IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA645/2022
[2023] NZCA 216

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

Court:	Courtney and Mallon JJ
Counsel:	P F Wicks KC and K M Dunn for Applicants P Cranney for Respondents
Judgment: (On the papers)	8 June 2023 at 3 pm

JUDGMENT OF COURT

A The application for leave to appeal is granted on the following questions of law:

(a) Did the Employment Court err by misdirecting itself on the application of s 6 (the meaning of "employee") of the Employment Relations Act 2000?

(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?

B We reserve costs pending the outcome of the appeal.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] Rasier Operations BV, Uber Portier BV, Uber BV, Portier New Zealand Ltd and Rasier New Zealand Ltd (the applicants) operate within the Uber group (Uber). Mr Abdurahman, Mr Keil, Mr Rama and Mr Ang are drivers who worked for one or more of the applicants.

[2] E Tū Inc and First Union Inc (the respondents) sought declarations in the Employment Court on behalf of the drivers as to their employment status.[1] Chief Judge Inglis found that each of the drivers were in an employment relationship when carrying out their work for the applicants.[2] She granted a declaration accordingly.[3]

[3] An appeal from the Employment Court's decision on a question of law requires leave.[4] This Court may grant leave if the question of law is one that, by reason of its

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1 Employment Relations Act 2000, s 6(5).
2 *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192.
3 At [93].
4 Employment Relations Act, s 214(1).

general or public importance or for any other reason, ought to be submitted to this Court for decision.[5]

[4] The applicants seek leave to appeal that decision on the following proposed questions:

(a) Did the Employment Court err by misdirecting itself on the application of s 6 (the meaning of "employee") of the Employment Relations Act 2000?

(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?

[5] The respondents oppose the application for leave. They say the Employment Court made no errors of law and closely analysed the evidence to reach the conclusions it did.

Background

[6] Uber provides a digital ridesharing and food delivery platform. Via the Uber app, a person advises where they want a ride to, Uber offers the trip to available drivers, and a driver accepts the offer, collects the person and drives them to their chosen location. Similarly, via the Uber app, a person selects a restaurant and orders their food, Uber offers the food pick-up and delivery trip to available drivers, and a driver accepts the offer, collects the food from the restaurant and drives the food to the person at their nominated address for delivery. The person obtaining the ride or the food delivery service makes payment to Uber and Uber makes payment to the drivers.

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5 Employment Relations Act, s 214(3).

[7] The first applicant was an entity involved in the Uber rideshare business prior to 1 December 2018. Mr Ang and Mr Keil worked for the first applicant. The third and fifth applicants were involved in the Uber rideshare business. Mr Abdurahman, Mr Keil and Mr Rama worked for the third and fifth applicants. The second and fourth applicants were involved in the UberEats business. Mr Rama worked for the second and fourth applicants.

Employment Court decision

[8] Chief Judge Inglis said that the issue before her was one of statutory construction of the definition of s 6 of the Employment Relations Act.[6] She referred to the purpose of the Act, s 6 and the satellite provisions.[7]

[9] The Judge noted that there were two prerequisites to falling within the s 6 definition: a worker must be engaged to work for hire or reward and be engaged under a contract of service.[8] She noted that what amounted to a contract of service was to be assessed having regard to "the real nature of the relationship".[9] That was to be assessed pursuant to s 6(3) by considering "all relevant matters, including any matters that indicate the intention of the persons", while observing the statutory caution "not to treat as a determining matter any statement by the person that describes the nature of the relationship".[10]

[10] The Judge considered the matters relevant to assessing the real nature of the relationship were: the nature of the Uber business and the way it operated in practice; the impact of the Uber business model and its operation on the drivers; who benefited from the work undertaken by the drivers; who exercised control over the drivers' work, the way in which it was conducted and when and how it was conducted; any indication of intention, including what can be drawn from the nature, terms and conditions of the documentation between the parties; and the extent to which the drivers identified as, and were identified by others as, part of the Uber business.[11]

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6 *E Tū Inc v Rasier Operations* BV, above n 2, at [6].
7 At [8].
8 At [12].
9 At [12].
10 At [12].
11 At [25].

[11] The Judge examined those matters on the evidence. She concluded that, on the evidence and construing s 6 purposively, the drivers were in an employment relationship when driving for the benefit of the Uber businesses.[12] She further concluded that the Employment Relations Act did not exclude joint or multiple employers employing an employee.[13] She considered the real nature of the relationship in this case was joint employment (except in the period prior to December 2018 when Mr Ang and Mr Keil were each employed by the first applicant only).[14]

Leave assessment

[12] We are satisfied that leave to appeal should be granted on the first two questions. As they are concerned with the correct approach to s 6, they raise questions of law in the context of new ways and fast-moving changes to the way in which work is done.[15] Similar applications to that considered by the Judge in this case have been made in other jurisdictions with, as the Judge noted, "mixed results".[16] In a previous New Zealand case, the driver was found not to be an employee.[17] While the declaration related to the individual drivers on whose behalf the declarations were sought, it has a potential broader impact for a large number of other drivers where there is an apparent uniformity in the way in which the businesses operate and the framework under which the drivers are engaged.[18]

[13] We are also satisfied that leave should be granted on the third question. As framed it raises a question of law as to the factors that determine whether there is a joint employment of an employee. In the context of Uber businesses with multiple individual drivers who may be impacted by the decision, it is of general or public importance. It may have an impact on other businesses.

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12 At [81]–[82].
13 At [87]–[88].
14 At [90] and [92].
15 As noted by Chief Judge Inglis at [2] and [3].
16 At [1].
17 *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, [2020] ERNZ 530.
18 As noted by the Judge at [95].

Result

[14] The application for leave to appeal is granted on the following questions of law:

(a) Did the Employment Court err by misdirecting itself on the application of s 6 (the meaning of "employee") of the Employment Relations Act 2000?

(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?

[15] We reserve costs pending the outcome of the appeal.[19]

Solicitors:
Russell McVeagh, Auckland for Applicants
Oakley Moran, Wellington for Respondents

[19] Court of Appeal (Civil) Rules 2005, r 53G(3).