

Are You Uber Sure You're a Contractor?

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Late last year the Employment Court recently issued a judgment finding that four Uber drivers working for Uber Rideshare and Uber Eats are in fact employees, rather than independent contractors.¹

Uber have recently sought leave to appeal the decision, so it is very much a case of watch this space. However, if the Employment Court's decision stands the implications for not just Uber but other business that traditionally engage contractors will be significant.

The Facts

Uber operates a digital labour platform. Drivers sign up to the app and are able to either connect with passengers through Uber Rideshare or deliver food to customers through Uber Eats.

The company has always treated its drivers as independent contractors who are running their own business. This means they are not entitled to the benefits received by employees, such as the minimum wage, minimum hours of work, rest and meal breaks, holidays, parental leave, domestic violence leave, KiwiSaver and the ability to pursue a personal grievance.

In this case, four Uber drivers sought a declaration by the Employment Court that they are employees.

The Court's Approach

In reaching its decision that the drivers were employees, the Court considered the following factors:

- The nature of Uber's business and how it operated in practice;
- The impact of Uber's business model and its operation on drivers;
- Who benefited from the work done by Uber drivers;
- The control exercised over drivers' work;
- The parties intentions, as outlined in documentation signed by the parties; and
- The extent to which drivers were identified as part of Uber's business.

¹ *E Tū Incorporated & another v Raiser Operations BV & others* [2022] NZEmpC 192

The Court acknowledged that the drivers were not obliged to be physically present at a particular workplace at particular times and could log in and out of the Uber App to work at times that suited them. Such flexibility has traditionally been seen to suggest independent contractor status.

However, it also found that Uber exercised a high level of control over its workers. Although drivers could work when they wanted to, if they did not work enough or at the right times, they would lose access to useful information, and their status within the Uber app would be negatively affected.

Similarly, Uber had complete control over the contractual terms under which the plaintiff drivers performed their services, including in relation to setting the fare; fare cancellations and refunds; Uber's deduction from the fare before payment is made to the driver; driver incentives; standards of behaviour; its terms and conditions (which were updated unilaterally); and in relation to disciplining and deactivating drivers when they were in breach of its guidelines.

In the Court's view, the workers lacked genuine autonomy and there was little to no scope for them to grow their own business. They effectively obtained work via Uber's brand and had no connection with the customer after the transaction had taken place. They also had no ability to market their services, or to bring in substitute labour. Ultimately, all work was done in Uber's interest – rather than in the driver's interest.

The Court put little weight on the fact that all drivers were required to supply their own vehicle and mobile phone. It noted that many adults have access to a car and a smartphone, and this did not reflect the sort of investment that would otherwise indicate they were running their own business.

Nor did the Court put significant weight on the fact many of the drivers had other jobs. The Court observed that it was not uncommon for workers in the modern economy to have multiple jobs with multiple employers.

In the Court's view, this meant the parties were, in fact, in an employment relationship.

Further Advice

Whilst the decision only applies to the four drivers involved in the case, given the uniform way in which Uber engages its drivers, if the decision stands it will have wider implications.

The decision should also put other organisations and industries that commonly engage workers as contractors on notice that the Employment Court is increasingly willing to take a robust approach to finding an employment relationship where one exists.

Further, it seems to us that it will be increasingly difficult to engage workers as independent contractors where there is a significant power imbalance in the relationship between the parties. The Court has signalled that in examining the true nature of the relationship, it is willing to find that control exists over a worker even where traditional elements of control (such as, for example, the requirement to work specified hours, or a manager who exerts direction and control over the worker's work) are not present.

The decision will likely have particular significance for technology platforms and companies operating in the gig economy, but is also relevant to other industries that have traditionally engaged workers as independent contractors, such as courier drivers and taxi drivers.

Please contact our employment law team if you would like further advice on your obligations or rights as an employer, employee, or independent contractor.

Our thanks to Kari Schmidt and Gerrad Brimble for preparing this article.

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