

Ruling on Uber drivers likely to have broader impact

Column written by John Farrow and published in the Otago Daily Times on 4 November 2022.

The chief judge of the Employment Court has recently delivered a landmark decision finding that four Uber drivers were employees of Uber.

While the finding is only in respect of the individual drivers who brought the case, Chief Judge Christina Inglis cautioned that the case may well have broader impact, "... particularly where, as here, there is apparent uniformity in the way in which the companies operate, and the framework under which drivers are engaged".

Given the court's findings, it is difficult to imagine the decision will not have universal application to Uber and Uber Eats drivers in New Zealand.

This follows a line of recent decisions from the chief judge finding that persons previously thought to be independent contractors were, in fact, employees.

In *Leota v Parcel Express Ltd* she found that Mr Leota was an employee of Parcel Express, rather than an independent courier driver. In *Barry v CI Builders Ltd* she found that Mr Barry was an employee, rather than an independent building contractor. Most recently, she found that a number of members of the Gloriavale Community were, in fact, employees.

The Government is currently giving consideration to legislation to address employment status. The Tripartite Working Group on better protections for contractors provided a Report to the Workplace Minister in December 2021.

The Minister, Michael Wood, recently commented: "It is my expectation that relatively soon, the Government will be able to move forward and present some proposals for reform."

He suggested that the legal definition of an "employee" needed revising to include "a strong sense of

contradistinction" to someone who is genuinely in business for themselves.

In her decision, the chief judge emphasised that employment status allowed an employee to access a range of legislative minimum employment entitlements including minimum wage, rest and meal breaks, holidays, parental leave, domestic violence leave, bereavement leave etc. She also emphasised that the "growing fragmentation, casualisation and globalisation of work and work forces in New Zealand meant that the assessment of employment status is all the more important".

The Employment Relations Act was intended to extend minimum protection to workers. It includes statutory recognition of vulnerability based on an inherent inequality of bargaining power.

"... 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."

Workers' rights are primarily created by the Employment Relations Act and the employment contract plays a secondary role. The Employment Relations Act prohibits contracting out of its provisions. For that reason, a strictly contractual approach seeking to identify the key characteristics of a commercial contract misses the point.

The chief judge referred to six matters which were relevant to assessing the real nature of the relationship between the drivers and Uber. They were:

- a. the nature of the Uber business and the way it operated and practised;
- b. the impact of the Uber business model and its operation on the drivers;
- c. who benefited from the work undertaken by the drivers;

Ruling on Uber drivers likely to have broader impact (Continued)

- d. who exercised control over the drivers' work, the way in which it was conducted and when and how it was conducted;
- e. any indications of intention, including what can be drawn from the nature, terms and conditions of the documentation between the parties; and
- f. the extent to which the drivers identified as and were identified by others as part of the Uber business."

Uber argued that all it really did was operate a digital labour platform which facilitated a relationship between the driver, the rider (ride-share), the eater and the restaurant. Judge Inglis acknowledged that the way in which the business operates means that a number of the classic hallmarks of a traditional employment relationship are missing.

Ultimately the decision rested on the extent of control exercised by Uber. While drivers are not obliged to be present on demand or on stipulated days, Uber dictates the contractual terms under which the drivers perform services.

Those terms include being obliged to provide personal services and not being able to share their accounts or driver identifications to log on to the app.

Uber decides the cost of each trip and the charges to the customer. The rider pays directly to Uber. The driver has no control over setting the rates and Uber has sole discretion to review or cancel a fare and to make a full or partial refund to a customer.

Uber also imposes standards of behaviour which drivers are required to comply with, including an ability to discipline drivers for any breach of its Guidelines.

Perhaps most significantly, Uber exercises a rewards scheme. The top-tier Diamond status is achieved by accepting a certain number of rides and achieving a particular rating record.

Slipping below Diamond status means the driver is not told by Uber where the delivery address is until they arrive at the pick-up destination. This means they are deprived of selecting more profitable jobs.

So, while on the face of it drivers have the ability to refuse jobs and pick when they work, there is a significant consequence for this.

The drivers were found not to have any real ability to develop their own business. They are prohibited from contacting any passenger. The only way they can increase their earnings is by working longer hours.

The chief judge's decision follows a number of similar findings in overseas jurisdictions. My understanding is that an appeal is likely, so watch this space.

During a couple of recent Uber rides I talked to the drivers about the decision. Interestingly, the drivers in my "straw poll" were adamant that they didn't want to be employees and were independent drivers. Uber elected to call no evidence from drivers in defence of the claim. Based on my straw poll, that may have been ill-advised.

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