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EMPLOYMENT LAW

Court rules Uber driver is a contractor, not an employee

By Jenni McManus

A long-awaited decision on the employment status of an Auckland Uber driver has held that he is an independent contractor, not an employee, of the global ride-sharing business.

Atapattu ("Shane") Arachchige was seeking a declaration from the Employment Court that he was an employee of Rasier NZ Ltd, the local unit of Uber BV. Only with employee status could he file a personal grievance claim against Uber which terminated his contract in June 2019 after a passenger complaint. Arachchige says Uber gave him no details about the complaint; nor was he given the opportunity to respond. Uber simply deactivated him from its app, ending his four-year association with the business.

In ruling he was an independent contractor Judge Joanna Holden was careful to distinguish Arachchige's case from an earlier decision involving courier driver Mika Leota (*Leota v Parcel Express*) where Chief Employment Court Judge Christina Inglis found Leota was an employee. Nor will Judge Holden's decision necessarily apply to all 6500 Uber drivers in New Zealand.

"The inquiry is intensely fact-specific and deals only with Mr Arachchige's situation," she said. But barrister and employment law specialist Catherine Stewart says in certain circumstances, it will have precedent value.

"I would imagine most Uber drivers have fairly similar factual scenarios and if they do have similar fact scenarios, this is a very persuasive case," she says. "It's likely there are arrangements for Uber drivers that are the same or similar [to those of Arachchige]. If that's the case, this will be an important precedent."

Similarly, Chief Judge Inglis made it clear her decision in *Leota* should not be taken as a blueprint for the courier sector and did not mean all

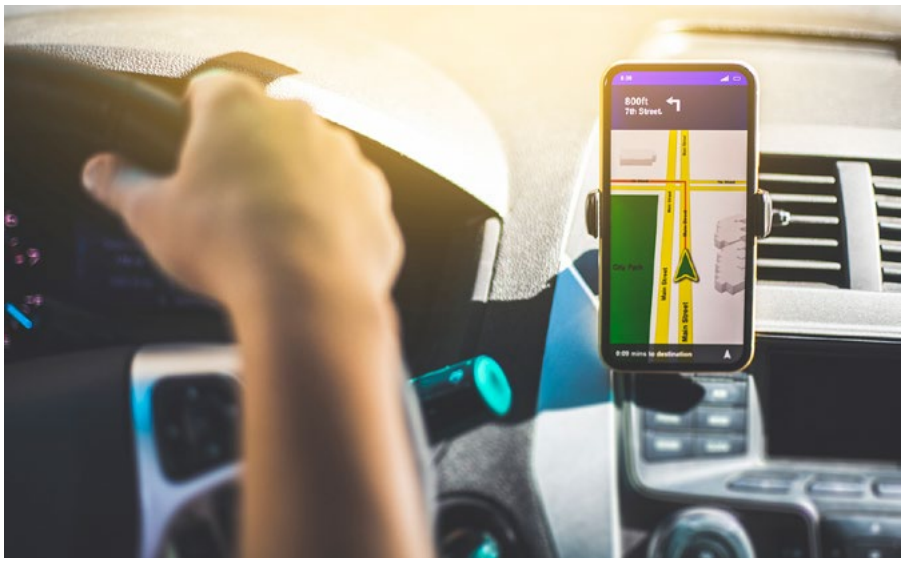

Photo by LPETTET/Getty Images

The employment status of Uber drivers is being tested in several foreign courts

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courier drivers in New Zealand were employees. "It makes a declaration of Mr Leota's status only," she said. But, as Leota's lawyer Garry Pollak said at the time, it's a "salutary reminder that simply because a worker is labelled an independent contractor does not mean they actually are". **Read more**

Stewart concurs. In making these decisions, no longer do the courts look simply at the wording of the contract.

The relevant law is s 6 of the Employment Relations Act 2000 which deals with the meaning of the word "employee". While a lay person might think signing a contract is the end of the matter, the question of whether a person is an employee or an independent contractor depends also on the way that contract is being performed and what the intentions of the parties were, Stewart says

This wasn't always the case. Twenty years ago, if a contract stated you were an employee or an independent contractor, "that was pretty much the end of it". But the label is no longer determinative. "And I think that's a good thing," Stewart says. "Otherwise, it enables people to put their own labels on it and avoid their obligations as an employer."

The leading case on the interpretation of s 6 is the Supreme Court's decision in *Bryson v Three Foot*

Continued on page 2

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Continued from page 1

Six (no 2) which spells out the matters that need to be taken into account in determining the true nature of the relationship. The court looks first at the terms of the contract and secondly at the way it is operating in practice.

"That's where *Leota* is so different [from *Arachchige*]," Stewart says. "The agreement said Leota was an independent contractor but pretty much everything else was pointing to him being an employee."

The facts

Before becoming an Uber driver, Arachchige drove for Alert Taxis for five years under a franchise agreement. At Alert, he considered himself to be in business on his own account.

He said driving for Uber was similar but there were important differences. For example, he paid a monthly franchise fee to Alert Taxis, giving him the right to use its brand and signage on his vehicle. He developed a regular clientele who paid him direct for his services and he had some flexibility about how much he charged them.

To Arachchige, the key difference between driving for Alert and Uber was his inability to develop a personal relationship with his Uber customers and to negotiate a fee. He was also unable to share in the profits of the ride-share business.

Against that, Uber argued that Arachchige had signed a service agreement which clearly denoted him to be an independent contractor. He had autonomy and control about when, where and how he worked and could also work for local competitors such as Zoomy, Ola and Didi. He was in control of his own vehicle and other equipment and was responsible for his own tax.

In Uber's view, it is simply an app, connecting riders with drivers who are willing to transport them. It operates a billing system and takes commissions. And while Arachchige's work was integral to its business, Uber says it lacked control over the way it was done.

As the Employment Court saw it, the key issue was whether Arachchige was in business on his own account or working for someone else's business. "I don't think that you could say in a million years that an Uber driver is conducting an independent business," says Pollak, who is also acting for Arachchige.

Stewart disagrees. When she applies the 12 guidelines laid out by Chief Judge Inglis in *Leota*, they strongly suggest Arachchige was an independent contractor. Using those same indicia, Pollak says he can make an equally compelling argument that he is an employee. "But are these tests even relevant to the gig economy?" he asks.

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Global battle

New Zealand isn't the only jurisdiction grappling with the status of Uber drivers. Cases have been filed in France, Australia, Canada and the United States. As *Arachchige* was being heard in December last year, the UK Supreme Court was hearing an appeal by Uber which was contesting a ruling that its drivers were "workers".

No other jurisdiction has the equivalent of New Zealand's s 6. But the UK has a third category of status – the dependent contractor – where workers are entitled to statutory protections such as the minimum wage, rest breaks and annual leave, and health and safety laws but cannot challenge the termination of their contract unless discrimination is alleged.

Closer to home, in 2017 the Australian Fair Work Commission in *Kaseris v Rasier Pacific VOF* produced a summary of the relevant factors that had to be taken into consideration and found Uber drivers were not employees. It noted Uber had no legal obligation to Kaseris, apart from providing access to its app and remitting fares and passenger cancellation fees. The commission said the fundamental elements of an employment relationship simply did not exist.

Judge Holden found that the services agreement Arachchige signed with Uber was not an employment agreement. Apart from Uber's basic licensing requirements, it was up to Arachchige to decide what vehicle he used, when he would carry out the services and where he would do so. "None of this is consistent with an employment agreement," she said. "It can be contrasted with the situation in *Leota* and *Southern Taxis* where the drivers worked as directed."

While he could not build a customer base, Arachchige could make other business decisions, the judge said. Specifically, he could improve his profitability by choosing to work at times of peak demand and could decide what vehicle, phone and insurer he used. And he could reduce costs by sharing the vehicle with another driver.

Judge Holden did not buy Uber's characterisation of itself as a technology business. She said it would be "artificial" not to describe it as a passenger transport operation in the wider sense. The drivers were integral to its operations as without them it didn't have a business. Nevertheless, Uber had little control over the way its drivers did their jobs.

"While there are some aspects of the relationship between Uber and Mr Arachchige that may point to employment, the intent of the parties throughout their relationship was that Mr Arachchige would operate his own business in the manner and at times he wished," she said. "The agreement between [the parties] reflected the parties' intention and the parties acted in accordance with the agreement."

Pollak says his client decided not to seek leave to appeal. It was primarily an access-to-justice issue, he said. Arachchige was on legal aid and the risk of a costs award against him, which could be as much as $100,000, was too big a hurdle.

Pollak says he considers the judgment was incorrect and "does not stand up logically" with the Leota decision. "It is likely that in every jurisdiction this year (already in France) Uber drivers will ultimately be determined to be employees, but not here....Sometimes boldness is required rather than adherence to old-fashioned notions.

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