree that Rasier NZ may, in its sole discretion, charge other fees in addition to the Service Fee. Rasier NZ will provide you with at least 14 days' notice before it implements any such fees. Your use of the Uber Services after the implementation of the new fees shall constitute your consent to Rasier NZ charging such fees. If Rasier NZ imposes or provides notice of an intention to impose a fee under this clause 14, you have the right to terminate the Agreement immediately, without notice. There are no fees payable to Uber in connection with the Driver App and licence granted under clause 19.

15. Devices. You are responsible for the acquisition, cost and maintenance of your mobile device/s and any associated wireless data plans that you use to access the Driver App. Subject to this Agreement, Uber grants you a personal, non-exclusive, non-transferable, non-sublicensable user right to install and use the Driver App on your device solely for the purpose of providing Transportation Services. This license shall immediately terminate in the event that this Agreement terminates, your access to the Driver App is deactivated or you otherwise cease to provide Transportation Services using your mobile device, and you must delete the Driver App from your mobile device. You agree not to give the Driver App or any associated data to anyone else. You agree that using the Uber Services may consume very large amounts of data, and Rasier NZ and Uber recommends that your mobile device should only be used under a data plan with unlimited, or at least very high, data usage limits. Neither Rasier NZ, Uber, nor their Affiliates, shall be responsible or liable for any fees, costs, or overage charges associated with any data plan.

16. Term & Termination. This Agreement shall commence on the date that the Agreement is executed by you (electronically or otherwise) and will continue until terminated by you, Rasier NZ or Uber, which any party can do (a) without cause at any time on 30 days' prior written notice to the other parties; (b) immediately, without notice, for any other party's material breach of this Agreement; or (c) immediately, without notice, in the event of the insolvency or bankruptcy of any other party, or upon such other party's filing or submission of request for suspension of payment (or similar action or event) against the terminating party. In addition, Rasier NZ may restrict you from using the Uber Services and/or Uber may deactivate or otherwise restrict you from accessing or using the Driver ID and/or Driver App immediately, without notice, in the event you no longer qualify, under applicable law or the standards and policies of Rasier NZ, Uber and their Affiliates, to provide Transportation Services or to operate the vehicle, or as otherwise set out in this Agreement.

17. Effect of termination. Upon termination of the Agreement, you shall immediately delete and fully remove the Driver App from your mobile device(s). Outstanding payment obligations and clauses 3, 4, 5, 11, 12, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 29, 32, 33, 34 and 35 shall survive any such termination.

18. Privacy. Your personal information will be collected, used and shared in accordance with the Uber Privacy Policy (located at privacy.uber.com/policy).

19. Intellectual Property. Subject to the terms and conditions of this Agreement, Uber hereby grants you, for no consideration, a non-exclusive, royalty-free, non-transferable, non-sublicensable, non-assignable license, during the term of this Agreement, to use the Driver App in connection with the provision of the Uber Services by Rasier NZ solely for the purpose of providing Transportation Services to Users and tracking resulting Fares and fees. Uber, its Affiliates and respective licensors reserve all rights not expressly granted in this Agreement. The Driver App and all data related to the access and use of the Uber Services (including all intellectual property rights in all of the foregoing) are and remain the property of Uber, its Affiliates or respective licensors. You shall not improperly use the Uber Services or Driver App. You shall not use any of Uber's names, logos or marks for any commercial purpose except as Uber expressly allows, nor shall

you try to register or otherwise use or claim ownership over any of Uber's or its Affiliates' names, logos or marks. You shall not copy, modify, distribute, sell or lease any part of the Driver App, Uber Services or related data, nor shall you reverse engineer or attempt to extract the source code of Uber software, except if allowed by law.

20. Confidentiality. This Agreement and any information provided by Uber, Rasier NZ or their Affiliate to you, which Uber, Rasier NZ or their Affiliate designates as confidential or which you should reasonably know should be treated as confidential, should be treated accordingly.

21. Insurance & Accidents.

21.1 You agree to maintain during the term of this Agreement motor vehicle liability insurance on all vehicles which you operate at insurance levels that satisfy the minimum requirements to operate a private passenger vehicle on public roads within the Territory, as well as any other minimum motor vehicle liability insurance cover which Rasier NZ requests you hold. Where applicable, you agree to provide Rasier NZ with a copy of the insurance policy, policy declarations, proof of insurance identification card and proof of premium payment for the insurance policy required in this clause 21.1 upon request. Furthermore, you must provide Rasier NZ with written notice of cancellation of any insurance policy required by Rasier NZ. Rasier NZ shall have no right to control your selection or maintenance of your policy. You must be a named insured or individually rated driver, for which a premium is charged, on the insurance policy required in this paragraph 21.1 at all times. You understand and acknowledge that your motor vehicle insurance policy, including any insurance coverage held via a commercial arrangement you have with a vehicle rental or leasing provider, may not afford liability, comprehensive, collision, medical payments, first or third party no fault personal injury protection, uninsured motorist, underinsured motorist or other coverage while you provide for any Transportation Services you provide pursuant to this Agreement. If you have any questions or concerns about the scope or applicability of your own insurance coverage, it is your responsibility, not Rasier NZ's or Uber's, to resolve them with your insurer(s). Rasier NZ may maintain during the term of this Agreement insurance related to your provision of Transportation Services as determined by Rasier NZ in its reasonable discretion, provided that Rasier NZ and its Affiliates are not required to provide you with any specific insurance coverage for any loss to you or your vehicle. Should Rasier NZ procure insurance related to your provision of Transportation Services, Rasier NZ may cancel such coverage at its sole discretion at any time. You are required to promptly notify Rasier NZ and relevant authorities of any accidents that occur while providing Transportation Services and to cooperate and provide all necessary information.

21.2 In relation to the Transportation Services, you agree that you are not an employee, or a worker or a deemed worker for the purposes of any workers compensation laws or occupational accident injury insurance and therefore acknowledge that Rasier NZ and/or Uber do not, and are not required to, maintain or provide you with workers' compensation insurance or maintain other occupational accident injury insurance on your behalf. You agree to maintain at your cost during the term of this Agreement workers' compensation insurance or other occupational accident injury insurance (or the local equivalent) as required by any applicable law in the Territory (provided that the foregoing shall have no impact on the mutual understanding between you and Rasier NZ and Uber that you are a self-employed individual (including from a labour and social security perspective)) and otherwise comply with all statutory workers compensation requirements. If permitted by applicable law, you may choose to insure yourself against industrial injuries by maintaining occupational accident insurance in place of workers' compensation insurance. Furthermore, if permitted by applicable law, you may choose not to insure yourself against industrial injuries at all, but do so at your own risk.

22. Indemnity. You shall indemnify, defend (at Rasier NZ's and Uber's option) and hold harmless Rasier NZ, Uber and their Affiliates and each of their respective officers, directors, employees, agents, successors and assigns from and against any and all liabilities, losses, costs, expenses (including legal fees), damages, penalties, fines, social security contributions and taxes arising out of or related to: (a) your breach of your representations, warranties or obligations under this Agreement; or (b) a claim by a third party (including Users, regulators and governmental authorities) directly or indirectly related to your provision of Transportation Services or use of the Uber Services (***"Losses"***). Your liability under this clause 22 shall be reduced proportionately if, and to the extent that, Rasier NZ or Uber directly caused or directly contributed to any such Losses.

23. Tax Indemnity. You shall comply with all of your obligations under tax and social security laws to the extent applicable to this Agreement. You shall indemnify Rasier NZ, Uber and their Affiliates from all tax liabilities, duties, levies, claims and penalties that may be imposed on you or on Rasier NZ, Uber and/or their Affiliates as a result of your failure to comply with any of your tax obligations, or for providing false information requested of you under clause 12.1. In particular, but without limitation to the foregoing, such taxes or duties shall include taxes, wages or other duties or withholdings (including any wage tax, social insurance premiums or employee insurance premiums) (***"Tax Liabilities"***) arising in the event that the relationship described in this Agreement, contrary to the intention and meaning of the parties, should be held to be an employment agreement between Rasier NZ or Uber and you by the Dutch or New Zealand taxation or fiscal or social security authority or the taxation, fiscal or social security authority of any other country or labour authority. The indemnity set out in this clause 23, insofar as it relates to a finding by a judicial body or legislative authority of competent jurisdiction

that there is an employment relationship between you and Rasier NZ, Uber or an Affiliate of Rasier NZ or Uber, applies only to that proportion of Rasier NZ's or Uber's liability that directly or indirectly relates to or arises from you holding yourself out to be an employee of Rasier NZ or Uber or any of their Affiliates, or any other act or omission by you that is not expressly authorised by Rasier NZ or Uber and would reasonably suggest to a third party that you are an employee of Rasier NZ, Uber or any of their Affiliates.

24. Representations and warranties. You hereby represent and warrant that: (a) you have full power and authority to enter into this Agreement and perform your obligations hereunder; (b) you have not entered into, and will not enter into, any agreement that would prevent you from complying with this Agreement; and (c) you will comply with all applicable laws in your performance of this Agreement, including holding and complying with all permits, licenses, registrations and other governmental authorisations necessary to provide Transportation Services under this Agreement, and passenger transportation services to third parties in the Territory generally.

25. Disclaimer. This clause 25 applies only to the maximum extent permitted by applicable law, and does not (and is not intended to) override any rights that you have pursuant to applicable law, including New Zealand consumer law. Rasier NZ, Uber and their Affiliates (as applicable) provide, and you accept, the Uber Services and Driver App on an "as is" and "as available" basis, and do not represent, warrant or guarantee that the Uber Services or Driver App will be uninterrupted or error free or will result in any requests for Transportation Services. Rasier NZ, Uber and their Affiliates function as on demand lead generation and related service providers only and Rasier NZ, Uber and their Affiliates make no representations, warranties or guarantees as to the actions or inactions of the Users who may request or receive Transportation Services from you, and Rasier NZ, Uber and their Affiliates do not screen or otherwise evaluate Users. Notwithstanding the Fare collection facilitation provided by Uber (or its Affiliates), Rasier NZ, Uber and each of their Affiliates expressly disclaim all liability for any act or omission of you, any User or other third party.

26. No Service Guarantee. This clause 26 applies only to the maximum extent permitted by applicable law, and does not (and is not intended to) override any rights that you have pursuant to applicable law, including New Zealand consumer law. Rasier NZ, Uber and their Affiliates do not guarantee the availability or uptime of the Uber Services or Driver App. You acknowledge and agree that the Uber Services or Driver App may be unavailable at any time and for any reason (e.g., due to scheduled maintenance or network failure). Further, the Uber Services or Driver App may be subject to limitations, delays, and other problems inherent in the use of the internet and electronic communications, and Rasier NZ, Uber and their Affiliates are not responsible for any delays, delivery failures or other damages, liabilities or losses resulting from such problems.

27. Limitation of Liability. This clause 27 applies only to the maximum extent permitted by applicable law, and does not (and is not intended to) override any rights that you have pursuant to applicable law, including New Zealand consumer law. Rasier NZ, Uber and each of their Affiliates shall not be liable under or related to this Agreement for any of the following, whether based on contract, tort or otherwise, even if a party has been advised of the possibility of such damages: (i) any incidental, punitive, special, exemplary, consequential, or other indirect damages of any type or kind; or (ii) your or any third party's property damage, or loss or inaccuracy of data, or loss of business, revenue, profits, use or other economic advantage. Except for Rasier NZ's (or an Affiliate of Rasier NZ's) obligation to remit amounts owed to you pursuant to clause 8 above, but subject to any applicable limitations or other provisions contained in these Agreement, in no event shall the liability of Rasier NZ, Uber and/or any of their Affiliates under this Agreement exceed the amount of Service Fees actually paid to or due to Rasier NZ in the 6 months immediately prior the event giving rise to such claim. You acknowledge and agree that any and all claims you have or purport to have against Rasier NZ, Uber and/or their Affiliates should be notified to Rasier NZ, Uber and/or their Affiliates within one (1) year after the event(s) that gave rise to such claim and that you forfeit all rights in respect of that claim if you fail to do so.

28. Relationship.

28.1 Rasier NZ and Uber are providing the limited payment services set out in clause 1 above, except as otherwise expressly provided herein. This Agreement is not an employment agreement, and does not create an employment, independent contractor or worker relationship (including from a labour law, tax law or social security law or insurance perspective), joint venture, partnership or agency relationship. You have no authority to bind Rasier NZ, Uber and/or their Affiliates, or hold yourself out as an employee, independent contractor, worker, agent or authorized representative of Rasier NZ, Uber and/or their Affiliates. Uber's facilitation of Fare payments from Users to you does not alter this relationship at all.

28.2 Where, by implication of mandatory law or otherwise, you may be deemed an employee, worker, agent or representative of Rasier NZ, Uber or any of their Affiliates, you undertake and agree to indemnify, defend (at Rasier NZ's, Uber's or the applicable Affiliate's option) and hold Rasier NZ, Uber and any of their Affiliates harmless from and against any claims by any person, entity, regulators or governmental authorities based on such implied employment, agency or representative relationship. The indemnity set out in this clause 28.2, insofar as it relates to a finding by a judicial body or legislative authority of competent jurisdiction that there is an employment relationship between you

and Rasier NZ, Uber or any of their Affiliates, applies only to that proportion of Rasier NZ's or Uber's liability that directly or indirectly relates to you holding yourself out to be an employee of Rasier NZ or Uber or any of their Affiliates, or any other act or omission by you that is not expressly authorised by Rasier NZ or Uber and would reasonably suggest to a third party that you are an employee of Rasier NZ or Uber or any of their Affiliates. You expressly agree that where required or implied by applicable law or otherwise, you may be deemed an employee, agent or representative of Rasier NZ, Uber or an Affiliate of Rasier NZ or Uber, any payments made to you will be taken to be inclusive of (i) superannuation contribution amounts; and (ii) amounts equivalent to all taxes (including but not limited to income taxes) payable by you in respect of those payments, in each case that Rasier NZ or Uber (or any of their Affiliates) may otherwise be required to pay under applicable law.

29. General. Invalidity of any provision in this Agreement does not affect the rest of this Agreement. Each of Rasier NZ and Uber may assign or transfer this Agreement or any or all of their respective rights or obligations hereunder, in whole or in part, without your prior consent (you may not, however, as the Agreement needs to remain with you). Should Rasier NZ or Uber do so, you have the right to terminate this Agreement immediately, without prior notice. Each of Rasier NZ and Uber may subcontract its rights and obligations under this Agreement. This Agreement, including the recitals, terms contained in any hyperlinks referenced in this Agreement and all Addenda and Supplemental Terms, constitutes the entire agreement and understanding of the parties with respect to its subject matter, and replaces and supersedes all prior or contemporaneous agreements or undertakings on this subject matter. In this Agreement, "including" and "include" mean "including, but not limited to."

30. Modification. Rasier NZ and Uber reserve the right to modify the terms and conditions of this Agreement at any time, effective upon publishing an updated version of this Agreement on the online portal available to you on the Uber Services. Rasier NZ and Uber reserve the right to modify any policies or information referenced at hyperlinks from this Agreement from time to time. Rasier NZ or Uber will provide you with at least 14 days' notice in the event of a material change to any clause of the Agreement, provided that in such event you shall have the right to terminate the Agreement immediately upon receiving notice from Rasier NZ or Uber. You hereby acknowledge and agree that, by using the Uber Services, or the Driver App, you are bound by any future amendments and additions to this Agreement, information referenced at hyperlinks herein, or documents incorporated herein, including with respect to Fare Calculations. Continued use of the Uber Services or Driver App after any such changes shall constitute your consent to such changes.

31. Supplemental Terms and Addenda. Supplemental terms may apply to your use of the Uber Services, such as use policies or terms related to certain features and functionality, which may be modified from time to time (***"Supplemental Terms"***). Addenda to this Agreement may also apply, setting forth additional Territory specific and/or service-specific terms, as made available and as updated by Uber or Rasier NZ from time to time (individually "***Addendum***"). You may be presented with certain Supplemental Terms from time to time and/ or Addenda which are in addition to, and shall be deemed a part of, this Agreement. Rasier NZ or Uber will provide you with 14 days' notice in the event that it adds or modifies Supplemental Terms and Addenda in a manner that it reasonably considers materially alters your rights under the Agreement, provided that in such event you shall have the right to terminate the Agreement immediately upon receiving notice from Rasier NZ. Supplemental Terms and Addenda shall prevail over this Agreement in the event of a conflict.

32. No Third Party Beneficiaries except for Rasier NZ's and Uber's Affiliates. You acknowledge that there are no third party beneficiaries to this Agreement except for Rasier NZ's and Uber's Affiliates. Nothing contained in this Agreement is intended to or shall be interpreted to create any third party beneficiary claims and the provisions of sections 10 to 20 of the Contract and Commercial Law Act 2017 shall not apply to this Agreement (to the extent permitted by law), except with respect to Rasier NZ's and Uber's Affiliates. For the purposes of this Agreement "Affiliates" means an entity that, directly or indirectly, controls, is under the control of, or is under common control with a party, where control means having more than fifty percent (50%) of the voting stock or other ownership interest or the majority of the voting rights of such entity, the ability of such entity to ensure that the activities and business of that Affiliate are conducted in accordance with the wishes of that entity or the right to receive the majority of the income of that Affiliate on any distribution by it of all of its income or the majority of its assets on winding up.

33. Notices. Any notice delivered by Rasier NZ or Uber to you under this Agreement will be delivered by email to the email address associated with your account or by posting on the Driver App or the online portal available to you on the Uber Services. Any notice delivered by you to Rasier NZ or Uber under this Agreement must be delivered by contacting Rasier NZ or Uber at t.uber.com/partner-contact. Additional Territory-specific notices may be required from time to time.

34. Arbitration Any dispute, conflict or controversy, howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules (***"ICC Mediation Rules"***). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (***"ICC Arbitration Rules"***). The ICC Rules' Emergency

Arbitrator provisions are excluded. The dispute shall be resolved by one (1) arbitrator to be appointed in accordance with the ICC Rules. The language of the arbitration shall be English. The existence and content of the mediation and arbitration proceedings, including documents and briefs submitted by the parties, correspondence from and to the ICC, correspondence from the mediator, and correspondence, orders and awards issued by the sole arbitrator, shall remain strictly confidential and shall not be disclosed to any third party without the express written consent from the other party unless: (i) the disclosure to the third party is reasonably required in the context of conducting the mediation or arbitration proceedings; and (ii) the third party agrees unconditionally in writing to be bound by the confidentiality obligation stipulated herein. Nothing herein limits or excludes (nor is intended to limit or exclude) any statutory rights that you may have under applicable law, including New Zealand consumer law, that cannot be lawfully limited or excluded.

35. Governing Law and Jurisdiction. Except as otherwise set forth above, this Agreement shall be exclusively governed by and construed in accordance with the laws of New Zealand, excluding its rules on conflicts of laws. The Vienna Convention on the International Sale of Goods of 1980 (CISG) shall not apply.

By clicking "Yes, I accept" or signing below (as such may be required by applicable law), you expressly acknowledge that you have read, understood, and taken steps to thoughtfully consider the consequences of this Agreement, that you agree to be bound by the terms and conditions of the Agreement, and that you are legally competent to enter into this Agreement with Rasier NZ and Uber.

Your Signature: _____

Name: _____

Date: _____