



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Amita Gupta

v

Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats

(U2019/1001)

COMMISSIONER HAMPTON

ADELAIDE, 23 AUGUST 2019

Application for an unfair dismissal remedy - jurisdictional objections - whether correct entities named as respondents - whether applicant an employee - whether applicant had been dismissed - previous decisions of Commission dealing with Uber business model considered - determined that one incorrect respondent named but not critical given other findings - nature of relationship between applicant and Uber entities considered - required approach identified - multifactorial test applied - relevance of Independent Contractors Act 2006 and GST legislation considered - on balance, applicant not an employee - jurisdictional objection upheld - application dismissed.

1. What this decision is about

[1] Ms Amita Gupta (or the Applicant) has applied to the Fair Work Commission (the Commission or FWC) for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the FW Act). Ms Gupta has cited as respondents to the application Portier Pacific Pty Ltd (Portier, or the First Respondent) and Uber Australia Pty Ltd T/A Uber Eats (Uber Australia or the Second Respondent). This is based upon the Applicant's proposition that one or both of these entities were her employer.

[2] The precise nature of Portier's and Uber Australia's activities, and the relationship between them and Ms Gupta, will be subject to more detailed consideration in this Decision. For present purposes it is sufficient to state that, together with another entity – Uber Portier BV (Uber BV), Portier and Uber Australia market and provide a food ordering and food delivery platform in Australia. Where the distinction between the companies is not relevant, I will, for convenience, refer to them collectively by reference to the brand name "Uber Eats".

[3] In her application, Ms Gupta states that she worked as an (employed) delivery driver for Portier and Uber Australia from 26 September 2017 to the day her "dismissal" took effect on 15 January 2019. Ms Gupta contends that Uber Eats' decision to suspend, and then permanently block her access to the Uber Partner App,¹ constituted a dismissal.

¹ As will be later set out, the platform operated by the Uber Eats comprises three separate mobile applications (Apps) for various elements of the delivery process.

[4] Uber Eats oppose the application and have raised three jurisdictional matters. Those being; that the Applicant had no relationship with Uber Australia and that irrespective of any other outcome, the application against that entity should be dismissed (**the identification of the correct respondents**); that the Applicant was not an employee within the meaning of the FW Act (**the nature of the relationship**); and that the Applicant was not dismissed within the meaning of the FW Act (**the dismissal issue**). In practical terms, the dismissal issue is based upon the proposition that Ms Gupta was not an employee who could be subject to a relevant dismissal. As a result, I will not deal separately with that aspect.

[5] It is not in dispute that in order for Ms Gupta to make and advance this application, she must have been an employee within the meaning of the FW Act. This arises from, amongst other sources, the requirement in s.382 that in order to be protected from unfair dismissal, the person (the applicant) must be an employee who has served at least the minimum employment period. Under s.380 the terms “employee” and “employer” are defined by reference to the concepts of national system employee and national system employer as defined in s.13 and s.14 respectively.

[6] Relevantly for present purposes, employee has its normal meaning which imports the common law test as to what constitutes an employee and employment.²

[7] In this matter Ms Gupta has been represented by her husband, Mr Santosh Gupta. Both Ms and Mr Gupta are Hindi speakers and an Interpreter assisted Ms Gupta with giving evidence in these proceedings. Mr Gupta fully participated in proceedings without requiring or requesting any access to the Interpreter provided by the Commission. I also observe that in practical terms, Mr Gupta largely undertook the activities associated with Ms Gupta’s arrangements with Uber Eats in conjunction with the Applicant. Further, Mr Gupta undertook the Uber Eats registration processes on her behalf and drove the vehicle involved on most occasions.³

[8] After conducting a conference with the parties on 4 April 2019, and considering the jurisdictional questions to be considered and the evidence involved, I determined that a hearing would be the most effective and efficient way to resolve this matter.⁴

[9] For reasons provided separately to the parties by email, permission was given to the First and Second Respondents to be represented by a Lawyer under s.596 of the FW Act.

[10] This decision deals with the relevance of Uber Australia and the nature of the relationship issues that go to the jurisdiction of the Commission to hear and determine the substantive unfair dismissal application.

2. Previous decisions of the Commission dealing with the Uber business model

² *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 at [46].

³ Another relative also drove the vehicle on some occasions.

⁴ Section 399(1) of the FW Act.

[11] The Commission has dealt with the application of what might be described as the “Uber” business model in three unfair dismissal decisions that have been referred to in the submissions of the parties. Each of these decisions concern whether the relevant applicants were employees in the context of the Uber passenger transport business model, rather than that applying to Uber Eats. However, each remains relevant and it is convenient to summarise these before outlining and dealing with the evidence and considerations that arise in this particular matter.

[12] In *Kaseris v Rasier Pacific V.O.F*⁵ (*Kaseris*), Gostencnik DP undertook a detailed analysis of the Uber passenger business model and I do not propose to repeat that analysis here. Relevantly for this matter, the Deputy President observed that (amongst other things) the Uber business model was founded on software developed by Uber to facilitate the connection of drivers with members of the public seeking transportation services via lead generation applications and that this model operated across two smartphone applications - a “Rider App” (for those seeking transportation services) and a “Partner App” (for those seeking to supply transportation services).⁶ Mr Kaseris filed his unfair dismissal application after his account in the “Partner App” was deactivated. Ultimately, the Deputy President found that Mr Kaseris was not an employee. Without detracting from the Deputy President’s comprehensive discussion of the application of the legislative framework and the common law approach, it is appropriate to highlight that a critical element contributing to the Deputy President’s decision was that the work-wages bargain, a fundamental element of an employment relationship, was absent.⁷ The bargain was described as follows:

“[48] For there to exist an employment relationship, certain fundamental elements must be present. A contract of employment is, at its essence, a work-wages bargain, so that the “irreducible minimum of mutual obligation” necessary to create such a contract is an obligation on the one side to perform the work or services that may reasonably be demanded under the contract, and on the other side to pay for such work or services.” (citations omitted)

[13] In *Kaseris*, the Deputy President also applied a multifactorial assessment endorsed by the Full Bench of the then Fair Work Australia in *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario*⁸ (*French Accent*) and found that the preponderance of these also militated against the existence of an employment relationship.

[14] In *Pallage v Rasier Pacific Pty Ltd*⁹ (*Pallage*) Wilson C dealt with the same Uber passenger transport business model as considered in *Kaseris* in the context of an unfair dismissal application made after the user of the “Partner App” had their account deactivated. Similarly to *Kaseris*, the Commissioner considered the nature of the work performed and the manner in which that work was being undertaken. Wilson C also applied the multifactorial approach of *French Accent* in determining the matter and ultimately found that while some

⁵ [2017] FWC 6610.

⁶ *Kaseris* at [1], [4]-[6].

⁷ *Kaseris* at [51].

⁸ [2011] FWAFB 8307. The indicia and required approach endorsed by the Full Bench are comprehensively discussed later in this decision.

⁹ [2018] FWC 2579.

indicia appeared more consistent with an employment relationship, the weight of the indicia suggested Mr Pallage was not an employee.¹⁰

[15] The recent decision of Bissett C in *Suliman v Rasier Pacific Pty Ltd*¹¹ (*Suliman*) dealt with the same issues in a similar context and adopted the approach evident in *Kaseris*. Mr Suliman attempted to distinguish *Kaseris* and its reliance on the non-existence of the work-wages bargain by suggesting the bargain was a characteristic (only) of permanent employment. Mr Suliman submitted that the relationship between Uber and a Driver is more akin to casual employment.¹² This approach was rejected by Bissett C, who found that the work-wages bargain was not confined to the attendance of work, but that it also included the compulsion to carry out work as directed while in attendance.¹³ This position was succinctly summarised by the Commissioner at [38]:

“The option to attend work is not the totality of the work-wages bargain – it is that in attending work there is a requirement to provide the services for which the casual employee is engaged and seeks to be paid. The Uber Driver differs from a casual employee as the Driver, having attended “work” (by logging on) is not required to offer any service.”

[16] In general terms, the evidence in this matter reveals that the Uber Eats business model and arrangements are consistent with the Uber (passenger transport) business model considered in the above matters; with some differences that emerge from the fact that this case involves the delivery of food rather than the transportation of passengers. Further, in the present application, there is an additional party to the arrangements through a further agreement, being a contract between Uber Eats and the restaurants which accept the orders and produce the food that is to be delivered.

[17] Although not dealing with the Uber business model, the parties also made reference to the decision of the Commission regarding the Foodora (food delivery) platform previously operating in Australia. In *Klooger v Foodora Australia Pty Ltd*,¹⁴ (*Klooger*) Cambridge C, having applied the multifactorial test, found Mr Klooger was not an independent contractor, as asserted by the Respondent, but rather was an employee of Foodora.¹⁵ While I do not propose to summarise the Commissioner’s comprehensive application of the multifactorial test, key elements in his conclusion appear to include that Mr Klooger was offered shifts of work as a bicycle food courier and was engaged on this basis, the capacity of control this shift arrangement allowed to Foodora, and that Mr Klooger was presented to the world as a part of Foodora’s business through both branded attire and equipment utilised, as well as through statements on Foodora’s website.

[18] I observe that there are some significant differences between the arrangements being considered in *Klooger* and those applying in this matter.

¹⁰ *Pallage* at [53].

¹¹ [2019] FWC 4807.

¹² *Suliman* at [33]-[35].

¹³ *Suliman* at [37]-[40].

¹⁴ [2018] FWC 6836.

¹⁵ *Klooger* at [102].

3. The position of the parties and their evidence

[19] Before dealing with the legislative framework and required approach in determining whether Ms Gupta was an employee it is convenient to outline the cases presented by the parties.

3.1 Ms Gupta

[20] Ms Gupta and Mr Gupta filed individual statements which were a mixture of witness material and submissions. Mr Gupta's statement, in particular, comprised what was later confirmed to be the substantive submissions made on behalf of the Applicant. I deal later with the implications of this conflation. A large proportion of the material filed on behalf of Ms Gupta addressed perceived 'unfairness' in the payment model operating under the Services Agreement entered into by the parties.

[21] The substance of the position advanced on behalf of Ms Gupta may be summarised as follows:

- Ms Gupta (and Mr Gupta) suffer from several disabilities and delivery work was suggested by a health professional to aid recovery;
- Ms Gupta registered as an Uber Eats delivery driver with the assistance of Mr Gupta;
- Ms Gupta and her husband completed over 2,200 deliveries using the platform;
- Concerns arose regarding payment rates and ongoing vehicle registration requirements;
- The terms of the Services Agreement are unfair and represent control being exercised by Uber Eats; and
- The relationship was one of employment.

[22] In terms of the features of the relationship relied upon as supporting the existence of an employment relationship, Ms Gupta contended, in effect, that:

- Ms Gupta was required to open an Uber account, have a registered vehicle, and have that vehicle insured in her name as an individual;
- Ms Gupta was supplied with an insulated bag by Uber at no cost and was expected to use the bag despite the fact that it was not fit for purpose;
- Training was provided to her by Uber;
- The Uber navigation app, did not always provide the best or fairest route to do the delivery but was used to calculate the payment based upon its assessment of the shortest route despite the road closures/work and other factors that might cause delay or extra distance;
- The delivery fee is less than that adopted by the Australian Taxation Office (for claiming mileage deductions for the use of a private vehicle);
- The work was unskilled;
- Ms Gupta was not required to have, and was not entitled to hold, an ABN;

- Uber controlled the work and also used its ratings systems (based upon Restaurant and Customer feedback) to exert more control;
- Uber took the risk associated with the delivery work as Ms Gupta was not required to hold indemnity insurance;
- Ms Gupta did not supply any specialist equipment;
- The need to continually prove the registration of the vehicle was unreasonable control;
- Ms Gupta could not subcontract the work and was required to undertake it personally; and
- Ms Gupta was required to accept jobs as a failure to do so would result in ratings falling below 85% and the risk that access to the App would be cancelled.

[23] Ms Gupta also contends that the relationship should be considered to be employment due to the operation of some other laws. In effect, she contends that:

- The contract (Services Agreement) was unfair within the meaning of s.9 of the *Independent Contractors Act 2006* as it provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work; and
- Under s.9-20 of the *A New Tax System (Goods and Services Tax) Act 1999*, Ms Gupta could not be considered to be conducting a business because she had no reasonable expectation of profit or gain given the payments made under the Uber Eats model that did not reflect the hours of work represented by the time when logged onto the App.

3.2 Uber Eats

[24] Uber Eats filed written submissions addressing the jurisdictional issues and provided a witness statement of Mr Luke Mulholland, Uber Eats State Manager for Western Australia and South Australia.

[25] The general propositions underlying Uber Eats' position may be summarised as follows:

- Ms Gupta was a party to a tripartite Services Agreement between her, Uber BV and Portier from 19 September 2017 to 14 January 2019;
- Ms Gupta had no relationship with Uber Australia;
- Uber Eats is a "technology business" that provides "lead-generation" software;
- Ms Gupta was not an employee of Uber BV or Portier;
- Ms Gupta was a "Delivery-Partner" who intermittently used Uber software, a mobile phone App, to receive requests for food delivery services on behalf of the restaurants from September 2017 to January 2019;
- Ms Gupta was under no obligation to sign-on to the App, or when logged on, to accept any delivery request;

- Ms Gupta paid Portier a service fee and Uber Eats did not pay Ms Gupta but rather acted as a limited payment collection agent to permit the Restaurant to pay the Applicant;
- There was no “work-wages” bargain between Ms Gupta and Uber Eats;
- The terms of the Services Agreement defined the relationship as being a business relationship – not one of employment – and this should be given effect to if any ambiguity as to the nature of the relationship exists;
- In any event the various indicia of the relationship do not lead to a conclusion of employment;
- The decisions in *Kaseris*, *Pallage* and *Suliman* were indistinguishable and directly relevant and should be applied as a matter of comity;
- In January 2019 Ms Gupta’s access to the Uber software as a Delivery-Partner was removed, ending the relationship between Ms Gupta and Portier and Uber BV;
- As Ms Gupta was not an employee the removal of access as a Delivery-Partner did not constitute a termination of employment; and
- As Ms Gupta was not an employee, she was not protected from unfair dismissal in any event.

4. Observations on the evidence

[26] Despite the fact that Ms Gupta is the applicant in this matter, her husband and representative Mr Gupta filed the more comprehensive witness statement and was the primary person giving evidence. Given Mr Gupta’s position as both a deponent and representative it was agreed that Mr Gupta would give his evidence before Ms Gupta did so. Ms Gupta remained in the hearing room during Mr Gupta’s evidence. I admitted Mr Gupta’s statement on the basis that those elements that were in the nature of submissions would be treated as such, rather than as evidence of any facts. I found the evidence of Mr Gupta to be generally reliable however his recall of some events was not clear and he had a tendency to let his subjective views as to the fairness of the arrangements influence his evidence.

[27] Given the comprehensive nature of Mr Gupta’s evidence, and the thorough cross-examination of that evidence, by agreement between the parties the challenge to Mr Gupta’s evidence was also taken to challenge those parts of Ms Gupta’s statement that were in the same terms.

[28] Ms Gupta’s evidence was brief and she was assisted in parts by the Interpreter. Subject to the same reservations regarding conflated submissions and statements, Ms Gupta’s statement was accepted as evidence.

[29] Mr Mulholland’s evidence was generally objective and convincing as to the operation of the Uber Eats business model and the facts of the arrangements.

[30] There are some limited factual disputes and I have resolved these having regard to the objective evidence before the Commission and my view of the witness evidence.

[31] I also observe that as part of the materials relied upon by Ms Gupta were some comparisons undertaken between the payments made to Ms Gupta and the wages that she would have been paid if she was an employee. Importantly, although the full parameters of these calculations were not disclosed, they appear to assume that all times when Ms Gupta had activated the Partner App were treated as being hours worked. I will return to the utility of this material but note that given the nature of the relationship, both in legal and practical terms, and the absence of obligations upon Ms Gupta when signed on, I do not consider that this element of the comparison is reasonable or of direct assistance.

5. Identification of the correct respondents

[32] It is appropriate to determine whether both Respondents are properly parties to the matter.

[33] The original application made to the Commission, in effect, cited Uber Australia and Portier. In the Form F3 response provided on behalf of the respondents, Uber Eats indicated, in effect, that any relationship with Ms Gupta involved (only) Portier and Uber BV. During a subsequent directions conference, Ms Gupta confirmed that she intended to proceed against the present respondents.

[34] The evidence reveals that the role played by various entities that make up Uber Eats is as follows:

- Uber Australia – A private company registered in Australia providing marketing and support service to the other Uber entities. It is not a party to the Services Agreement with Ms Gupta or with the restaurants whose products are delivered.
- Portier – A private company registered in Australia. It is a payment collection agent that invoices restaurants and transfers payments to the “Delivery-Partners” (in this case the Applicant), charging a fee to both parties based upon information provided by Uber BV. Portier was a named party to the Services Agreement with Ms Gupta.
- Uber BV – A company registered in the Netherlands. The provider of the various Apps used by the public, the restaurants and the Delivery-Partners that allow food to be ordered by the public, produced on order by participating restaurants and delivered by the Delivery-Partners. It is also the controller of the data entered into and produced by those Apps. Uber BV was a named party to the Services Agreement with Ms Gupta.

[35] Ms Gupta confirmed during submissions that the decision to cite Uber Australia was because Uber BV was registered in the Netherlands. It is apparent to me that the Applicant may have been unaware of the capacity to take proceedings against a foreign company. In any event, there is no proper basis for the Commission to find that Uber Australia is a party to the relationship with Ms Gupta and accordingly, is not properly cited as a respondent.

[36] The relationship reflected in the Services Agreement is between Ms Gupta, Uber BV and Portier. Given the arrangements in place, if any of the Uber Eats entities were to be the employer of Ms Gupta, Uber BV would probably be the relevant party. I also observe that the

fact of Portier undertaking the payment agent role would not, in my view, detract from that position. Portier is acting as an agent, or portal, for all parties.

[37] However, given my findings to follow, there is no utility in considering whether, assuming it could now be done, the application should be amended to cite Uber BV as a respondent.

6. The required approach to the nature of the relationship

[38] Each of the “Uber” decisions of the Commission set out earlier adopted the summary of the general approach to distinguishing between employees and independent contractors as utilised by the Full Bench in *French Accent*.¹⁶ I respectfully agree and adopt that approach. For convenience, that summary is in the following terms:

“[30] The general law approach to distinguishing between employees and independent contractors may be summarised as follows:

- (1) In determining whether a worker is an employee or an independent contractor the ultimate question is whether the worker is the servant of another in that other’s business, or whether the worker carries on a trade or business of his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own of which the work in question forms part? This question is concerned with the objective character of the relationship. It is answered by considering the terms of the contract and the totality of the relationship.
- (2) The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant indicia and the relative weight to be assigned to various indicia and may often be relevant to the construction of ambiguous terms in the contract.
- (3) The terms and terminology of the contract are always important. However, the parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract.
- (4) Consideration should then be given to the various indicia identified in *Stevens v Brodribb Sawmilling Co Pty Ltd* and the other authorities as are relevant in the particular context. For ease of reference the following is a list of indicia identified in the authorities:

¹⁶ [2011] FWAFB 8307.

- *Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like.*

Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of an independent contract. While control of this sort is a significant factor it is not by itself determinative. In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where the work involves a high degree of skill and expertise. On the other hand, where there is a high level of control over the way in which work is performed and the worker is presented to the world at large as a representative of the business then this weighs significantly in favour of the worker being an employee.

“The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter’s order and directions.”
“[B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd v Federal Commissioner of Taxation*, a case involving a droving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract.”

- *Whether the worker performs work for others (or has a genuine and practical entitlement to do so).*

The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, working for others (or the genuine and practical entitlement to do so) suggests an independent contract.

- *Whether the worker has a separate place of work and or advertises his or her services to the world at large.*
- *Whether the worker provides and maintains significant tools or equipment.*

Where the worker’s investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary.

- *Whether the work can be delegated or subcontracted.*

If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator

that the worker is an independent contractor. This is because a contract of service (as distinct from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.

- *Whether the putative employer has the right to suspend or dismiss the person engaged.*
- *Whether the putative employer presents the worker to the world at large as an emanation of the business.*

Typically, this will arise because the worker is required to wear the livery of the putative employer.

- *Whether income tax is deducted from remuneration paid to the worker.*
- *Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.*

Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.

- *Whether the worker is provided with paid holidays or sick leave.*
- *Whether the work involves a profession, trade or distinct calling on the part of the person engaged.*

Such persons tend to be engaged as independent contractors rather than as employees.

- *Whether the worker creates goodwill or saleable assets in the course of his or her work.*
- *Whether the worker spends a significant portion of his remuneration on business expenses.*

It should be borne in mind that no list of indicia is to be regarded as comprehensive or exhaustive and the weight to be given to particular indicia will vary according to the circumstances. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

- (5) Where a consideration of the indicia (in the context of the nature of the work performed and the terms of the contract) points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. However, a consideration of the indicia is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture of the relationship from the accumulation of detail. The overall

effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The ultimate question remains as stated in (1) above. If, having approached the matter in that way, the relationship remains ambiguous, such that the ultimate question cannot be answered with satisfaction one way or the other, then the parties can remove that ambiguity a term that declares the relationship to have one character or the other.

- (6) If the result is still uncertain then the determination should be guided by “matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability” including the “notions” referred to in paragraphs [41] and [42] of *Hollis v Vabu*.¹⁷ (citations omitted)

[39] The reference to the extracts from *Hollis v Vabu*¹⁸ above, is as follows (footnotes omitted):

“[41] In *Bazley v Curry*, the Supreme Court of Canada saw two fundamental or major concerns as underlying the imposition of vicarious liability. The first is the provision of a just and practical remedy for the harm suffered as a result of the wrongs committed in the course of the conduct of the defendant's enterprise. The second is the deterrence of future harm, by the incentive given to employers to reduce the risk of accident, even where there has been no negligence in the legal sense in the particular case giving rise to the claim.

[42] In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise. In delivering the judgment of the Supreme Court of Canada in *Bazley v Curry*, McLachlin J said of such cases that "the employer's enterprise [has] created the risk that produced the tortious act" and the employer must bear responsibility for it. McLachlin J termed this risk "enterprise risk" and said that "where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong". Earlier, in *Ira S Bushey & Sons, Inc v United States*, Judge Friendly had said that the doctrine of respondeat superior rests:

"in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities".¹⁹

¹⁷ [2011] FWA FB 8307 at [30].

¹⁸ *Hollis v Vabu* (2001) 207 CLR 21.

¹⁹ Per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

[40] I also note that the plurality of the High Court illustrated the import of its approach as follows:

"[47] In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it. The case does not deal with situations of that character. The concern here is with the bicycle couriers engaged on Vabu's business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees."²⁰

[41] As a result, the Commission is obliged to consider the totality of the relationship having regard to various indicia that might shed light on the true nature of the relationship.²¹

[42] The Full Bench in *French Accent* also provided some important context for the present matter in the following terms:

"[24] The benefits and protections enjoyed by employees may be seen as reflecting a social consensus, expressed in legislation, that workers who are properly characterised as employees *should* have the benefits and protections of superannuation, workers' compensation insurance, sick leave, annual leave and award entitlements (and it is not to the point that other protections, for example unfair dismissal protection, have been more contentious in recent years).

[25] The FW Act imposes obligations on employers in relation to their "employees" and confers benefits and rights on "employees" without defining when a worker is an employee as distinct from an independent contractor. The definition of "employee" leaves it to the general law to supply that distinction. The nature of the established general law approach to distinguishing between employees and independent contractors may be seen as contributing to the problem precisely because the nature of the general law test is such that it does not admit a clear answer in every case. Once one adopts the position, as the general law has done, that the distinction is rooted in the objective *character* of the work relationship two things follow. First, the infinite variety of human affairs means that work relationships present as a spectrum, some of which are clearly relationships of employment and others of which are clearly relationships of independent contract but some of which are less clear cut. Secondly, that character of a work relationship is what it is and cannot be changed simply because the parties agree to label it differently (unless, of course, the relationship is sufficiently ambiguous that a clear determination is not possible, the situation

²⁰*Hollis v Vabu* (2001) 207 CLR 21.

²¹ See also *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 [(2011) 206 IR 252 per Bromberg J for a further discussion of the 'ultimate question' cited in *French Accent* at [30].

addressed by the *Massey* Proposition). That is a matter clearly recognised by the courts and tribunals.

[26] Moreover, the nature of the ultimate question is such that in any given case that is not clear cut, reasonable judicial minds may differ as to the correct answer in any given case. This was explicitly recognised in *Roy Morgan*. This necessarily means that there is an area of uncertainty for businesses that wish to engage only on the basis of independent contract and not on the basis of employment. Any change to the present approach is a matter for the legislature. Our duty is to continue to apply the established general law approach until legislation or the High Court requires otherwise.”(emphasis in original)

7. Consideration

[43] Whether Ms Gupta was an employee for the purpose of her application for an unfair dismissal remedy made under s.394 of the FW Act is one of jurisdictional fact. It is convenient to discuss the general framework for the relationship, before turning to the relevant indicia and the overall assessment of the nature of the relationship.

7.1 The general factual framework

How the Uber Eats model works

[44] There are four operative parties in the arrangements that lead to the delivery of food under the Uber Eats model; namely, Uber Eats - which provides the system that connects all of the other parties, the final customer - who orders and receives the food (called the “Eater” in the respondents’ evidence), the restaurants – which receives the order and prepares the food (called “Restaurant-Partners” in the respondents’ evidence), and the person (called the “Delivery-Partner” in the respondents’ evidence)²² who picks up the food from the restaurants and delivers it to the final customer. Ms Gupta was a Delivery-Partner.

[45] The Uber Eats technology operates across three software applications:

- Two of the smartphone applications are available to download from the Apple Store or the Google Play Store (depending upon the operating system), being:
 - The “Eats App” for people who would like food delivered to them; and
 - The “Uber Driver” or “Partner App” for individuals who wish to provide food delivery services.
- The Eats App and the Partner App can be downloaded free of charge by any individual, at any time. An individual must have an account to be able to use either application. An individual can download either of the applications and/or create an account in each application and then never use the Eats App or Partner App or the account(s).

²² I have used the terms adopted by Uber Eats for convenience without adopting any implications that may be intended as to the nature of their relationships.

- The third application is provided to restaurants that utilise the "Uber Eats" platform to engage Delivery-Partners to perform delivery services (the "Restaurant App"). Restaurants also use the "Uber Eats" platform to advertise and sell food to Eaters via the Eats App. Restaurants can access the Restaurant App after they sign a services agreement and pay an activation fee.

[46] To place an order for food through the Eats App, an Eater must have an account in the Eats App. Creating that account requires the individual to download the Eats App to their smartphone and then provide their name, contact details and payment (account) details. Once they have created an account, the Eater must then accept terms and conditions with Uber B.V.. After accepting those terms and conditions, the Eater is able to use the Eats App.

[47] To place an order, the Eater opens the Eats App, provides their location for delivery, and a list of Restaurants that are currently accepting orders for delivery to the Eater's area is displayed. Once the Eater selects a Restaurant, they choose items from the menu made available by the Restaurant. The Eater is given the total cost of the meal, delivery fee, the estimated time of arrival of their order and they may then place their order with the Restaurant.

[48] Once a Restaurant accepts an order from an Eater, the Uber Eats platform attempts to connect the Restaurant with a nearby Delivery-Partner who may choose to accept the Restaurant's delivery request. If no Delivery-Partner accepts the Restaurant delivery request, the request will lapse and not be fulfilled.

[49] In order to use the Partner App to be eligible to receive delivery requests from Restaurants, an individual Delivery-Partner needs to complete certain steps. The process currently involves the following steps:

- The individual must have an account in the Partner App. That account can be created either online (at www.uber.com) or within the Partner App (after it has been downloaded to a smartphone).
- The individual must choose whether they will deliver by car, motorbike or bicycle.
- The individual must provide or apply for documents that confirm:
 - (i) their right to work in Australia;
 - (ii) their criminal and police history; and
 - (iii) for individuals who use a car or motorbike, that they have a valid and current driver's licence, vehicle registration and current vehicle insurance policy.
- The individual also submits proof of identity documents and a profile photo.

[50] The final step before an individual is able to accept delivery requests via the Partner App is for them to accept the terms and conditions to use the Partner App contained in the Services Agreement.

[51] When a delivery request is made by a Restaurant, that request is sent to a Delivery-Partner who is logged into the Partner App within the general area. The delivery request is communicated to a Delivery-Partner as a notification within the Partner App. That notification

includes a map with the general location of the Restaurant-Partner and an estimate of the time required to travel to the pick-up location.

[52] A Delivery-Partner who receives the delivery request can accept or ignore the request, or select 'decline' to reject the request. If the Delivery-Partner:

- accepts the trip request - the Partner App will display the Restaurant name and address and any pick-up instructions, as well as the kilometre distance and how many minutes away the pick-up location is;
- ignores the request - the request will lapse after approximately 15-30 seconds and the Delivery-Partner is able to receive other delivery requests;
- selects 'decline' - the request will be rejected and the Delivery-Partner is able to receive other delivery requests.²³

[53] If the Delivery-Partner ignores three requests in a row, they are automatically logged off of the Partner App. The Delivery-Partner may however immediately log back on and it is evident that this is designed to inform the system whether the Delivery-Partners that are logged on are actively seeking the work or are simply logged on without that intention.

[54] If the Delivery-Partner accepts the delivery request, they are free to cancel the request without consequence until they have collected the food. This includes the capacity to cancel after the additional information is provided following the initial acceptance.

[55] At least in theory, a Delivery-Partner is also free to cancel the order after they have collected the food; however this may raise issues of fraud.

[56] Once a Delivery-Partner has accepted a delivery request, they ride or drive to the Restaurant-Partner's location to collect the order. Once the Delivery-Partner arrives at the Restaurant-Partner's location and has collected the order, they confirm the start of the delivery in the Partner App. When a delivery is started in the Partner App, the App displays the Eater's address, the kilometre distance of travel and estimated time of arrival, as well as a map of a suggested delivery route.

[57] After the order is collected from the Restaurant, the Restaurant can rate the pick-up by the Delivery-Partner by selecting thumbs up or thumbs down via the Restaurant App. If the Restaurant-Partner selects "thumbs down", they can also select from a number of pre-defined tags which describe the reason for the rating provided to the Delivery-Partner.

[58] The Delivery-Partner then delivers the order to the Eater's location. The Delivery-Partner can take the route suggested in the Partner App, or can take their own route to the Eater's location. The delivery fee is however calculated by reference to the suggested route.

[59] Once the Delivery-Partner arrives at the Eater's location and delivers the order, they can then confirm that they have completed the delivery in the Partner App.

[60] The Delivery-Partner can "rate" the Restaurant and Eater by selecting a thumbs up or thumbs down. The Eater is also invited, via the Eats App, to rate the Restaurant, including the menu and to separately rate the Delivery-Partner by selecting a thumbs up or thumbs down. If

²³ Where a request is not accepted, it would then be offered to another active (logged-on) Delivery-Partner in the area.

the Eater selects "thumbs down" in relation to a Delivery Partner, they can then also select from a number of pre-defined tags to describe the reason for the rating. In addition, Eaters may tip the Delivery-Partner.

[61] If a Delivery-Partner has the Partner App activated for a continuous period of 12 hours, the system, would in effect, log them off the system for a period (six hours). This appears to operate as a reasonable public safety feature to encourage Delivery-Partners to have some rest periods.

[62] Rating is not compulsory for any of the parties to the arrangement. However, in order to maintain the "user experience" of the Uber Eats platform, Delivery-Partners may lose access to their account with Uber Eats if their overall rating drops below 85%. In that regard, although Ms Gupta contended that there was a direct link between the rate of acceptance of delivery requests and the overall rating, the objective evidence does not support that position.

[63] At the completion of a delivery, the amount payable by the Eater to the Restaurant for food and delivery is charged by the Uber Eats platform and a receipt from the Restaurant to the Eater is generated.

[64] Delivery-Partners are paid a Delivery Fee for each delivery, nominally on behalf of the Restaurant, which is calculated based on a pick-up, drop-off and distance component. The Delivery Fee does not take into account actual time spent and the distance component is calculated using the most direct route, rather than the actual distance travelled by the Delivery-Partner. The Delivery Fee, and certain amounts that may be charged when a User cancels an order, are described as being a "recommended amount" with the Delivery-Partner free to negotiate a lesser amount with the relevant Restaurant and/or User concerned.²⁴

[65] The Uber Eats platform, in effect, invoices the Restaurant on behalf of the Delivery-Partner for the Delivery Fee, accepts payment from the Restaurant and pays it into the Delivery-Partner's nominated account, with the deduction of a service fee (by Portier) from the Delivery Fee otherwise due.

[66] There are optional incentive arrangements that may be offered to Delivery-Partners for referrals.

[67] In practical terms this model led to Ms Gupta undertaking in the order of 2,200 deliveries between September 2017 and January 2019. This also involved Ms Gupta being logged onto the Partner App for various times and periods; being logged on over multiple occasions on some days and not being logged on at all on other days; and accepting varying numbers of requests when logged on, including some occasions when she did not perform any deliveries when logged on. Further, Ms Gupta expressly rejected over 550 delivery requests and cancelled in the order of 240 delivery requests after having initially accepted the request.

[68] The payments due to Ms Gupta for the provision of the delivery services varied over time and were also dependent upon the number and circumstances of each delivery. This in turn was largely dependent upon the periods when the Partner App was activated, the number of requests that were made to Ms Gupta, and the number of those requests that were accepted by her.

²⁴ See 2.2 of the Services Agreement set out later in this Decision.

[69] At the end of the arrangement, the payments included \$4.30 for a pick up, \$0.66 per kilometre for the distance travelled to make the delivery by reference to the “preferred route”, and \$2.10 per delivery.

[70] There is limited objective information and metrics before the Commission about the extent of overall remuneration gained by Ms Gupta. There is also no specific evidence about whether Ms Gupta was actively seeking to perform deliveries during all periods when the Partner App was activated and this also makes the comparison of earnings and hours posited by the Applicant, rather problematic. I note in that respect that there is a significant difference between the time Ms Gupta spent “online” and the time that the App has recorded her as being “active”.²⁵ Based on the limited evidence, the precise import of that is not entirely clear. In addition, to the extent that weekly activities might be considered, on the limited examples provided by Ms Gupta, the Partner App was not activated (or at least there were no deliveries) on some days of the week. Further, there is no indication as to whether the limited materials provided are representative of Ms Gupta’s experience more generally.

[71] The limited information that was provided²⁶ reveals that for some periods, Ms Gupta appears to have undertaken, on at least one day, only 6 deliveries in a 12 hour period and received between \$171.78 (for 17 deliveries) and \$402.86 (for 44 deliveries) over a week. This must be understood with the above significant caveats in mind.

The Services Agreement

[72] I have set out the role played by the various Uber Eats entities earlier in this decision. Ms Gupta entered into a written Services Agreement²⁷ with Uber BV and Portier in September 2017. I observe that given the terminology used in the agreement, it appears to be in the same general terms as applying to the Uber passenger transport matters discussed earlier in this decision.

[73] The purpose of the Services Agreement is stated in the following terms:

“Portier Pacific will procure and facilitate the provision of the lead generation services, being on-demand intermediary and related services rendered via a digital technology application that enable independent providers of delivery services to seek, receive and fulfill on-demand requests for Delivery Services (“*Uber Services*”) to you, an independent provider of Delivery Services. Uber will license you the Provider App (as defined below). The Uber Services and Provider App enable you to seek, receive and fulfill requests for Delivery Services from authorized users of the Uber App (as defined below). In order to use the Uber Services and Provider App, you must agree to the terms and conditions that are set forth below. Upon your execution (electronic or otherwise) of this Agreement, you, Uber and Portier Pacific shall be bound by the terms and conditions set forth herein. References herein to “Uber Group” shall be taken as a reference to Uber, Portier Pacific and each of their Affiliates.

²⁵ Document 6B of Exhibit R1.

²⁶ Attached to Exhibit A1.

²⁷ Document 1 of Exhibit R1. I have used the version of the Services Agreement operating at the time of the conclusion of the relationship.

If you receive services from an Affiliate of Portier Pacific (e.g. Rasier Pacific Pty Ltd) that enable you to seek, receive and fulfil requests for passenger transportation services from Users (as defined below), the services provided by Portier Pacific's Affiliate are separate and independent of the services provided by Portier Pacific under this Agreement and are subject to separate terms with Portier Pacific's Affiliate.

You acknowledge and agree that Uber is a technology services provider and that neither Uber, Portier Pacific nor their Affiliates provide delivery services.²⁸
(emphasis in original)

[74] The Services Agreement describes the context for the use of the “Uber Services” in the following manner:

- “2.1 **Provision of Delivery Services.** When the Provider App is active, User requests for Delivery Services may appear to you via the Provider App if you are available and in the vicinity of the User. The User request may also specify the User's required deadline for your completion of the Delivery Services. If you accept a User's request for Delivery Services, you will be provided with certain User Information, Delivery Recipient Information, and User instructions via the Provider App, including (as applicable) the User's first name and the pickup and drop-off location of the applicable goods to be delivered. In order to enhance User satisfaction with the Provider App and your Delivery Services, it is recommended that you follow the User instructions for pickup and drop-off, including details of the location within the building address to pick-up/drop-off a package and waiting at least ten (10) minutes for a User or Delivery Recipient to appear at the requested pick-up or drop-off location. You acknowledge and agree that once you have accepted a User's request for Delivery Services, the Uber App may provide certain information about you to the User and Delivery Recipient, including your first name, contact information, photo and location, and as applicable, information about your Transportation Method. You shall not contact any Users or Delivery Recipients or use any User's personal information for any reason other than for the purposes of fulfilling Delivery Services. You acknowledge and agree that: (a) you shall be solely responsible for determining the most effective, efficient and safe manner to perform each instance of Delivery Services; and (b) except for the Uber Services, you shall provide all necessary equipment, tools and other materials, at your own expense, necessary to perform Delivery Services. Additionally, depending on the type of Delivery Services you are providing, you acknowledge that you may need to acquire third party inventory (e.g., food in the case of *UberEATS*) from various locations from time to time in order to fulfill certain requests for Delivery Services. In order to provide Delivery Services, you may need to accept from time-to-time, certain additional terms, as set forth in an Addendum.
- 2.2 **Your Relationship with Users and Delivery Recipients.** You acknowledge and agree that your provision of Delivery Services to Users creates a direct business relationship between you and the User, to which Uber, Portier Pacific

²⁸ Document 1 of Exhibit R1.

and their Affiliates are not a party. Uber, Portier Pacific, and their Affiliates are not responsible or liable for the actions or inactions of a User or Delivery Recipient in relation to your activities or your Transportation Method. You shall have the sole responsibility for any obligations or liabilities to Users, Delivery Recipients or other third parties that arise from your provision of Delivery 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, a Delivery Recipient or other third party.

- 2.3 **Your Relationship with Uber Group.** You acknowledge and agree that Portier Pacific's provision of the Uber Services creates a legal and direct business relationship between Portier Pacific and you. You also acknowledge and agree that Uber's licence to you of the Provider App creates a legal and direct business relationship between Uber and you. Neither Uber nor Portier Pacific shall be deemed to, direct or control you generally or in your performance under this Agreement specifically, including in connection with your provision of Delivery Services, your acts or omissions, or your operation and maintenance of your Transportation Method. Except as expressly set out herein, you retain the sole right to determine when, where, and for how long you will utilize the Provider App or the Uber Services. You retain the option, via the Provider App, to attempt to accept or to decline or ignore a User's request for Delivery Services via the Uber Services, or to cancel an accepted request for Delivery Services via the Provider App, subject to Uber's then-current policies (including the Community Guidelines located at ...). You will not: (a) display Uber's, Portier Pacific's or any of their Affiliates' names, logos or colors on your Transportation Method; or (b) wear a uniform or any other clothing displaying Uber's, Portier Pacific's or any of their Affiliates' names, logos or colors. The foregoing does not apply if you and Uber or Portier Pacific (as applicable) have agreed otherwise or if so required by law. You acknowledge and agree that you have complete discretion to provide services or otherwise engage in any business or employment activities. For the sake of clarity, you understand that you retain the complete right to: (i) use other software application services in addition to the Uber Services and the Provider App; and (ii) engage in any occupation or business. Portier Pacific retains the right, at any time at its sole discretion, to restrict you from using the Uber Services in the event of a violation of this Agreement or any relevant Uber policy, your disparagement of Uber, Portier Pacific or any of their Affiliates, or your act or omission that causes harm to Uber's, Portier Pacific's or their Affiliates' brand, reputation or business as determined by Portier Pacific in its sole discretion. Portier Pacific also retains the right to restrict you from using the Uber Services for any other reason at the sole and reasonable discretion of Portier Pacific. Uber retains the right to, at any time at its sole discretion, deactivate or otherwise restrict you from accessing the Provider ID and/or Provider App, in the event of a violation of this Agreement, any relevant Uber policy, including the Community Guidelines or the Uber Privacy Policy (located at privacy.uber.com/policy/), your disparagement of Uber, Portier Pacific or any of their Affiliates, your act or omission that causes harm to Uber's Portier Pacific'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 Provider ID and/or Provider App, for any other reason at the sole and reasonable discretion of Uber.

- 2.4 **Ratings.** You acknowledge and agree that: (a) after completion of an instance of Delivery Services, a User and/or Delivery Recipient may be prompted by the Uber App to provide a rating of you and such Delivery Services and, optionally, to provide comments or feedback about you and such Delivery Services; and (b) after providing Delivery Services, you will be prompted by the Provider App to provide a rating of the User and, optionally, to provide comments or feedback about the User. You shall provide your ratings and feedback in good faith. Uber, Portier Pacific and their Affiliates reserve the right to use, share and display your, User and Delivery Recipient ratings and comments in any manner in connection with the business of Uber, Portier Pacific and their Affiliates without attribution to you or your approval. You acknowledge and agree that Uber, Portier Pacific and their Affiliates are distributors (without any obligation to verify) and not publishers of User, Delivery Recipient and your ratings and comments, provided that Uber, Portier Pacific and their Affiliates reserve the right to edit or 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 Uber's, Portier Pacific's or their Affiliates' content policies. There is no obligation on you, a User or a Delivery Recipient to provide ratings or comments nor is there any consequence for not providing a rating.²⁹

[75] The Operative terms of the Services Agreement largely reflect the elements of the Uber Eats model outlined earlier in this Decision and include the following obligations upon the Delivery-Partner:

- To hold and maintain a valid applicable (drivers) licence if the transportation method requires a licence, all permits and work entitlements to provide the delivery services in the location concerned, and the necessary citizenship, residency or visa status to work in Australia;³⁰
- To provide the Delivery Services in a professional manner with due skill, care and diligence and to maintain high levels of professionalism, service and courtesy – supported by the right of Uber Eats to seek relevant information and to deactivate access to the Apps, if there is a failure on these or the above obligations;³¹ and
- To meet the then-current Portier requirements for a vehicle to provide the Delivery Services authorised by it for that use and to be properly authorised and licensed to use that vehicle for that purpose and that such be both suitable and maintained in a good operating condition consistent with any applicable industry safety and maintenance standards and in a clean and sanitary condition.³²

²⁹ Document 1 of Exhibit R1.

³⁰ Clause 3.1.

³¹ Clause 3.1.

³² Clause 3.2.

[76] The substantive financial term of the Services Agreement contemplates the following:

“4.1 **Delivery Fee Calculation and Your Payment.** You can charge a delivery fee for each instance of completed Delivery Services provided to a User that are obtained via the Uber Services (“**Delivery Fee**”), where such Delivery Fee is, as applicable (a) calculated based upon a base delivery fee amount plus distance (as determined by Portier Pacific) and/or time amounts; or (b) a flat fee, each as detailed at <http://ubermovement.com/> for the applicable Territory (“**Delivery Fee Calculation**”). Distance and time amounts may be based on the expected, not actual, trip distance and duration as reasonably determined by Uber. You acknowledge that the Delivery Fee is the only payment you will receive in consideration for your provision of Delivery Services to a User and that neither the Delivery Fee nor the Delivery Fee Calculation includes any gratuity. You can also charge Users for any Tolls, taxes and/or fees incurred during the provision of Delivery Services, if applicable, whether charged by a third party or Portier Pacific. You: (i) appoint Portier Pacific as your limited payment collection agent solely for the purpose of accepting the Delivery Fee, applicable Tolls and, depending on the region and/or if requested by you, applicable taxes and fees from the User on your behalf via the payment processing functionality facilitated by the Uber Services that are related to your provision of Delivery Services; and (ii) agree that payments made by Users to Portier Pacific shall be considered the same as payment made directly by Users to you. In addition, the parties acknowledge and agree that as between you and Portier Pacific, the Delivery Fee is a recommended amount, and the primary purpose of the pre-arranged Delivery Fee is to act as the default amount in the event you do not negotiate a different Delivery Fee. You shall always have the right to: (i) charge a delivery fee that is less than the pre-arranged Delivery Fee, a “**Negotiated Delivery Fee**”). Portier Pacific shall consider all such requests from you in good faith. Portier Pacific agrees to remit, or cause to be remitted, to you on at least a weekly basis: (a) the Delivery Fee less the applicable Service Fee and other fees charged by Portier Pacific; (b) the Tolls; (c) any incentive payments; and (d) depending on the region, certain taxes and ancillary fees (where applicable). If you have separately agreed that other amounts may be deducted from the Delivery Fee prior to remittance to you (e.g., vehicle financing payments, lease payments, government fees and charges, etc.), the order of any such deductions from the Delivery Fee is to be determined exclusively by Portier Pacific (as between you and Portier Pacific).”³³

[77] The Services Agreement³⁴ also contemplates that:

- Portier reserves the right to change the Delivery Fee calculation upon notice and any use of the services after that time will be deemed to be consent to the change;
- Portier may adjust the Delivery Fee in certain circumstances including where the Delivery-Partner took an inefficient route or failed to properly note the end of the delivery in the App, technical error on its part, where the Delivery Fee was charged

³³ Document 1 of Exhibit R1.

³⁴ At clause 4.

but the delivery was not made or a user complaint provided that it does so in a reasonable manner; and

- The Uber Services not provide the capacity (requirement) for gratuities (tips) to be provided as the Delivery Fees are full payment for the Delivery Service, however if a User pays a gratuity to Portier (to accept on the Delivery-Partner's behalf) that amount will be forwarded to the Delivery-Partner without deduction and the Delivery-Partner has the right to collect and keep all cash gratuities.

[78] The Service Fee payable **by** the Delivery-Partner **to** Portier is provided in the following manner:

“4.5 **Service Fee.** In consideration of Portier Pacific's provision of the Uber Services to you, you agree to pay Portier Pacific a service fee on a per Delivery Services transaction basis, which as at 1 December 2017 is calculated as a percentage of the Delivery Fee determined by the Delivery Fee Calculation (regardless of any Negotiated Delivery Fee) (“*Service Fee*”). Portier Pacific will provide you with notice via email or via the Provider App, of the Service Fee that applies to each Delivery Service that you provide. You acknowledge that, unless regulations applicable to your Territory require otherwise, taxes (in particular GST) will be calculated and charged on the Delivery Fee, and Portier Pacific shall calculate the Service Fee on an amount equal to the Delivery Fee Calculation plus the amount of such taxes (in particular GST) that would be calculated on the amount of the Delivery Fee. You acknowledge and agree that Portier Pacific may adjust: (i) the Service Fee; or (ii) introduce a new model to determine the Service Fee payable to you. Portier Pacific 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.”³⁵

[79] In relation to taxes, the Services Agreement provides as follows:

“4.9 **Taxes.** 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 Delivery Services as required by applicable law; and (b) provide Portier Pacific with all relevant tax information requested of you by Uber, Portier Pacific and/or each of their Affiliates (including, a valid Australian Business Number (ABN) and/or Goods and Services Tax (GST) registration number under which you provide Delivery Services, if obtaining such a valid ABN and/or 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 Delivery Services, including income tax and GST. Notwithstanding anything to the contrary in this Agreement, Portier Pacific 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 Delivery Services

³⁵ Document 1 of Exhibit R1.

and/or provide any of the relevant tax information you have provided pursuant to the requirement mentioned in this clause 4.9, directly to the applicable governmental tax authorities on your behalf or otherwise.

- 4.10 **GST.** Unless expressly stated otherwise in this Agreement, all amounts payable or consideration to be provided under this Agreement by you to Portier Pacific are exclusive of GST. If GST is payable on any supply by Portier Pacific made under this Agreement, for which the consideration is not expressly stated to include GST, you agree to pay Portier Pacific 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 Portier Pacific includes GST that is payable by the representative member of Portier Pacific's GST group.
- 4.11 **GST Law.** The parties agree that, for the purposes of the GST law, Portier Pacific supplies to you the Uber Services in sole consideration for the Service Fee. In addition, Uber supplies to you a licence to use the Provider App under clause 5 for no consideration.³⁶

[80] As to the insurance terms, the Services Agreement states the following:

- “8.1 You agree that before entering into this Agreement you will obtain the coverage required by clause 8.2 below at your sole cost and expense. You agree to review the terms and conditions of such coverage to ensure that it provides the amounts of coverage required by clause 8.2 while you are using a motor vehicle to provide Delivery Services. As between you, Uber and Portier Pacific, it is your sole responsibility to inform your insurer of the use of your motor vehicle while providing Delivery Services.
- 8.2 You agree to maintain during the term of this Agreement motor vehicle liability insurance on all vehicles which you operate under this Agreement at insurance levels that satisfy the minimum requirements to operate a private vehicle on the public roads within the Territory, as well as any other minimum motor vehicle liability insurance cover which Portier Pacific requests you hold. You must be the policyholder or a individually rated driver, for which a premium is charged or calculated, on the insurance policy required in this clause 8.2 at all times. You agree to provide Portier Pacific 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 8.2 upon request. Furthermore, you must provide Portier Pacific with written notice of cancellation of any insurance policy required by Portier Pacific. Uber and Portier Pacific shall have no right to control your selection or maintenance of your policy.
- 8.3 You agree that you are not an employee, independent contractor, a worker or a deemed worker of Uber and/or Portier Pacific for the purposes of Australian workers compensation laws and therefore acknowledge that Uber and/or

³⁶ Document 1 in Exhibit R1.

Portier Pacific does not, and is 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, Uber and Portier Pacific 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.

- 8.4 You understand and acknowledge that your private 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 for any Delivery 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 Uber's or Portier Pacific's, to resolve them with your insurer(s).
- 8.5 Portier Pacific may maintain during the term of this Agreement motor vehicle insurance related to your provision of Delivery Services as determined by Portier Pacific in its reasonable discretion, provided that Portier Pacific and its Affiliates are not required to provide you with any specific insurance coverage for any loss to you or your motor vehicle. Should Portier Pacific procure insurance related to your provision of Delivery Services, Portier Pacific may cancel such coverage at its sole discretion at any time. You are required to promptly notify Portier Pacific of any accidents that occur while providing Delivery Services and to cooperate and provide all necessary information related thereto.³⁷

[81] As to the termination arrangements, clause 12 of the Services Agreement provides, in effect, as follows:

- The agreement commences when executed and continues until terminated in accordance with the provision;
- Either party may terminate the agreement, without cause upon 30 day's prior notice, without notice for a material breach or other events including insolvency, bankruptcy or a party requesting suspension of payments;
- Uber Eats may restrict access to the Apps in the event that the Delivery-Partner no longer qualifies to provide the Delivery Services; and

³⁷ Document 1 of Exhibit R1.

- Upon termination the Delivery-Partner must delete and fully remove the Partner App from their mobile device.

[82] The relationship between the parties is described in clause 13 of the Services Agreement in the following terms:

“13.1 Portier Pacific is acting as the limited payment collection agent solely for the purpose of collecting payment from Users on your behalf, 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 perspective), joint venture, partnership or agency relationship. You have no authority to bind Uber, Portier Pacific and/or their Affiliates, or hold yourself out as an employee, independent contractor, agent or authorized representative of Uber, Portier Pacific and/or their Affiliates.

13.2 Where, by implication of mandatory law or otherwise, you may be deemed an employee, agent or representative of Uber, Portier Pacific or an Affiliate of Uber or Portier Pacific, you undertake and agree to indemnify, defend (at Uber's or Portier Pacific's option) and hold Uber, Portier Pacific and 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 13.2, 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 Uber, Portier Pacific or an Affiliate of Uber or Portier Pacific, applies only to that proportion of Uber's or Portier Pacific's liability that directly or indirectly relates to you holding yourself out to be an employee of Uber, Portier Pacific or any of their Affiliates, or any other act or omission by you that is not expressly authorised by Uber or Portier Pacific and would reasonably suggest to a third party that you are an employee of Uber, Portier Pacific 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 Uber, Portier Pacific or an Affiliate of Uber or Portier Pacific, 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 Uber, Portier Pacific (or any of their Affiliates) may otherwise be required to pay under applicable law.”

[83] The services fee addendum,³⁸ which operates in conjunction with the Services Agreement, provides as follows:

- The delivery fees are to be posted and updated on the relevant website page;
- The service fees, payable to Uber Eats by the Delivery Partner are calculated by reference to the relevant percentage of the delivery and the method of transportation used to provide the services; and

³⁸ Document 3 in Exhibit R1.

- The relevant percentage ranges from 25% for a car that is registered on uberX, 30% for a car that is not registered in uberX and scooters and motorcycles, and 35% for a bicycle.³⁹

[84] The Community Guidelines⁴⁰ are referenced in the Services Agreement and designed for the information of all parties using the Uber Eats system and includes information relevant to the Delivery-Partners such as general behavioural standards (of all parties), the circumstances in which they can lose access to the App, and the requirement to comply with anti-discrimination and other laws.

7.2 The application of the indicia

[85] In assessing the application of the Uber Eats model to the present circumstances I have noted the following observations cited by the Deputy President in *Kaseris*:

“**[5]** Uber commenced its operations in approximately 2010 and is now one of the most widely used means of private transportation across the globe. Uber is the trademark name for the software application which is more popularly known as the “Uber App”. The Respondent describes Uber as a technology based business premised on supplying lead-generation software and is in no way affiliated with providing transport services in Australia. Respectfully, the distinction drawn by the Respondent is one that is in reality, without a difference. Whilst it may be correct that the Respondent does not directly provide transport services in Australia, it and the technology upon which its business is based facilitate the provision of transport services. Moreover, it generates its revenue directly as a consequence of the transport services provided by drivers to members of the public who are brought together by the Uber App. To quote from a recent United States District Court decision concerning a similar issue to this application:

“First, Uber’s self-definition as a mere “technology company” focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides). This is an unduly narrow frame. Uber engineered a software method to connect drivers with passengers, but this is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides.”” (all footnotes omitted)

[86] I would respectfully agree with these observations as applied to the Uber Eats model but with the necessary and important qualification that, in this case, it is the delivery of food ordered from, and prepared by others, that is being sold. Further, the Services Agreement operates in conjunction with an additional agreement between Uber Eats and the participating restaurants. This means that the agency or facilitator role stated in the written arrangements here is more evident in practice.

³⁹ UberX is apparently a reference to the type of car that is registered to conduct that class of passenger transport services under that particular Uber passenger transportation model.

⁴⁰ Document 5 of Exhibit R1.

Control

[87] On the evidence, Ms Gupta appears to have had very significant control over the way in which she wanted to conduct the services she provided. This included the ability to choose when to log on to and log off of the Partner App, control over the hours she wanted to dedicate to the task, and was able to accept or refuse delivery requests (with some very limited caveats) and was free to choose which vehicle⁴¹ and how she operated and maintained her vehicle – provided that any car had to be registered and kept in a clean and sanitary condition. All of these factors tend to weigh in favour of an independent contractor relationship.

[88] However, weighing against these factors is what I would describe as the “soft control” that Uber Eats exercised over Ms Gupta. This included the link between the ratings, which was undertaken at least in part based upon the rating person’s perception of work performance, and the capacity to continue to use the Partner App. Further, although Ms Gupta could use any route to undertake the deliveries, the link between the Delivery Fee and the suggested route was very influential in a practical sense. Further, Uber Eats, in practice, set the **maximum** Delivery Fee.

[89] Although these and some other factors illustrate some control, they are the kind of business efficiency rules that one might expect in any relationship and are not of themselves particularly strong signals of the type of relationship. Moreover, evidence of the kinds of control commonly associated with employment, principal amongst them the obligation to attend work and to perform work when in attendance, are not present. In that regard, the following findings of the Commission in *Suliman* in the context of the work-wages bargain issue when conceptually applied to a casual employee, are also apposite to the degree of control exercised in, and the nature of, the relationship:

“[37] I do not agree with Mr Suliman’s submission that the arrangement he has with Uber is no different to that of a casual employee. His characterisation of the work-wages bargain as no more than if you work you will be paid but you are not required to work when you do not want to (for a casual employee) is an overly simplistic characterisation of the relationship between an employer and employee, when the employee is engaged on a casual basis. The relationship between the Driver and Uber cannot be equated to that of a casual employee and employer with the compulsion to perform work a key differentiator. Whilst it is true that neither a casual employee nor an Uber Driver can be compelled to *attend* work (if the casual employee refuses casual work offered or the Driver decides not to log on to the Partner App), having attended work the casual employee can be compelled to work for the period present in exchange for wages paid. Conversely the Driver, having logged on, cannot be compelled to accept any requests that are sent to the Partner App. The failure of a casual employee to provide services has consequences for the offer of future work whilst, for a Driver, there are none as the Driver controls when and if they will accept a request. That they have refused a request has no consequences for them.

[38] The option to attend work is not the totality of the work-wages bargain – it is that in attending work there is a requirement to provide the services for which the casual employee is engaged and seeks to be paid. The Uber Driver differs from a

⁴¹ Provided that, if using a car, it was manufactured after 1990 – Exhibit R1 at 66.

casual employee as the Driver, having attended “work” (by logging on) is not required to offer any service.”

[90] This is a factor that weighs against a finding that an employment relationship existed.

The entitlement to work for others

[91] Ms Gupta had the express and practical right to sign up to and use other food delivery systems in parallel with the Uber Eats Services Agreement. This included the capacity to be logged onto multiple apps and to use the vehicle for whatever other services intended.

[92] However, the need to respond to the delivery requests (accept if she so chose) within a short period of time must also be taken into account. This would practically have meant that it would have been difficult to be logged on and accept requests from multiple apps at the same time, but does not mean that Ms Gupta could not work for other food delivery or transport operations using exactly the same equipment; being her vehicle and mobile phone.

[93] Accordingly, this is a factor that weighs against a finding that an employment relationship existed.

A separate place of work and the advertising of the services

[94] Ms Gupta undertook work, for the most part, in and around her own vehicle and visiting restaurants and the homes or business premises of customers.

[95] There is no evidence that Ms Gupta advertised her services or had any promotional material for her work at all. The Uber Eats model would not appear to provide any scope for her to directly generate further work as an individual, at least in that context.

[96] Ms Gupta could, at least in theory, promote the use of Uber Eats through informal channels and was encouraged to have others sign-on as Delivery-Partners through the incentive system.

[97] I consider this to be a neutral consideration.

The provision and maintenance of tools and equipment

[98] Ms Gupta was required to provide her own capital equipment. That is, in order to use the Partner App and ultimately be paid for the deliveries Ms Gupta supplied her own vehicle, smart phone and wireless data plan. In addition, Ms Gupta, at her own cost, maintained a valid registration and at least compulsory third party insurance on the vehicle.

[99] The fact that this equipment is largely the sort of things that many people have in their normal life, is also a factor to be weighed in assessing the import of this indicia.

[100] The evidence is that Ms Gupta was supplied with a large insulated (delivery) bag by Uber Eats. However, despite a contrary view taken by the Applicant, the evidence is also that this was subject to a refundable deposit that was deducted from her payments. That bag was not branded. It is also the case that whilst it would be reasonable to assume that the bag

supplied would be used by Ms Gupta, this was not required and Ms Gupta could use any suitable insulated bag, where one was required, for deliveries.

[101] On balance, this is a factor that marginally weighs against a finding that an employment relationship existed.

The entitlement to delegate or sub-contract work

[102] Under the terms of the Services Agreement, Ms Gupta was required to personally register as the service provider, have the motor vehicle registered in her name, and to undertake the actual pickups and deliveries herself. There was nothing that prevented Ms Gupta from being assisted in those duties by others and the evidence is that this occurred on most occasions. Indeed, for the most part, Mr Gupta undertook many of the actual activities involved with the deliveries and the administration of Ms Gupta's role under the Services Agreement.

[103] There was no formal right to delegate or subcontract the work itself and this is a factor that weighs for a conclusion of an employment relationship. However, the reality of the fact that many of the activities could be undertaken by someone other than Ms Gupta, which does not sit well with the concept of employment, remains relevant to the characterisation of the relationship more generally.

The right to suspend or dismiss

[104] It is clear that Uber Eats had the right to suspend or dismiss (conclude) the relationship on certain grounds set out in clause 12 of the Services Agreement and described earlier in this decision.

[105] The circumstances in which Portier and/or Uber B.V. may seek to rely on clause 12 of the Services Agreement in Australia are also set out in the Community Guidelines, which reflect the service standards that apply to use of the Partner App.⁴² Some of the circumstances that may lead to a Delivery-Partner's account in the Partner App being deactivated include if the Delivery-Partner's overall rating continually falls below 85%; if the Delivery-Partner's account in the Partner App is associated with fraudulent activity; or if the Delivery-Partner's account is associated with a critical incident as defined.

[106] Such rights tend to exist in any business or employment relationship and this aspect is not significant in this case. However, the right to suspend access to the service in the manner contemplated in the Services Agreement does not sit well with the concept of employment.

The public presentation of the workers (uniforms and other badging)

[107] Ms Gupta did not, and was not permitted to, display any of the Respondents' or affiliates' names, logos or colours on the vehicle. She did not, and was required not to, wear any uniform or other clothing which had the Uber Eats logo or other identification that would illustrate to the world that she was attached to or connected or associated with the Respondents or the Uber brand. I observe that this is also consistent with the right to

⁴² Document 5 of Exhibit R1.

undertake any other work in connection with, or in parallel to, being available to do the Uber Eats deliveries.

[108] However, the marketing and delivery of the Uber Eats services to the world contemplate the delivery being provided by Uber Eats because the User has made an order using the Uber Eats App and when the service is provided, it is the Delivery-Partner that is advised to the User by the relevant App as conducting the services and they attend to the final destination, sometimes with a paper bag carrying the Uber Eats logo provided by the restaurant. This type of arrangement is not inconsistent with an independent contractual relationship, as many business subcontract part of their service delivery, but does further inform the real world public presentation of Ms Gupta.

[109] Accordingly, this is a neutral factor.

Deduction of income tax - Goods and Services Tax (GST)

[110] Clause 4.9 of the Services Agreement provides that Ms Gupta was required to remit all tax liabilities and to register for GST, if required to do so under the relevant law. The income received by the Applicant was not treated by the parties as being subject to PAYG tax. The Applicant was expected to maintain her own private taxation affairs and there is no evidence that the Respondent had any dealings with the Australian Taxation Office on behalf of Ms Gupta. In that regard, I do note that clause 4.9 of the Services Agreement enabled Portier to collect and remit taxes on behalf of Ms Gupta, including if required to do so under the law.

[111] The fact that the Ms Gupta was expected to deal with any applicable GST and none of the income was treated as being subject to PAYG taxation, marginally weighs against a conclusion of an employment relationship.

The provision of invoices/periodic payment of “wages”

[112] Invoices were, in effect, generated by Portier on behalf of the Applicant and the Apps enabled Ms Gupta to be paid the Delivery Fee, less the service charge for each delivery.

[113] The parameters of the Delivery Fee were, in effect, controlled by Uber Eats and had the components outlined earlier in this Decision. However, Ms Gupta had the capacity to negotiate a separate lower fee with the other parties; being the Restaurant and the User. Ms Gupta also had the choice to accept any particular delivery, depending upon her view as the likely remuneration to be generated, amongst other factors. Ms Gupta was also not obliged to accept any work at all, even when logged onto the Partner App.

[114] Ms Gupta could also dispute the Delivery Fee on certain grounds, normally associated with how the trip distance was calculated, and the evidence is that she did so successfully on a reasonable number of occasions.⁴³

[115] The absence of anything that approximates a wage and the associated arrangements weigh against a finding that an employment relationship existed.

⁴³ 96 times – Exhibit R1 at 55.

Paid holidays and leave

[116] There was no provision of paid leave of any description as part of the arrangements.

[117] However, all of the indicia must be weighed in the context of each circumstance, including the potential for the equivalent of casual employment.

[118] In this case, I do not consider that this factor is of particular assistance.

The nature of the work (profession, trade or special calling)

[119] Ms Gupta contends that the Uber Eats work was unskilled work, akin to labouring. There is some support for this proposition in *Pallage*⁴⁴ and the evidence is that apart from some very limited guidance on the registration process provided by Uber Eats (by chance) when Ms Gupta collected the delivery bag, there was no training provided or required.

[120] I would not consider the work involved to be unskilled but I do accept that it does not involve a profession, trade or special calling as contemplated by the authorities.

[121] This factor weighs for a finding that an employment relationship existed.

The creation of goodwill and other saleable assets

[122] Ms Gupta did not have any capacity to generate goodwill or saleable assets as a result of her work with Uber Eats.

[123] Accordingly, this is a factor that weighs for a finding that an employment relationship existed.

The proportion of remuneration on business expenses

[124] There is very little objective material before the Commission to inform this consideration. There is some evidence of Ms Gupta's income and a comparison undertaken with wages that would have been due under the relevant modern award if all of the time spent with the App operating was treated as being hours worked. However, there is no evidence about the "business" expenses" incurred.

[125] It would be possible to make some reasonable assumptions about the costs of operating the vehicle and mobile phone. However, given that these, according to Ms Gupta, were normal personal use items in any event and there is no evidence of the actual total mileage driven on deliveries, it is not appropriate to attempt to formulate such an assessment for present purposes.

[126] I would accept that there was little by way of "business" expenses in relative terms, apart for the (additional) operating costs of the vehicle and the mobile phone.

⁴⁴ At [26] to [28].

7.3 The import of the *Independent Contractors Act 2006* and the *A New Tax System (Goods and Services Tax) Act 1999*

[127] In determining this matter, I have not overlooked the propositions advanced by Ms Gupta arising from the other legislation referred to in submissions. As will become clear, whilst they do not have the direct import claimed by Ms Gupta, the substance of the related propositions are not without merit and have been taken into account in the application of the various indicia.

[128] The principal objects of the *Independent Contractors Act 2006* (Cth) (IC Act) are stated to be to protect the freedom of independent contractors to enter into services contracts, to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; and to prevent interference with the terms of genuine independent contracting arrangements.⁴⁵

[129] Section 9(1)(f) of the IC Act as relied upon by Ms Gupta defines an unfairness ground in the following terms:

“9 What is an unfairness ground

- (1) Subject to subsection (2), each of the following grounds is an ***unfairness ground*** in relation to a services contract:
- (a) the contract is unfair;
 - (b) the contract is harsh or unconscionable;
 - (c) the contract is unjust;
 - (d) the contract is against the public interest;
 - (e) the contract is designed to, or does, avoid the provisions of:
 - (i) the *Fair Work Act 2009*; or
 - (ia) the *Workplace Relations Act 1996*, as in force at any time before the WR Act repeal day, or as that Act applies after that day because of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or
 - (ii) a State or Territory industrial law; or
 - (iii) an award, agreement or other instrument made under a law referred to in subparagraph (i), (ia) or (ii);
 - (f) **the contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work;**
 - (g) any other ground that is substantially the same as a ground specified in any of paragraphs (a) to (f);
 - (h) any other ground specified in regulations made for the purposes of this paragraph.

⁴⁵ Section 3 of the IC Act.

- (2) A ground specified in subsection (1) is not an **unfairness ground** in relation to a services contract to the extent that the ground relates to matters that, because of subsection 8(2), are not workplace relations matters.
- (3) In this section:
WR Act repeal day has the meaning given by Schedule 2 to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.”
(emphasis of s.9(1)(f) added to recognise the Applicant’s proposition)

[130] This definition, and the scheme of the IC Act more generally, is linked to the capacity for a contractor to make an application to the Court to seek that the terms of a certain services contract be set aside or varied⁴⁶ on the basis of opinions formed⁴⁷ that a contract is unfair or harsh.⁴⁸ Although the approach evident in s.9 of the IC Act might form the basis of an alternative policy approach to defining the scope of employment,⁴⁹ this is not the intention or import of that legislation. That is, if a finding of unfairness or harshness was to be made by the Court in relation to the present circumstances (I am not doing so) the consequences might be an order under s.16 of the IC Act, but these provisions do not mean that an unfair contract becomes one of employment or cannot (on that ground alone) be an independent contract.

[131] To the extent that Ms Gupta relied upon aspects of what she contended to be **unfair control**, I have considered those in the application of the multifactorial approach discussed earlier.

[132] Ms Gupta also relied upon the definition of an enterprise under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) to support her contention that an enterprise or business cannot exist by individuals who do not expect a reasonable profit. Section 9-20 of the GST Act relevantly provides as follows:

“9-20 Enterprises

- (1) An **enterprise** is an activity, or series of activities, done:
 - (a) in the form of a *business; or
 - (b) in the form of an adventure or concern in the nature of trade; or
 - (c) on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property; or
 - (d) by the trustee of a fund that is covered by, or by an authority or institution that is covered by, Subdivision 30-B of the *ITAA 1997 and to which deductible gifts can be made; or
 - (da) by a trustee of a *complying superannuation fund or, if there is no trustee of the fund, by a person who manages the fund; or

⁴⁶ Section 16 of the IC Act.

⁴⁷ Section 15 of the IC Act.

⁴⁸ Section 12 of the IC Act.

⁴⁹ This is a matter for the Legislature and not the Commission. See also *French Accent* at [26] on this aspect.

- (e) by a charity; or
 - (g) by the Commonwealth, a State or a Territory, or by a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or
 - (h) by a trustee of a fund covered by item 2 of the table in section 30-15 of the ITAA 1997 or of a fund that would be covered by that item if it had an ABN.
- (2) However, *enterprise* does not include an activity, or series of activities, done:
- (...)
 - (c) by an individual (other than a trustee of a charitable fund, or of a fund covered by item 2 of the table in section 30-15 of the ITAA 1997 or of a fund that would be covered by that item if it had an ABN), or a *partnership (all or most of the members of which are individuals), without a reasonable expectation of profit or gain; or
- (...)" (sub-paragraphs (a), (b) and (d) were not pressed by Ms Gupta, subsections (3) and (4) are not relevant to this discussion)

[133] The evident purpose of the cited provisions of GST Act is to define terms for the application of the GST and to differentiate between enterprises involving individuals where there is (objectively) a reasonable expectation of profit or gain from those which are not undertaken with that expectation. It is not directed at the present consideration. In any event, the present limited information before the Commission would not support a conclusion that Ms Gupta did not have a reasonable expectation of some gain from her Uber Eats activities; albeit that her actual income (and profit) appears not to be substantial.

[134] I have taken this latter aspect into account as part of my earlier consideration of the multifactorial approach.

7.4 UK Court of Appeal Decision

[135] In the lead up to the hearing, I put both parties on notice that I intended to further explore the implications of a decision of the United Kingdom Court of Appeal (Civil Division) in *Uber B.V. and Others v Aslam and Others*⁵⁰ (*Uber v Aslam*). This concerned an Uber business model somewhat similar to that applied by Uber Eats and involved an appeal of a decision of the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) that the drivers concerned were covered by certain employment rights. *Uber v Aslam* was considered by Gostencik DP in *Kaseris* who pointed out⁵¹ that the findings were based upon an extended definition of worker⁵² rather than the common law contract of employment required by the FW Act.

[136] However, in reaching its conclusion the UK Court of Appeal made findings that included :

⁵⁰ [2018] EWCA Civ 2748.

⁵¹ At [64].

⁵² Section 230 of the *Employment Rights Act 1996* (UK).

- There was a high degree of fiction in the standard form agreement arising from the absence of an Uber Entity (Uber London Limited - ULL) that in fact “enforced a high degree of control over the drivers In order to protect its position as PHV [Private Hire Vehicle] operator in London.”⁵³
- “It is not real to regard Uber as working for the drivers and that the only sensible interpretation of the relationship is the other way around. Uber runs a transportation business. The drivers provide skilled labour through which the organisation delivers its services and earns its profits.”⁵⁴
- : “...at the latest that the driver is working for Uber from the moment when he accepts any trip.”⁵⁵

[137] The question that arises is whether, notwithstanding the broader definition (of worker) being considered by the UK Court of Appeal, these findings may be relevant when considering the approach evident in *Hollis v Vabu* and as applied in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* referenced earlier in this Decision.

[138] For reasons advanced by Counsel for the Respondents, the broader statutory context in which *Uber v Aslam* was decided significantly reduces the import of that decision for present purposes. That context includes the following:

- “87. The Appellant’s submissions repeatedly referred to the regulatory regime as if it were irrelevant or of trivial importance. We disagree. In our view the statutory position strongly reinforces the correctness of the ET’s conclusion that the drivers were providing services to Uber (specifically to ULL), not the other way round.
88. ULL is the PHV operator for the purposes of the PHVA 1998 and the regulations made under it. It is ULL which has to satisfy the licensing authority for the purposes of section 3(3)(a) of the Act that it is a fit and proper person to hold a PHV licence. It is ULL which alone can accept bookings, and ULL which is required by the PHV Regulations to provide an estimate of the fare on request. For ULL to be stating to its statutory regulator that it is operating a private hire vehicle service in London, and is a fit and proper person to do so, while at the same time arguing in this litigation that it is merely an affiliate of a Dutch registered company which licenses tens of thousands of proprietors of small businesses to use its software, contributes to the air of contrivance and artificiality which pervades Uber’s case.”

[139] Further, the findings as to the point at which the drivers were found to be working arises in the specific context of the relevant minimum wage legislation⁵⁶ being considered.

⁵³ [2018] EWCA Civ 2748 at [90] and [91].

⁵⁴ [2018] EWCA Civ 2748 at [95] - agreeing with the ET decision.

⁵⁵ [2018] EWCA Civ 2748 at [103] - agreeing with the ET decision.

⁵⁶ *National Minimum Wage Act 1988* (UK).

[140] More importantly for present purposes, there is no equivalent regulatory regime in Australia for the provision of the Uber Eats model and as a result none of the Uber Eats entities plays the role undertaken by ULL as discussed in *Uber v Aslam*. In addition, some of the elements of control exercised by ULL in the context of that matter arising from its role as the actual PHV operator are not replicated in this case. Further, given the quadripartite nature of the arrangements and Uber Eats' relationship with Restaurants, Delivery-Partners and the Users in this case, its claimed agency role has much more substance both in theory and in practice.

[141] This does not mean that the approach taken by the UK Court of Appeal is not of some assistance in analysing the Uber business model more generally but must be applied with care having regard to the statutory context; including both the particular employment and PHV legislation being considered. This is particularly so as, despite the influence of the regulatory environment upon the role of ULL, the ET, EAT and the Court of Appeal did not find that the relationship was that of common law employment, despite that being a category of "worker"⁵⁷ available under the relevant legislation.

[142] As a result, the discussion in *Aslam* is of some aid in considering this matter but its findings are not of direct assistance to Ms Gupta's case.

7.5 The overall assessment

[143] As would be clear from *French Accent*, the Commission's present role is to ascertain the objective character of the relationship having regard to the terms of the contract and the totality of the relationship. The indicia discussed earlier in this Decision are part of this assessment but are not exhaustive and must also be weighed according to their importance in the circumstances being considered. It is also not appropriate to treat them as part of a mechanical exercise; rather, it is the overall effect that must be assessed.

[144] There are some competing indicia however in my view the more significant factors tend to weigh in favour of this particular relationship not being that of employment. These include the major elements evident in the control indicia and the manner in which the delivery work was organised, actually carried out and remunerated, and the various roles of the parties under the Services Agreement. All of the contrary factors outlined earlier, including the personal contractual obligations, the non-specialist nature of the work, the inability to generate goodwill and related features, must also be weighed into the assessment to inform the overall picture.

[145] I also consider that what was described in *Kaseris*, and further discussed in *Suliman*, as the absence of the "work-wages bargain" is significant in the assessment of the nature of this relationship.⁵⁸ Amongst the authorities relied upon in this context in *Kaseris* is *Forestaff Pty Ltd v Chief Commissioner of State Revenue*⁵⁹ (*Forestaff*). In *Forestaff*, the Supreme Court of New South Wales explored the impact of a number of Federal Court decisions in the context of labour hire arrangements and stated:

⁵⁷ Section 230 of the *Employment Rights Act 1996* (UK).

⁵⁸ In this regard I also note the observations of the Deputy President in *Kaseris* at [66] as to the relevance of the work-wages bargain in the present statutory context and the potential deficiency of this approach in contemporary policy terms.

⁵⁹ [2004] NSWSC 573, (2004) 144 IR 1 per McDougall J.

“91 In any event, having regard to what was said in *Automatic Fire Sprinklers, BWIU v Odco* and *Curro*, I think that, for there to be a relationship of employer and employee, it is essential that the putative employer be obliged to pay the putative employee in accordance with the terms of the contract for services reasonably demanded under it, and that the putative employee be obliged to perform such services. That is as much so where the service consists of standing and waiting as where it is active.”⁶⁰

[146] The application of that approach in *Forestaff* included consideration of whether the client business had an obligation to pay the worker. The Court ultimately found that *Forestaff* had that obligation under its contracts and did so as the principal (party).⁶¹

[147] When applied to this matter, there was never an obligation upon Ms Gupta to elect to provide any delivery service, even when the Partner App was activated, which of itself was also optional. Further, given the manner in which the quadripartite arrangements operate, and the absence of an obligation upon Uber Eats to pay for the delivery service, including in the event of a default by another party,⁶² both elements of the work-wages bargain are problematic. I also observe that under the Services Agreement, the Delivery-Partner indemnifies⁶³ Uber Eats for claims arising from the performance of the deliveries, subject to certain statutory and other caveats.

[148] This analysis also informs the ultimate question and the extent to which it might be said that Ms Gupta is conducting a business in her dealings with Uber Eats.

[149] Clause 13 of the Services Agreement outlines the extent of the relationship between Uber Eats and Ms Gupta. The relationship is said to be limited to Portier and Uber B.V. acting as a payment collection agent and providing technology services respectively. I have made certain observations about that narrow statement in this Decision. The Services Agreement also expressly provided that the relationship is that involving an independent contractor. Simply labelling a relationship in that manner alone does not necessarily equate to the relationship being just that and the parties cannot alter the true relationship with the adoption of a label. However, when the totality of this particular relationship is considered, together with the fact that the Applicant and Respondent declared that the relationship was solely of one independent contractor and that description is a reasonable one in light of the evidence and considerations before the Commission, any ambiguity that exists can be resolved by the parties themselves.⁶⁴

⁶⁰ *Forestaff* (2004) 144 IR 1, [91].

⁶¹ At 99.

⁶² Both in practical and legal terms, any cancellation fee that is payable when a User cancels after the delivery has been commenced, is payable by the User and Uber Eats do not have an obligation itself to pay that fee or the normal delivery fee to the Delivery-Partner. Indeed, Uber Eats is permitted under cl 4.6 of the Services Agreement to charge the defaulting User a delivery fee on the Delivery-Partner’s behalf, with a Service Fee payable by the Delivery Partner to Portier. There is also no obligation upon Uber Eats itself to pay for the delivery that is undertaken.

⁶³ Clauses 10 and 11.

⁶⁴ *French Accent* at [30], (5).

8. Conclusions and Order

[150] On balance, I do not consider that Ms Gupta was an employee for the purposes of s.382 of the FW Act at the time of ending of the relationship, or more generally, and was not a person protected from unfair dismissal. As a result, the unfair dismissal application does not fall within the jurisdiction of the Commission.

[151] The application must be dismissed and an Order⁶⁵ to that end is being issued in conjunction with this Decision.



COMMISSIONER

Appearances:

S Gupta, on behalf of *A Gupta*, the Applicant.

Y Shariff, of counsel, with permission, and *C Loughlin* on behalf of Portier Pacific Pty Ltd and Uber Australia Pty Ltd T/A Uber Eats.

Hearing details:

2019
Adelaide
24 July.

Printed by authority of the Commonwealth Government Printer

<PR710455>

⁶⁵ PR711020.