DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Amita Gupta
v
Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats
(C2019/5651)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
DEPUTY PRESIDENT COLMAN

MELBOURNE, 21 APRIL 2020

Appeal against decision [2019] FWC 5008 of Commissioner Hampton at Adelaide on 23 August 2019 in matter number U2019/1001.

DECISION OF JUSTICE ROSS AND VICE PRESIDENT HATCHER

Introduction

[1] Ms Amita Gupta has lodged an appeal, for which permission to appeal is required, against a decision of Commissioner Hampton issued on 23 August 2019[1] (decision) in which the Commissioner dismissed Mr Gupta's application for an unfair dismissal remedy against Portier Pacific Pty Ltd (Portier Pacific) and Uber Australia Pty Ltd (Uber Australia) on the basis that she was not an employee of either entity. Ms Gupta contends in her appeal that the Commissioner erred in deciding that she was not an employee of Portier Pacific.

[2] The statutory framework may briefly be described. Part 3-2 of the *Fair Work Act 2009* (FW Act) contains the scheme pursuant to which persons may in prescribed circumstances apply for and obtain an unfair dismissal remedy. Relevantly, s 390(1)(a) provides that the Commission must be satisfied that a person was "*protected from unfair dismissal*" at the time of being dismissed before it may make an order in the person's favour for an unfair dismissal remedy. Section 382 defines when a person is "*protected from unfair dismissal*", and the definition includes (in paragraph (a)) a requirement that the person be "*an employee*". "*Employee*" in that provision means a "*a national system employee*" (s 380), which expression is defined by s 13 to mean, relevantly "*…an individual so far as he or she is employed, or usually employed ... by a national system employer…*". "*National system employer*" is defined in s 14. It is not in dispute that, in order for a person to be a "*a national system employee*" in accordance with the definition in s 13, the person must be an employee at law of the relevant national system employer.

Outline of the Uber Eats business model

[1] [2019] FWC 5008

[3] Ms Gupta's unfair dismissal remedy application related to her work as a meal delivery driver in connection with the Uber Eats business. The respondents to her application, Portier Pacific and Uber Australia, are constituent corporate elements of that business which, to put it as neutrally as possible at this stage, facilitates the delivery of restaurants meals to customers in their homes or other locations. There are four participants in the arrangement by which this is done: the customer who orders the meal, the restaurant which prepares the meal, the deliverer (known as a "*Delivery Partner*") who (by car, motorcycle or bicycle) picks up the food from the restaurant and delivers it to the customer, and Uber Eats itself, which provides the system by which an order for food and delivery by a customer are arranged and paid for.

[4] Uber Eats operates the business model using a number of software applications provided and controlled by Uber Portier BV (Uber), a company registered in the Netherlands. Firstly, there is an "*Eats App*" by which the customer orders the food and delivery. This can be downloaded onto a smartphone, but to use it the customer must have created an account, which involves the customer entering their name, contact details and payment method and accepting Uber Eats' terms of service and privacy policy. When a customer wishes to order a meal, they must use the Eats App to identify the location to which the meal is to be delivered, choose a restaurant, and order a meal from the menu made available by the restaurant. The Eats App then provides the customer with the cost of the meal, the delivery fee and the estimated time of delivery of the meal. The customer may then place an order.

[5] Restaurants who choose to participate in the Uber Eats system use the "*Restaurant App*", which they can access after they sign a services agreement and pay an activation fee. They place a menu and associated promotional material on the Uber Eats platform which is accessible to the customer on the Eater App. When a customer orders a meal from a particular restaurant, the restaurant must first accept the order through the Restaurant App, and then enter the estimated preparation time for the meal (which may be the subject of subsequent amendment). The Restaurant App will generate an estimated time for collection of the meal from this information.

[6] Persons who wish to work as deliverers in the Uber Eats system must download the "*Partner App*" and then create an account. The person is required to elect whether to deliver by car, motorcycle or bicycle, to provide documents concerning their right to work in Australia, proof of identity, and their criminal and police history and, in respect of cars and motorcycles, to provide a current and valid driver's licence, vehicle registration and vehicle insurance policy. The person is also required to accept the terms and conditions contained in a services agreement with Portier Pacific and Uber. Once this is done, the person becomes a "*Delivery Partner*" and is able to be notified of "*delivery requests*" on the Partner App.

[7] Once a restaurant accepts an order, a "*delivery request*" is generated and sent to deliverers who are logged into the Partner App and are in the vicinity. This is done by way of a notification which includes a map of the location of the restaurant and an estimate of how many minutes' travel away the restaurant is. The Partner App allows the deliverer to accept the request, or either decline or ignore it. If the request is accepted by the deliverer, the Partner App will then display the restaurant's name and address, any pick-up instructions, and the distance and travel time to the restaurant. The deliverer may however cancel the request at any time prior to picking up the meal, including immediately after receiving this information or if there is a delay in the meal being ready for delivery upon arrival at the restaurant. Where a request is declined, the deliverer will be able to receive further delivery requests. Where it is

ignored, the request will lapse after a period of 15-30 seconds, and the deliverer will be able to receive further delivery requests. If a deliverer ignores three requests in a row, they are logged off the Partner App, but may immediately log back on. The purpose of this is to ensure that persons who are logged on the Partner App are active and have not simply failed to log off once they have ceased to be active.

[8] Once the deliverer arrives at the restaurant and picks up the meal, they confirm the start of the delivery in the Partner App, which then displays the customer's address, travel distance, estimated time of arrival and a map of a suggested delivery route. The deliverer then transports the meal to the customer's location, using the suggested route or their own route, and upon arrival and the delivery being effected, confirms the delivery in the Partner App.

[9] We will discuss the proper legal characterisation of the payment system in due course, but in practical terms what happens is that when the customer makes an order on the Eats App, they authorise payment of the specified cost of the meal and a separately specified delivery fee via their nominated payment method. The delivery fees are determined by the Uber Eats business, and at the relevant times consisted of flat pick-up and drop-off components and a distance rate calculated on the basis of the recommended route. The payment is actually charged to the customer's account when delivery of the meal is effected. The Uber Eats platform delivers the payment for the meal to the restaurant's account, less a service fee which is payable to Portier Pacific, and delivers the delivery fee to the deliverer's account, less another service fee which is payable to Portier Pacific. The platform renders an invoice to the restaurant, which is stated to be issued by Portier Pacific on behalf of the named deliverer, and the restaurant is charged the delivery fee payable to the deliverer. The delivery fee is the only form of payment made to deliverers.

[10] Customers can rate both the restaurant they have selected, and the deliverer, on the Eats App using a thumbs up or down. If the customer selects a thumbs down for the deliverer, they can then select a reason for the negative rating from a number of pre-defined tags. If the deliverer's overall positive rating continuously falls below 85%, they may lose access to the Partner App. There are also other service standards which we will describe later in this decision.

[11] Where deliverers provide a car for the purpose of making deliveries, it does not have to be of any particular type, make or model, except that it must be manufactured after 1990. The deliverer bears all the expenses associated with the use of the vehicle, including fuel and insurance premiums, except for tolls. There is no branding placed on any vehicle, nor are deliverers required to wear any uniform or display any name, logo or colours identifying Uber Eats or any of its constituent corporate entities. Deliverers must use an insulation bag for the delivery of meals, and they may either provide this themselves or buy one from the Uber Eats business at a cost of $35.00. They must carry with them their own smartphone for the purpose of operating the Partner App. There is no practical impediment to deliverers performing other delivery work using different apps while they are logged on to the Partner App. Deliverers with an account on the Partner App are required to perform the work personally, as the Partner App periodically requires the deliverer to identify themselves using facial recognition software on the app in order to log on.

Ms Gupta's engagement

[12] Ms Gupta created an account on the Partner App (with the assistance of her husband) and accepted the terms of a service agreement on or about 19 September 2017. Subsequently a new version of the service agreement was issued, and Ms Gupta accepted the terms of this on 15 December 2017. She was supplied by Uber Eats with an insulation bag, although there was a factual dispute as to whether she was charged for this. She undertook her first delivery using the Partner App on 26 September 2019, using her own car. Over the period when she held an account on the Partner App, she undertook approximately 2,200 deliveries, rejected about 550 delivery requests, and cancelled about 240 delivery requests after she had initially accepted them. On almost every occasion when Ms Gupta undertook a delivery, she was accompanied by her husband or occasionally her son, and while Ms Gupta physically collected the meal from the restaurant and delivered it to the customer, the husband or son generally did the actual driving. There was no particular pattern as to her performance of work, either as to the days on which she chose to log on or the periods for which she remained logged on. On some days she logged on and off more than once. On some occasions she logged on but did not accept any delivery requests.

[13] Ms Gupta was suspended from the Partner App on 21 December 2018. It was subsequently restored, but then she was permanently blocked from accessing the app on 15 January 2019. The reason for this appears to have been that Ms Gupta was not meeting Uber Eats' standards for timely delivery.

Contractual arrangements

[14] As earlier stated, Ms Gupta accepted the terms of the new service agreement (Service Agreement) on 15 December 2017, and this continued to apply at all times until her relationship with the Uber Eats business ceased on 15 January 2019. The parties to the Service Agreement were, apart from Mr Gupta, Portier Pacific and Uber. The agreement refers to Ms Gupta, as the deliverer, in the second person. The Partner App is referred to as the "*Provider App*". The preamble to the agreement seeks to set out the background and context of the business relationship the subject of the agreement in the following terms (bolding in original):

> "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.
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> . . .
>
> **You acknowledge and agree that Uber is a technology services provider and that neither Uber, Portier Pacific nor their Affiliates provide delivery services.**"

[15] A number of provisions of the agreement seek to describe or label the character of the legal relationships created by the Service Agreement. Clause 2.2 of the Service Agreement

relevantly provides that the deliverer acknowledges and agrees that the provision of "*Delivery Services*" to "*Users*" (the definition of which appears to encompass both restaurants and customers) creates a direct business relationship between the deliverer and the User to which Portier Pacific and Uber are not party, and that the deliverer has the sole responsibility for any obligation or liability to Users or other third parties that arise from the provision of the delivery services. "*Delivery Services*" is defined in clause 1.7, relevantly, to mean "*the deliverer's provision of delivery services to or on behalf of Users via the Uber Services*..". Clause 2.3 relevantly provides that the deliverer acknowledges and agrees that Portier Pacific's provisions of the "*Uber Services*" (an expression defined in the preamble quoted above) creates a legal and direct business relationship between Portier Pacific and the deliverer. Clause 8.3 provides that deliverer is not an employee, independent contractor, a worker or deemed worker of Uber or Portier Pacific for the purpose of Australian workers' compensation laws and accordingly that neither Uber nor Portier Pacific are required to maintain or provide workers' compensation insurance or other occupational accident injury insurance. Clause 13.1 provides (under the heading "*Relationship of the Parties*") that Portier Pacific acts as the "…*limited payment collection agent solely for the purpose of collecting payment from Users on your behalf*...", and that the Service Agreement is not an employment agreement, and does not create an employment, independent contractor or worker relationship, joint venture, partnership or agency relationship. Clause 13.2 provides that if "*by implication of mandatory law*" the deliverer is deemed to be an employee, agent or representative of Uber or Portier Pacific, the deliver is required to indemnify Uber and Portier Pacific against any claims arising from this.

[16] Clause 4 of the Service Agreement concerns the "*Financial Terms*". Clause 4.1 provides that "*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**")*...", subject to the proviso that the delivery fee is calculated accordingly to a methodology determined by Portier Pacific or is a flat fee that is, in effect, determined by Portier Pacific. Clause 4.1 goes on to provide, relevantly, that:

- the deliverer appoints Portier Pacific as their "…*limited payment collection agent solely for the purpose of accepting the Delivery Fee*...";

- the deliverer agrees that "…*payments made by Users to Portier Portier shall be considered the same as payment made directly by Users to you*…";

- the deliverer acknowledges that the Delivery Fee is a recommended amount, its primary purpose is to act as the default amount in the event that the deliverer does not negotiate a different Delivery Fee, and the deliverer has the right to charge a delivery fee that is less than the pre-arranged Delivery Fee;

- Portier Pacific agrees to remit on at least a weekly basis, the Delivery Fee less the "*Service Fee*".

[17] Clause 4.2 provides that Portier Pacific reserves the right to change the Delivery Fee calculation at any time at its discretion, and the deliverer's continued use of the Uber services after any such change constitutes consent. Clause 4.3 provides that Portier Pacific also reserves the right to "*adjust*" the Delivery Fee in a particular instance (including where the deliverer took an inefficient route, failed to properly end a delivery on the Provide App, or there was a technical error in the Uber services), and to cancel the fee altogether or require

repayment if already paid, including where a communicated deadline for the completion of a delivery was not met or in the case of User being charged for a delivery which was not made or in event of a User complaint or fraud. Under clause 4.5, the deliverer agrees to pay the "*Service Fee*", calculated as a percentage of the Delivery Fee, "*in consideration of Portier Pacific's provision of the Uber services to you*", and further agrees that Portier Pacific can adjust the Service Fee or introduce a new model to determine the Service Fee on 14 days' notice.

[18] Other relevant provisions in the Service Agreement are:

- the deliverer is prohibited from contacting "*Users other than for the purposes of fulfilling Delivery Services*" (clause 2.1);

- the deliverer is solely responsible for determining the most effective, efficient and safe manner to perform the Delivery Services

- the deliver is required to "*provide Delivery Services in a professional manner with due skill, care and diligence*" and "*maintain high standards of professionalism, service and courtesy*" (clause 3.1);

- the deliverer takes responsibility for the payment of tax on their earnings (clause 4.9);

- the Service Agreement may be terminated by either party without cause upon 30 days' notice, or without notice if the other party has committed a material breach or becomes insolvent or bankrupt, and Portier Pacific may restrict the deliverer from using the Uber Services and/or Uber may deactivate the deliverer's account and restrict access to the Provider App if the deliverer is no longer qualified under applicable laws or the standards and policies of Uber or Portier Pacific to provide Delivery Services or operate the relevant transportation method (clause 12.2);

- Uber and Portier Pacific reserve the right to modify the term and conditions of the Service Agreement by publishing an updated version on Uber Services' online portal, and 14 days' notice is required of any material change (clause 14.4);

- supplemental terms may apply to the deliverer's use of the Uber Services, such as policies or terms of use, which may be modified from time to time and which are deemed to be part of the Service Agreement (clause 14.2); and

- the deliverer may not assign or transfer the agreement, or any of the deliverer's rights or obligations, in whole or in part without the written consent of Uber and Portier Pacific (clause 14.4).

[19] Uber Eats has published a document entitled "*Legal – Uber Eats Community Guidelines*" (Guidelines) which, the evidence demonstrated, Uber and Portier Pacific consider to be an applicable standard for the purpose of clause 12.2. The Guidelines also appear to us to be a policy constituting supplemental terms incorporated into the Service Agreement by clause 14.2. However the Guidelines do not purport to apply only to deliverers; they are also expressed to apply to restaurants and customers. The provisions applicable to deliverers include that they:

- must treat the people with whom they deal with respect;

- must complete deliveries safely, keep to the speed limit, not text while on the road, use a phone mount, never deliver under the influence of alcohol or drugs, and take a break if feeling tired;

- must not engage in discriminatory behaviour;

- may lose their access to Uber Eats temporarily or permanently if their customer rating persistently falls below their city's minimum threshold, and may lose access immediately in the case of behaviour involving violence, sexual misconduct, harassment, discrimination, illegal activity, or poor, unsafe or distracted driving;

- may be logged out of the app if their cancellation rate is much higher than the average for their city, and may lose access to their account if the cancellation rate continues to exceed the maximum limit or if they cause a higher than average cancellation rate from restaurants by not arriving after conforming availability;

- may be logged off if they consistently decline or fail to accept delivery requests;

- may lose access to their account if they are consistently slow to complete trips and materially deviating from ETAs, subject to prior notification and being given an opportunity to improve;

- must not touch or hit restaurant personnel or customers, use inappropriate or abusive language or gestures, make unwanted contact with customers after a delivery has been completed, ensure the food is delivered in accordance with relevant safety standards, and comply with restaurant requests about how they want the food to be delivered (eg. keeping halal and non-halal food separate);

- may lose access to Uber Eats if they do not use an insulated bag where required;

- must not carry a firearm while using the app;

- may be subject to action for activities such as harming the Uber business or brand, unauthorised use of Uber's trademark or intellectual property, soliciting payments of fares outside the Uber Eats app or otherwise violating the services agreement with Uber Eats;

- will have their account deactivated if they provide Uber Eats with inaccurate information, allow someone else to use their account or make a delivery with a vehicle not registered with their account, or if their driver's license becomes invalid or if checks of any vehicle or driver documents uncover a violation of Uber Eats safety standards or local regulatory requirements;

- will have their accounts deactivated if they engage in fraudulent activity or misuse, including picking up an item without the intention to complete a delivery, creating dummy accounts, claiming fraudulent fees or charges, claiming to complete a delivery

without ever picking up the delivery item, and picking up a delivery item but not delivering it in full.

[20] Uber has separate standard-form contracts with restaurants and customers. The agreement with restaurants (Restaurants Agreement) consists of a "*Master Framework Letter Agreement*" and a "*Marketplace Addendum to UberEATS Master Framework Agreement*", and the former document expressly provides that it incorporates the latter (clause 1). The preamble to the Restaurants Agreement provides that its parties are the relevant restaurant, Uber and Portier Pacific, and that under the agreement Portier Pacific "*...will procure and facilitate the provision of lead generation services, being on-demand intermediary and related services rendered via a digital technology network ("Uber Services")...*" and that "*…The Uber Services and Uber Toll enable you to seek, receive and filfill requests of Meals from your customers ... and to connect with independent providers of delivery services…*". Relevant to this proceeding, the agreement provides that:

- for the purpose of the delivery of meals, Uber, Portier Pacific and the deliverers shall operate "*under cover of your retail license privileges and control as your agent, and not employee*", and the restaurant, through the services provided by deliverers, is responsible for delivery of meals and maintains possession, control and care of the meals at all times;

- hot meals must be at a temperature of at least 60 degrees and cold meals less than 5 degrees, the restaurant must determine the criteria concerning the quality, portion, size, ingredients and other matters in relation to the meals, and that if the restaurant fails to provide meals which meet the temperature requirements or its own criteria, Portier Pacific is under no obligation to make such substandard meals available for sale via Uber;

- in consideration of Portier Pacific provisions of the Uber Services, the restaurant agrees to pay Portier Pacific a specified service fee;

- Uber and Portier Pacific may showcase the availability of the restaurant's meals via the Uber Eats app throughout various promotional activities;

- each party warrants that it has full power and authority to enter into the agreement and perform its obligations hereunder;

- the restaurant acknowledges and agrees that it is bound by any future amendments and additions to the agreement, including with respect to delivery fee calculations, and continued use of the Uber services or the app constitutes consent to such changes;

- the restaurant shall pay a delivery fee to deliverers for each applicable order of meals (in accordance with specified calculation criteria) and deliverers will invoice the restaurant for the delivery fee via the Uber services;

- if the restaurant is paid for a meal, the restaurant must pay the service fee and the delivery fee even if the deliverer is unable to complete the delivery'

- the restaurant authorises Portier Pacific or its affiliate to collect the delivery fee from the customer and remit it to the deliver on the restaurant's behalf; and

- Portier Pacific will remit to the restaurant meal payments from the customers, less the service fee and any refunds, on a weekly basis.

[21] The Restaurant App (under a link headed "*Legal*") contains a standard-form agreement between the customer and Uber. It provides that the service provided under the agreement "*constitute the provision of a technology platform that enables you* [the customer] *...to (a) arrange and schedule transportation services or delivery services with independent third party providers of those service, who have an agreement with Uber or its affiliates ("Third Party Providers"), and (b) facilitate payments to Third Party Providers for the services and receive receipts for those payments*". The agreement further states that the customer acknowledges that Uber does not provide delivery services or function as a transportation carrier, and that all such transportation or delivery services are provided by independent third party contractors who are not employed by Uber or any of its affiliates. In respect of payment, the agreement provides that after the customer has received services or goods obtained through the use of the service, Uber will facilitate the customer's payment of the applicable charges on behalf of the third party provider as its limited payment collection agent, and payment in such manner is to be considered the same as a payment made directly to the Third Party Provider.

[22] This agreement makes no reference to Portier Pacific, or to restaurants, and on one view is more apt to apply to Uber's passenger business. Nonetheless it is the only identifiable terms of service document on the Restaurant App.

The decision

[23] After summarising the evidence in the matter, the Commissioner stated two conclusions concerning the identification of the correct respondents in the matters. The first was that Uber Australia provided marketing and support services to Uber and Pacific Portier, was not a party to the services agreement or the restaurants agreement, and there was no proper basis for the Commission to find that Uber Australia was a party to the relationship with Ms Gupta and was accordingly not a proper respondent.[2] The second was as follows:

> "[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."

[24] The Commissioner then set out the legal principles applicable to distinguishing between employees and independent contractors, the factual framework of the matter, and the relevant terms of the service agreement. The Commissioner then referred to the decision in *Kaseris v Rasier Pacific VOF*[3] (*Kaseris*), in which the Commission (Gostencnik DP) had concluded that a driver operating as part of the Uber passenger business was not an employee for the purpose of Pt 3-2 of the FW Act, and quoted paragraph [5] of that decision in which the Deputy President rejected Uber's description of itself as a "technology based business premised on supplying lead-generation software" and characterised Uber and the technology

[2] Ibid at [34]-[35]

[3] [2017] FWC 6610

upon which its business was based on as facilitating the provision of transport services. The Commissioner then said:

> "[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."

[25] The Commissioner then considered each of the factors identified for consideration under the multi-factor test for distinguishing between independent contractors and employees as summarised in the Full Bench decision in *Jiang Shen Cai trading as French Accent v Rozario*[4] (*French Accent*). The Commissioner's consideration of these factors may be summarised as follows:

- *Control:* Ms Gupta had significant control over the way she wanted to conduct the services she provided, including when she worked, how long she worked, what delivery requests she performed, the type of vehicle she used and how the vehicle was operated and maintained. Uber Eats had a measure of "soft control", including through the ratings system, its capacity to suggest the route to be taken and its setting of the maximum delivery fee, but these were common business efficiency rules and not of themselves strong signals of any particular type of relationship. This factor weighed against a finding of the existence of an employment relationship.[5]

- *Entitlement to work for others:* Ms Gupta had the express and practical right to use other food delivery systems and to use her vehicle for other services, although there were practical limitations on her capacity to accept requests from multiple apps at the same time. This weighed against a finding of the existence of an employment relationship.[6]

- *Separate place of work and advertising of services:* Mr Gupta undertook work in and around her vehicle, visiting restaurants and delivering to the premises of customers. There was no evidence that she advertised her services or had the practical scope to generate work as an individual. This was a neutral consideration.[7]

- *Provision and maintenance of tools and equipment*: Ms Gupta provided and maintained her own capital equipment. She was provided with an insulated delivery bag which was subject to a refundable deposit that was deducted from her payments, which she could have provided herself if she wished. This factor weighed marginally against a finding that an employment relationship existed.

- *Entitlement to delegate or sub-contract work:* There was no formal right for Ms Gupta to delegate or sub-contract the work, which weighed in favour of the existence of an

[4] [2011] FWAFB 8307

[5] [2019] FWC 5008 at [87]-[90]

[6] Ibid at [91]-[93]

[7] Ibid at [94]-[97]

employment relationship, although in practice she was assisted in the performance of her duties by her husband and this was also a relevant matter.[8]

- *Right to suspend or dismiss:* Uber Eats had the right to suspend or conclude the relationship on certain grounds. This was a right that tended to exist in any business or employment relationship, and the right to suspend did not sit well with the concept of employment.

- *Public presentation:* Ms Gupta did not, and was not permitted, to display any Uber Eats signage on her vehicle, and was not required to and did not wear any Uber Eats uniform or identification. However the marketing and provision of the service by Uber Eats contemplated that a deliverer arranged using the Uber Eats system would deliver the meal. This was a neutral factor.[9]

- *Deduction of income tax and GST:* Ms Gupta was required under the Service Agreement to deal with any applicable GST, and Uber Eats did not deduct income tax from the payments made to her. This marginally weighed against the existence of an employment relationship.[10]

- *Provision of invoices and periodic payment:* Invoices were generated by Portier Pacific on behalf of Ms Gupta, and although the parameters of the delivery fee were, in effect, controlled by Uber Eats, Ms Gupta had the capacity to negotiate a lower fee, to accept or reject particular delivery requests, and to dispute the delivery fee calculation. The absence of anything approaching a wage and associated payments weighed against a finding of an employment relationship.[11]

- *Paid leave:* There was no provision of any paid leave, but in the circumstances this factor was of little assistance.[12]

- *Nature of the work:* The work did not involve a profession, trade or special calling, and this weighed in favour of a finding that an employment relationship existed.[13]

- *Creation of goodwill and other saleable assets:* Ms Gupta did not have the capacity to generate goodwill or any saleable assets, and this weighed in favour of a finding that an employment relationship existed.[14]

- *Proportion of remuneration spent on business expenses:* There was little evidence about this. There was little by way of "business" expense in relative terms apart from the operating costs of the vehicle and the mobile phone.[15]

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[8] Ibid at [102]=[103]

[9] Ibid at [107]-[109]

[10] Ibid at [110]-[111]

[11] Ibid at [112]-[115]

[12] Ibid at [116]-[117]

[13] Ibid at [119]-[121]

[14] Ibid at [122]-[123]

[15] Ibid at [124]-[126]

[26] The Commissioner said he was not assisted by Ms Gupta's submissions that the *Independent Contractors Act 2006* (Cth) would operate to render her contract unfair or that under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) a business cannot exist where there is no expectation of a reasonable profit.[16] The Commissioner also regarded the decision of the UK Court of Appeal in *Uber B.V. and Others v Aslam*[17] (*Aslam*), which concerned the Uber passenger service business, as not being of direct assistance because it was made in the context of a different regulatory environment and was concerned with a legislative definition of employment rather than the common law test.[18]

[27] Weighing the considerations identified in *French Accent*, the Commissioner reached the following overall conclusion:

> "[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."

[28] The Commissioner also concluded that the existence of the fundamental aspects of a work-wages bargain was problematic[19] and, as to the way in which the Service Agreement characterised the relationship, said:

> "[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."

[29] On this basis, the Commissioner concluded that Ms Gupta was not an employee for the purposes of s 382 of the FW Act and was therefore not a person protected from unfair dismissal, and dismissed her application for an unfair dismissal remedy.

Submissions

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[16] Ibid at [127]-[134]

[17] [2018] EWCA Civ 2748

[18] Ibid at [135]-[142]

[19] Ibid at [147]

[30] Ms Gupta submitted that the grant of permission to appeal would be in the public interest because her appeal raised questions of general importance and significance in the context of the proliferation of the so-called "*gig economy*", and because the status of drivers undertaking work using the Uber Eats platform had not been considered at the Full Bench level before. The question which the appeal raised was one of objective jurisdictional fact, and accordingly, it was submitted, the Full Bench was required to determine for itself whether the Commissioner reached the wrong conclusion. The question of whether a worker providing personal services is an independent contractor or an employee is a mixed question of fact and law. This question is to be determined using a multi-factorial approach with the ultimate question being whether the worker is the servant of another in that other's business or whether, viewed as a practical matter, the worker is carrying on a trade or business on their own behalf.

[31] It was submitted that the application of the relevant principles to the circumstances of Ms Gupta's performance of work as a deliverer using the Partner App reveals her to have been an employee working in Portier Pacific's Uber Eats business, in that:

- the work she performed did not require any special skill or qualification;
- Ms Gupta was told via the Partner App, where orders were to be collected from, the location of the customer and the route to be taken;
- the car and the mobile phone she was required to provide were not specialised pieces of capital equipment which could only be used for food delivery, and were used for personal purposes;
- clauses 2.3 and 12 of the Service Agreement conferred on Portier Pacific power to terminate the agreement and restrict Ms Gupta's access to the Partner App, without which she would have no ability to perform work;
- the Guidelines operated to effect real and practical control over the work performed by deliverers, including behavioural standards;
- the ratings system operated as a de facto performance management/disciplinary system;
- there were also detailed instructions as to what Ms Gupta was to do if a customer could not be located or if multiple orders were to be picked up from a single restaurant, and departures from the recommended route was at the deliverer's financial peril;
- Ms Gupta was not permitted to have any independent contact with customers which might allow her to accrue goodwill or establish her own customer connection to any business she may have been running;
- Ms Gupta was not permitted to subcontract or delegate her work, and was required to verify that she was the person using the Partner App by logging in from time to time using facial recognition software;

- clause 4.9 of the Service Agreement provided that Ms Gupta was to be responsible for taxation registration and remittance, and that she would provide Portier Pacific with her ABN and GST registration number, but this emphasised the disconnect between form and substance in that Ms Gupta never had an ABN, never registered for GST and no GST was ever paid on the fare she received for her services;

- Ms Gupta could be logged off, suspended or de-activated from the Partner App if her delivery rate fell below the city's minimum, if her cancellation rate was too high, or if she failed to accept three consecutive trip requests, and these amounted to a requirement for Ms Gupta to maintain a sufficient level of work; and

- the rates Ms Gupta was paid were determined by Portier Pacific, and the freedom to negotiate lower rates was nugatory; and

- the characterisation in the Services Agreement of Portier Pacific as a "limited payment collection agent" would be accorded little weight in circumstances where the terms were unilaterally drawn up by Portier Pacific and Ms Gupta was in no position to negotiate or bargain for better terms; and

- on any view, Ms Gupta was performing work in Portier Pacific's food delivery business and was not operating a business of her own.

[32] Portier Pacific submitted that there was no public interest in the appeal such as to permit the grant of permission to appeal because it raised no point of jurisdiction, principle or general application. The applicable principles were established in the *French Accent* decision, and the Commissioner applied those principles in an orthodox way and on the basis of findings of fact that were not challenged by Ms Gupta. In the alternative, if permission to appeal was granted, Portier Pacific submitted that the appeal could not succeed unless error was demonstrated in the Commissioner's finding of jurisdictional fact concerning whether Ms Gupta was an employee. That finding involved the making of an evaluative and qualitative assessment for which there was no right or wrong legal answer. If the decision-maker, it was submitted, had applied the correct criteria, the fact that another decision-maker might have attached different weight to the various factors is not a basis for ascribing jurisdictional error. In this case, the Commissioner correctly identified the relevant indicia by reference to *French Accent*, evaluated, weighed and balanced those indicia, and addressed the issue by reference to the terms of the Service Agreement. There was no error in the Commissioner's decision as to the legal character of the relationship disclosed by the facts found by him, and that was sufficient to dispose of the appeal.

[33] In response to Ms Gupta's submissions, Portier Pacific submitted that:

- the issue of the existence of a "work-wages" bargain strictly arises before the exercise of the evaluation described in *French Accent*, and the Commissioner was correct to treat this as important in a finding against the existence of an employment relationship;

- the Commissioner was correct to find that both elements of the "work-wages" bargain - that is, reciprocal obligations to work and to pay - were "problematic" in the sense that they were absent, meaning that there could be no finding of an employment relationship;

- the Commissioner correctly found that there was an absence of an obligation for Uber Eats to pay for the delivery service, and that payment was rather made by the restaurant and collected and remitted to the deliverer by Portier Pacific on the restaurant's behalf;

- the Commissioner also correctly found that there was no obligation on Ms Gupta to elect to provide any delivery service even when she exercised the option of accessing the Partner App;

- the question to be determined was not whether Ms Gupta performed work in the conduct of her own business but whether she was an employee, and a negative finding as to the former matter was not determinative of the proper question;

- the "soft controls" exercised by Portier Pacific were for the purpose of ensuring the quality of the Uber Eats platform acting as intermediary between the restaurant, customer and deliverer, and this was not inconsistent with a non-employment relationship; and

- the more significant facts show an absence of control on the part of Portier Pacific, with Ms Gupta having control over when and how long she logged on to the Partner App, whether she accepted any delivery requests when logged on, and whether she proceeded with or cancelled a delivery request after having accepted it.

[34] It is necessary at this point to note that at first instance and in the appeal, Portier Pacific's position was that, in relation to the Restaurant Agreement, it acted as agent for the restaurant in arranging for the delivery of the meal and in collecting the restaurant's fee from the customer and, in relation to the Service Agreement, as agent for the deliverer in obtaining the deliverer's fee from the restaurant.[20] The contract for the performance of each delivery was, it contended, between the restaurant and the deliverer.

Consideration

[35] The approach taken by the Commissioner was to determine, by application of the indicia identified in the Full Bench decision in *French Accent* (derived from High Court authorities to which we will later refer), whether Ms Gupta was an employee or independent contractor of Portier Pacific. As part of that assessment, the Commissioner took into account whether there existed a "work-wages" bargain between Ms Gupta and Portier Pacific without making a conclusive finding about that issue.

[36] The multi-factorial evaluative approach set out in *French Accent* proceeds on the premise that the individual in question personally performs work pursuant to a contractual relationship with another person or entity, so that the question to be determined is whether the first person does so in the capacity of an employee or as an independent contractor. However in this case, a prior question arises: did Ms Gupta perform her delivery work pursuant to a contractual relationship with Portier Pacific at all? Portier Pacific denies this is the case; it says that Ms Gupta performed each delivery task pursuant to a contract with the relevant restaurant, that the restaurant had the obligation to pay her, and that Portier Pacific acted

[20] See Transcript 24 July 2019 at PN875 and Transcript 18 November 2019 at PNs770-825, 851

merely as the agent of the restaurant in arranging for the attendance of Ms Gupta to pick up and deliver the meal, and acted as Ms Gupta's "limited payment collection agent" in collecting the delivery fee on her behalf and remitting it to her. In this connection, it is to be noted that clause 8.3 of the Service Agreement seeks to deny that Ms Gupta is either an employee *or an independent contractor* of Portier Pacific. It characterises the relationship the other way around, in that it contends that Portier Pacific (together with Uber) provide services to Ms Gupta by way of giving her access to the Partner App and collecting payments on her behalf, and for this she pays a service fee to them.

[37] If the position is as Portier Pacific contends, there cannot be an employment relationship between it and Ms Gupta because the "irreducible minimum of mutual obligation necessary to create a contract of service", described by the Supreme Court of NSW (McDougall J) in *Forstaff v Chief Commissioner of State Revenue*[21] as "… an obligation on the one side to perform work (or provide service) and on the other side to pay…", does not exist. For that reason, it is necessary first to analyse the contractual relationship between Ms Gupta and Portier Pacific/Uber, and the other contractual relationships in the Uber Eats business system, to determine whether the minimum reciprocal obligations of work and payment existed as between Ms Gupta and Portier Pacific/Uber.

[38] There is no doubt that the characterisation of the nature of the relationship between Ms Gupta and Portier Pacific/Uber in the Service Agreement supports Portier Pacific's position to a substantial degree. We have earlier set out or described the relevant provisions of the Service Agreement. In summary:

- the preamble seeks to cast Ms Gupta as an "independent provider of delivery services" who utilises "lead generation services" to "seek, receive and fulfil" requests for delivery services from restaurants, and who acknowledges and agrees that neither Uber nor Portier Pacific provide delivery services themselves;

- clause 2.2 provides that Ms Gupta acknowledges and agrees that the provision of delivery services to any restaurant creates a direct business relationship between her and the restaurant to which Portier Pacific and Uber are not parties;

- clause 8.3 (as stated above) provides that Ms Gupta is not an employee or independent contractor of Portier Pacific; and

- clause 13 provides that Portier Pacific acts as a "limited payment collection agency" solely for the purpose of collecting payment from restaurants on Ms Gupta's behalf.

[39] However all the above provisions may be regarded as merely labelling or characterising the nature of the contractual relationship between Ms Gupta and Portier Pacific/Uber; none of them set out the substantive rights and obligations of that relationship. It is well established that such labels cannot alter the substantive nature of the relationship. As was stated by Isaacs J in *Curtis v Perth & Fremantle Bottle Exchange Co Ltd*:[22]

> "Where parties enter into a bargain with one another whereby certain rights and obligations are created, they cannot by a mere consensual label alter the inherent

[21] [2004] NSWSC 573, 144 IR 1 at [90]-[91]

[22] [1914] HCA 21, 18 CLR 17

character of the relations they have actually called into existence. Many cases have arisen where Courts have disregarded such labels, because in law they were wrong, and have looked beneath them to the real substance."

[40] More recent decisions of the Federal Court Full Court have elucidated this principle in the context of the identification of whether an employment relationship exists. In *ACE Insurance Limited v Trifunovski*, Buchanan J (with whom Lander and Robertson JJ agreed) said that "the nature of the relationship may be legitimately examined by reference to the actual way in which work was carried out".[23] In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*, North and Bromberg JJ (with whom Barker J relevantly agreed) said that: "...appellate courts in Australia and the United Kingdom have been particularly alert, when determining whether a relationship is one of employment, to ensure that form and presentation do not distract the court from identifying the substance of what has been truly agreed. It has been repeatedly emphasised that courts should focus on the real substance, practical reality or true nature of the relationship in question...".[24] And in *WorkPac Pty Ltd v Skene* the Full Court said "The conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship will need to be assessed.[25]

[41] A similar principle[26] was applied in the decision of the England and Wales Court of Appeal (Civil Division) in *Uber B.V. v Aslam*,[27] which concerned whether drivers in Uber's passenger business in London were "*workers*" under the relevant legislation. Uber's position was that the driver contracted with the passenger, and the role of the relevant Uber entity was only to act as agent of the driver to secure bookings through its technology platform. The Court majority (Etherton MR and Bean LJ) rejected this, and affirmed the conclusion of the Employment Tribunal that "it is not real to regard Uber as working 'for' the drivers and that the only sensible interpretation is that the relationship is the other way round. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits."[28] This conclusion was based on the following considerations which the Court considered of relevance and significance:

- the relevant Uber entity (ULL) had the sole and absolute discretion to accept or decline bookings;
- ULL interviewed and recruited the drivers;
- ULL controlled key information concerning passengers from which the drivers were excluded;
- ULL required drivers to accept or not cancel trips and enforced this by logging them off;
- ULL set the default route and the driver departed from it at his or her peril;

[23] [2013] FCAFC 3, 209 FCR 146 at [91]

[24] [2015] FCAFC 37 at [142], Barker J agreeing at [316]

[25] [2018] FCAFC 131 at [180]

[26] Derived from *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157

[27] [2018] EWCA Civ 2748

[28] Ibid at [95]

- ULL fixed the fare and the driver could not agree on a higher fare (with the right to negotiate a lower fare being nugatory);

- ULL imposed numerous conditions on drivers, instructed them on how to do their work and controlled them in the performance of their duties;

- ULL's rating system amounted to a performance management/disciplinary procedure;

- ULL determined issues about rebates, sometimes without reference to the affected driver;

- ULL handled customer complaints, including complaints about passengers; and

- ULL had the power to amend the driver's terms unilaterally.[29]

[42] By contrast, a different approach was taken when the Uber passenger business model was considered by this Commission in *Kaseris*[30] in the context of an application by an Uber driver for an unfair dismissal remedy. In that decision Gostencnik DP found that the fundamental requirement of "work-wages" bargain as between the driver and the relevant Uber entity were absent:

> "[51] ...It is, I consider, in this case clear on the facts that these fundamental elements of an employment relationship did not exist as between the Applicant and the Respondent. I briefly restate the uncontested evidence set out earlier to make good this conclusion. First, neither under the terms of the Services Agreement between the parties nor under the arrangement as it operated in practice was the Applicant required to perform any work or provide any services for the benefit of the Respondent. As the evidence plainly establishes, the Applicant was free to perform as much or as little work with it as he liked. In providing a transportation service to riders, the Applicant did so when, where and for whom he saw fit, without any further reference to the Respondent. In the provision of the transportation service to a Rider, the Applicant was not performing any contractual obligation he owed to the Respondent. Secondly, the Respondent did not make any payment to the Applicant for the provision of any work or services. Rather, the Applicant was charged a service fee by the Respondent calculated as an agreed percentage of the fee paid by the Rider for the trip in consideration for certain services provided by the Respondent to the Applicant to which reference has earlier been made. The work-wages bargain is plainly absent. There was no employment relationship between the Applicant and the Respondent with the consequence that the Applicant was not an employee and was thus not a person protected from unfair dismissal."

[43] The same approach was taken by the Commission (Bissett C) in another unfair dismissal remedy application involving the Uber passenger service.[31]

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[29] Ibid at [96]-[98]

[30] [2017] FWC 6610

[31] *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807

[44] In the matter before us, the question for whom did Ms Gupta perform delivery work, and by whom was she paid for it, must be answered by reference to the substantive rights and obligations under the Service Agreement, the Guidelines, the Restaurants Agreement and the commercial or working reality of the overall arrangement by which Ms Gupta delivered restaurant meals to customers. The following matters, we consider, are demonstrative of the proposition that Ms Gupta performed her delivery work for and was paid for it by Portier Pacific, notwithstanding the labelling in the Service Agreement to which we have earlier referred.

[45] First, there is no basis to conclude that there was any contractual relationship between Ms Gupta and any restaurant in relation to which she delivered a meal to a customer. There are of course no identifiable terms of any such agreement. Portier Pacific does not anywhere in the comprehensive terms of the Service Agreement purport to be acting as agent for any restaurants using the Restaurant App and engaging with Ms Gupta on this basis. The Service Agreement could not legally effect an agreement between Ms Gupta and any restaurant, regardless of the assertion in clause 2.2 of that agreement. It is difficult to see how any such contract could be formed consistent with usual contractual principles. Under the Uber Eats system, Ms Gupta was not at the time she accepted any delivery request informed of the name and address of the relevant restaurant; this was only disclosed to her after the acceptance of a request. Neither the restaurant nor Ms Gupta had any role in setting the price to be paid for the delivery to be performed; this was set by Portier Pacific. Insofar as the Service Agreement purportedly permitted Ms Gupta and restaurants to negotiate a lower fee, it was entirely nugatory, being commercially nonsensical and at odds with the way in which the arrangement operated in practice. Ms Gupta was prohibited under clause 2.1 of the Service Agreement from engaging in communication with restaurants other than for the purpose of fulfilling specific delivery requests which she had accepted, so she was effectively not permitted to form any ongoing commercial relationship or build goodwill with any restaurant in relation to which she performed a delivery. Indeed the purpose of this provision is likely to have been to prevent Ms Gupta and other deliverers "stealing" the restaurants which Portier Pacific considered to be its clients.

[46] Second, any obligations attaching to the performance of the delivery work are to be found in the Service Agreement between Ms Gupta, Portier Pacific and Uber, and the Guidelines (which, as earlier stated, were incorporated by reference into the Service Agreement). Clause 3.1 of the Service Agreement obliged Ms Gupta to provide her delivery services in a professional manner with due skill, care and diligence, and maintain high standards of professionalism, service and courtesy. The Guidelines required that delivery services be performed safely and lawfully, that all interactions with customers be appropriate and respectful, and that meals be delivered in accordance with safety and other relevant requirements. The ratings system meant that Ms Gupta was at risk of suspension or expulsion from the Partner App, and termination of the Service Agreement, if these standards were not maintained in the eyes of customers. Consistent delays in performing deliveries might lead to the same result. These obligations are most readily explicable on the basis that Ms Gupta was performing her delivery work for Portier Pacific. There is no evidence of any restaurant imposing obligations of this nature upon Ms Gupta.

[47] Third, payment for Ms Gupta's delivery work was a matter entirely within the control and responsibility of Portier Pacific. As earlier stated, the price for the work was set by Portier Pacific, not any restaurant. Portier Pacific had the right under the Service Agreement to alter the delivery fee structure applicable to Ms Gupta without any reference to the restaurant. No

money changed hands as between any restaurant and Ms Gupta; rather, Portier Pacific collected the total fee from the customer for the meal and the delivery, and distributed it to the restaurant and Ms Gupta respectively (less deductions for its own fees). There was no separate payment for each delivery; instead, in accordance with clause 4.1 of the Service Agreement, Portier Pacific paid Ms Gupta on a weekly basis for all deliveries made for various restaurants across the week. The invoices to restaurants prepared by Portier Pacific on behalf of Ms Gupta were purely notional, since payment for her deliveries had already been received by Portier Pacific from customers via the Partner App. Ms Gupta had no role in the preparation of these invoices, and the amounts nominally charged were the amounts determined pursuant to the contract between her, Portier Pacific and Uber.

[48] In summary, we consider that Portier Pacific engaged Ms Gupta to perform delivery services for it, and paid her for them, as part of a business by which it delivered restaurant meals to the general public. On that basis, the minimum reciprocal obligations of work and payment can be said to exist.

[49] Two decisions may be referred to in support of the above analysis. Relevant to Portier Pacific's contention that it acted as agent of the restaurants in securing deliverers to deliver meals for the restaurants, the Federal Court Full Court in *Building Workers' Industrial Union of Australia v Odco Pty Ltd*[32] considered the legal relationships established when a progenitor of the labour hire business model in Australia, Troubleshooters, provided labour to businesses operating in the building industry. The Court rejected a submission that in doing so, the builders entered directly into contracts with the workers with Troubleshooters merely acting as agent for the builders in obtaining the labour, for four reasons. The first was as follows:

> "An alternative analysis for which the appellants contended was that Troubleshooters was the agent of the builder in engaging the services of the worker and brought about a contract of employment between its presumptive principal and the worker. The chief objection to this analysis arises from the evidence that it was Troubleshooters which fixed, and adjusted from time to time, the remuneration to which each worker was entitled. That was apparently done without reference to the builder who was only concerned to know the gross amount which he was obliged to pay Troubleshooters in respect of workers made available by it."[33]

[50] This underscores the significance we have placed upon the fact that Portier Pacific, not the restaurants, determined unilaterally the rate of delivery fees to be paid to Ms Gupta. The second reason given by the Court was that when Troubleshooters collected the fees for the labour from the builders, deducted its own fees and then paid the workers, it did so not as agent for the workers, but pursuant to a clearly express liability to pay the worker whether the builder paid for the work or not.[34] It may be accepted that there was no express provision for such liability on the part of Portier Pacific in the Service Agreement, but in any event there were no practical circumstances in which the restaurant had to actually pay for the delivery services at all, since the fee was collected by Portier Pacific from the customer. The third reason, taken from the judgment of the trial judge, was as follows:

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[32] [1991] FCA 87, 29 FCR 104

[33] Ibid at 119

[34] Ibid

> "In the first place, when the builder's order is accepted - subject only to later notification of inability to supply - the particular worker to be allocated is not known. Some worker will later ring in and will be offered the job - he will accept or reject it as he sees fit. It would be highly artificial to suggest that the contract with the builder had already been made on his behalf..."

[51] That proposition is entirely applicable here. When a restaurant receives and accepts a meal request via the Restaurant App, neither it nor Portier Pacific knows the identity of the deliverer who will ultimately deliver it. Nor, as explained above, does the deliverer know the identity of the restaurant prior to accepting a delivery request.

[52] Finally, the Court said: "As well, the appellant's contention involves the awkward concept of Troubleshooters owing at one moment a fiduciary duty as agent to the builder, and then at some later undefined point, assuming a similar obligation to the worker."[35] Portier Pacific's case involves the same difficulty since it contends that it acts as both agent for the restaurant and Ms Gupta.

[53] In *Damevski v Giudice*,[36] the Federal Court Full Court determined that a cleaner, Mr Damevski, who had been directly employed by a business named Endoxos, but was then terminated and re-engaged to perform the same cleaning duties for Endoxos pursuant to an arrangement with a labour hire agency, MLC Workplace Solutions, remained at law an employee of Endoxos. In the judgment of Merkel J, the factual features of the case which distinguished it from the *Odco* scenario and the normal labour hire agency situation were identified. They included that Endoxos rather than MLC determined the remuneration payable to Mr Damevski, and MLC played no role in the relationship between Mr Damevski and Endoxos.[37] Merkel J went on to say:

> "[173] In general, the courts have held that the interposition of a labour hiring agency between its clients and the workers it hires out to them does not result in an employee-employer relationship between the client and the worker: *[citations omitted]*
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> [174] However, the present case differs in significant respects from those cases. In those cases, in general, the hiring agency interviewed and selected the workers, and determined their remuneration, without reference to the client. Usually, a client requesting a worker with particular skills was provided with one, who may or may not have been "on the books" of the hiring agency at the time the order was placed. The workers of such hiring agencies were usually meant to keep the agency informed of their availability to work, and in many cases were not to agree to undertake work for the client which had not been arranged or directed by the hiring agency. Equipment was either supplied by the worker themselves, or by the hiring agency, except for specialist safety equipment which the client often supplied. Dismissal of a worker was only able to be effected by the hiring agency. The client can only advise the hiring agency that the particular worker is no longer required by it. Had AICA/MLC acted as a labour hiring agency for Damevski to contract his services to other cleaning companies, as suggested in the chart and in the information pack, then the decisions in

[35] Ibid at 119-120

[36] [2003] FCAFC 252, 133 FCR 438

[37] Ibid at [172]

> the above cases may have been applicable to this situation. However, that did not eventuate in the present case."

[54] None of the distinguishing features identified by Merkel J are applicable in the present case, and the role of Portier Pacific can be regarded as analogous to a high degree with that of the normal labour hire business scenario.

[55] Having concluded that Ms Gupta performed her delivery work for Portier Pacific pursuant to the Service Agreement and the guidelines, it remains necessary for us to determine whether she did so as an employee or independent contractor. As earlier stated, a multi-factorial test has been adopted in the common law to answer this question. The application of this test in borderline cases such as the one before us is not without difficulty, since it requires the making of an evaluative judgment involving the weighing of various relevant considerations and, as such, may not produce any single clear answer. Notwithstanding this, where the existence of an employment relationship is a jurisdictional fact, as here, a decision determining that question is not to be treated as if it is a discretionary decision for the purposes of an appeal. In *Sammartino v Foggo*,[38] a Full Court of the Federal Court said in relation to the proper approach to be taken by a Full Bench of the Australian Industrial Relations Commission in an appeal from a decision concerning whether a worker was an employee at law:

> "[9] On an appeal from such a decision, if leave to appeal is given, the Commission is plainly not confined, in its consideration of the case, by principles that are found in cases such as *House v The King* (supra). In dealing with the appeal, the Commission is under a duty to consider all of the proven facts and those facts that have been admitted, and any inferences to be drawn from those facts, to arrive at its decision. It is also under a duty to determine the content of any point of law upon which its decision might depend. If, in undertaking any of these tasks, it finds that the Commissioner has made an error of law or an error of fact, it can exercise its powers under s 45(7).
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> [10] It will find an error of law or an error of fact if the Commission reaches a different conclusion on the facts or on the law than that arrived at by the primary decision-maker. Further, what must be shown in order to succeed on an appeal will plainly have a bearing on whether leave should be granted."

[56] Full Benches of this Commission have accordingly proceeded in appeals of this type on the basis that it is necessary to determine whether the primary decision-maker's conclusion concerning the existence or otherwise of an employment relationship was correct.[39]

[57] It is only necessary to refer to two High Court authorities concerning the multi-factorial test to be applied. First, in *Stevens v Brodribb Sawmilling Co Pty Ltd*[40] (*Brodribb*) Mason J (as he then was) said:

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[38] [1999] FCA 1231

[39] *Voros v Dick* [2013] FWCFB 9339 at [11], *Asia Pacific Cleaning Services Pty Ltd v Cook* [2013] FWCFB 5320 at [5]

[40] [1986] HCA 1, 160 CLR 16

> "...A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it (*Zuijs v. Wirth Brothers Pty Ltd* [1955] HCA 73; (1955) 93 CLR 561, at p 571; *Federal Commissioner of Taxation v. Barrett* [1973] HCA 49; (1973) 129 CLR 395, at p 402; *Humberstone v. Northern Timber Mills* [1949] HCA 49; (1949) 79 CLR 389). In the last-mentioned case Dixon J. said (at p 404):
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> > '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.'
>
> But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question (*Queensland Stations Pty Ltd v. Federal Commissioner of Taxation* [1945] HCA 13; (1945) 70 CLR 539, at p 552; *Zuijs' Case*; *Federal Commissioner of Taxation v. Barrett*, at p 401; *Marshall v. Whittaker's Building Supply Co.* [1963] HCA 26; (1963) 109 CLR 210, at p 218). Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."[41]

[58] The second is *Hollis v Vabu*,[42] in which the High Court (by majority) determined that a bicycle courier engaged by a courier company was employed by it such as to make the company vicariously liable for injury caused by the courier to a third person. In the context of a discussion about the doctrine of vicarious liability and its application to the acts of employees done in the course of their employment, but not to those of independent contractors, the majority (Gleeson CJ and Gaudron, Gummow, Kirby and Hayne JJ) attached significance[43] to a passage in the judgment of Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[44] in which his Honour "fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor". In connection with this, the majority then referred[45] with approval to the statement made by Windeyer J in *Marshall v Whittaker's Building Supply Co*[46] that the distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a

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[41] Ibid at

[42] [2001] HCA 44, 207 CLR 21

[43] Ibid at [39]-[40]

[44] [1931] HCA 53, 46 CLR 41 at 48.

[45] [2001] HCA 44, 207 CLR 21 at [40]

[46] [1963] HCA 26, 109 CLR 210 at 217

person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own". However the context indicates that the reference to this statement was not intended to erect a substitute or proxy for the multi-factorial test referred to in *Brodribb* but rather to explain the fundamental import of the distinction between employees and independent contractors in the doctrine of vicarious liability. Thus the majority, after referring to *Brodribb*, said that in the case before the Court that "guidance for the outcome is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability" (underlining added).[47]

[59] In determining that the courier company's bicycle couriers were employees (contrary to the decision of the NSW Court of Appeal under appeal), the majority placed emphasis upon seven matters, which may be summarised as follows:

(1) The couriers did not provide skilled labour or labour which required special qualifications and could not independently operate as couriers or generate any goodwill.[48]

(2) The couriers had little control over the manner of performing their work. They had a required start time, were assigned to a roster and were not able to refuse work. It was unlikely that they could delegate their work or be able to work for another courier operator.[49]

(3) The couriers were presented to the public as emanations of the courier company: they had uniforms with a company logo, and were required in their attitude and appearance to act as the company's representative. This partly reflected the company's wish to advertise its business.[50]

(4) The need for deterrence in respect of the known danger of bicycle couriers to pedestrians favoured a finding of employment.[51]

(5) The courier company superintended the couriers' finances in respect of remuneration, pay adjustments and deductions, and there was no scope for the couriers to bargain for the rate of their remuneration. The method of payment per delivery was a natural means to remunerate employees whose sole duty was to perform deliveries, for ease of calculation and to provide an incentive. The company also controlled absences from work for leave purposes.[52]

(6) The situation with tools and equipment favoured, if anything, a finding that the couriers were employees. The capital outlay was relatively small and bicycles were not tools inherently capable of use only for courier work, but could also be used for personal transport or recreation. The majority said: "The fact that the couriers were responsible for their own bicycles reflects only that they were in a

[47] Ibid at [45]

[48] Ibid at [48]

[49] Ibid at [49]

[50] Ibid at [50]-[52]

[51] Ibid at [53]

[52] Ibid at [54]-[54]

situation of employment more favourable than not to the employer; it does not indicate the existence of a relationship of independent contractor and principal". [53]

(7) There was considerable scope for the exercise of actual control by the courier company. It retained control of the allocation and direction of deliveries. The couriers had little latitude, their work was allocated by the fleet controller, and they had to deliver goods as directed.[54]

[60] The sixth matter requires some further elaboration. Before turning to the above matters, the majority had said:

> "[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…"

[61] The NSW Court of Appeal decision under appeal had substantially followed an earlier decision by that Court which involved the very same courier company, *Vabu Pty Ltd v Federal Commissioner of Taxation*.[55] In that decision, the Court had determined that the company's couriers who used light commercial vans or domestic-type cars to perform their work were not employees for the purpose of superannuation legislation. In the judgment of Meagher JA, one of the reasons identified for finding that the couriers were not employees was that they bore the "very considerable" expense of providing and maintaining their own vehicles and making payments for repairs and insurance. The High Court refused special leave to appeal from the Court of Appeal's decision.

[62] In *Hollis v Vabu*, the majority referred to this earlier decision and said:

> "[22] It is significant to note that one of the considerations mentioned by Meagher JA in the taxation decision as indicating that the couriers were independent contractors was that they bore the 'very considerable' expense of providing, maintaining and insuring their own vehicles. It is apparent that Meagher JA was there concerned with expense in relation to motor vehicles and motorcycles. The purchase and maintenance of a bicycle could hardly be termed a 'very considerable' expense. It may be that, in the taxation decision, a case that was, as his Honour put it, 'hardly without difficulty', a different result might properly have been reached respecting Vabu's bicycle couriers from that which obtained respecting its other couriers. However, it is unnecessary to express any conclusion on this matter. It is sufficient to say that this case concerns liability arising from the activity of a bicycle courier, not a motor vehicle or motorbike

[53] Ibid at [56]

[54] Ibid at [57]

[55] (1996) 33 ATR 537

courier. For the reasons that follow, the relationship between Vabu and its bicycle couriers in the present case is properly to be characterised as one of employment."

[63] This presents some difficulty in the present case, since it suggests that the provision by a courier of a vehicle - even merely a domestic-type car - as distinct from a bicycle would be sufficient to tip the balance away from a finding of employment. Some further assistance in this connection is provided by the Federal Court Full Court decision in *Roy Morgan Research Pty Ltd v Commissioner of Taxation*,[56] in which the Court affirmed a decision of the Administrative Appeals Tribunal that interviewers engaged by the Roy Morgan business were employees for the purpose of superannuation legislation. One relevant factual consideration was that the interviewers were generally required to supply, maintain and insure their own vehicle when working in the field, for which Roy Morgan paid a rate per kilometre for use of the vehicle. In relation to this issue, the Court said:

"[41] Roy Morgan's reliance on McHugh J's observations about the couriers' motor vehicles in *Hollis* 207 CLR at [71] does not assist. His Honour's was a lone voice on this issue. In any event there is a distinct difference between a requirement that a courier have a motor vehicle in order to be able to carry goods from one place to another, which is the essence of a courier's job, and a flexible requirement that an interviewer have a vehicle in which to keep documents secure while working in the field. More relevant are the observations of the majority at [56]. Their Honours were of the view that bicycles are not tools that are inherently capable of use only for courier work, but provide a means of personal transport. The same may be said of motor cars. In the cases relied on by McHugh J at [71], the vehicles in question were specialised conveyances: trucks for carrying timber and gravel respectively in *Humberstone v Northern Timber Mills* [1949] HCA 49; (1949) 79 CLR 389 and *Wright v Attorney-General (Tas)* [1954] HCA 26; (1954) 94 CLR 409. The Tribunal did not err in treating the flexible requirement to provide a vehicle in the way it did."

[64] In *French Accent*, a Full Bench of this Commission usefully summarised the considerations, derived from various court authorities, which may be relevant in the application of the multi-factorial test referred to in *Brodribb*. However as was stated by Winneke P in the Victorian Court of Appeal decision in *The Roy Morgan Research Centre P/L v The Commissioner of State Revenue*,[57] the task in applying the test is not to be approached as a mechanical exercise of running through items on a checklist, but is rather "a matter of obtaining the overall picture from the accumulation of detail". This involves "an assessment and evaluation of evidence for the purpose of identification and isolating factors or indicia which are capable of pointing in one direction or the other, and then weighing or balancing those factors in accordance with established principles, none of which is conclusive, in order to reach a conclusion".[58]

[65] We consider that a number of features of the Uber Eats business model are neutral in relation to the question of whether Ms Gupta was an employee. Firstly, we do not consider that the fact that Ms Gupta was required to provide her own motor vehicle and mobile phone in order to carry out her work necessarily points to her being an independent contractor.

[56] [2010] FCAFC 52

[57] [1997] VicSC 515, 37 ATR 528

[58] Ibid at 533

Beyond the very minimal requirement that the vehicle had to be of 1990 make or newer, these were not specialised items of equipment, and were not purchased for the purpose of performing Uber Eats work because they were already owned and used for personal purposes. The running cost of the vehicle's use can be seen as being encompassed in the distance element of the remuneration model. The provision of a vehicle and mobile phone in this way is common as a feature of employment relationships as well as principal-independent contractor relationships.

[66] Secondly, the degree of control exercised by Portier Pacific through the various obligations imposed by the Service Agreement, the Guidelines and the ratings system to require the performance of the work to a satisfactory standard does not necessarily point to an employment relationship. There is nothing particularly unusual about a principal establishing and enforcing performance and quality standards in respect of independent contractors engaged to perform work.

[67] Thirdly, the fact that Ms Gupta was remunerated on a per-delivery basis, received no leave or superannuation benefits, and was responsible for her own taxation obligations does not point to her necessarily being an independent contractor. As for the mode of payment, we take the same view as the majority in *Hollis v Vabu* that this was a natural means to remunerate the deliverers regardless of their status. The fact that no leave or superannuation benefits were provided and no taxation was deducted is simply reflective of Portier Pacific's view that its relationship with Ms Gupta was not one of employment.[59]

[68] Some matters lean in favour of a finding of employment. Ms Gupta's work did not involve the exercise of any particular trade or skill, and required no special qualifications. The rate of the delivery fee was set by Portier Pacific, and it superintended the payment to her of remuneration on a weekly basis (although it may be noted that it is not uncommon for principals who engage a body of independent contractors to perform work, such as in long distance road transport, to establish a standard rate or rate system which is equally applicable to all such contractors). There was no aspect of her work which would permit it to be characterised as the carrying on of an independent business or enterprise: she had no means of independently expanding her customer base or generating additional work within the Uber Eats business or of establishing goodwill with any of the restaurants or customers with whom she dealt. And, finally, she was not permitted to delegate the work, since she was required from time to time to use facial recognition software to log on, which was to ensure that she was the one using the Partner App. The evidence disclosed that, in practice, Ms Gupta's husband actually did most of the driving work in company with her, but it is not clear that this would have been permitted to occur had Portier Pacific known about it.

[69] However, there are three critical factors which we consider point decisively away from a finding of employment and provide a significant point of distinction from the factual scenario considered in *Hollis v Vabu*:

(1) Portier Pacific exercised no control over when or how long Ms Gupta performed her work. Both as a matter of legal right and actuality, it was entirely within Ms Gupta's control as to when she logged onto the Partner App and for how long she remained logged on. Once logged on, there was no obligation upon her to accept any particular delivery request.

[59] See *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3, 209 FCR 146 at [37]

(2) Ms Gupta was able, even when logged on and even when performing work pursuant to a delivery request, to accept work through other competitor food delivery apps or perform other types of passenger or delivery work provided this did not compromise her capacity to effect her Uber Eats deliveries within time expectations. This was not a case of a merely nominal right which cannot practically be exercised; in this case, there is no evidence of any practical impediment to her doing this, although she did not in fact choose to do it.

(3) Ms Gupta was not presented as an emanation of the Uber Eats business in the performance of her work: she was not required to wear a uniform, her car bore no logos, and there is no evidence that she was required to even represent that she was part of the Uber Eats business beyond what was necessary to collect the particular meal from the restaurant and deliver to the customer.

[70] In summary, we do not consider that Ms Gupta's relationship with Portier Pacific bore a number of the usual and essential hallmarks of an employment relationship, namely a requirement to perform work at particular times or in particular circumstances, exclusivity when work is being performed, and presentation to the public as serving in the business. For these reasons we conclude she was not an employee of Portier Pacific.

[71] It might be considered that there is some tension between this conclusion and our earlier finding that Ms Gupta was not conducting a business in her own right. A number of decisions have treated the notions of serving in the business of another and operating one's own business as being entirely dichotomous. For example, in *ACE Insurance Limited v Trifunovski*,[60] Lander J said:

> "[15] The primary judge did not err, in my opinion, in inquiring into the business in which the respondents were working, because if the respondents were not conducting their own business then logically it followed that they must have been working in the appellant's business."

[72] It may be that the difficulty is answered by the proposition that Ms Gupta had the capacity to develop her own independent delivery business as a result of her legal and practical right to seek and accept other types of work while performing work for Uber Eats, but chose not to. In any event, the question we are required to determine is whether Ms Gupta was an employee of Portier Pacific, and we consider that she was not.

[73] Permission to appeal should be granted because the appeal raises issues of importance and wider application. However we consider that the conclusion reached by the Commissioner was correct, albeit our reasons for that conclusion differ in some respects from his. Accordingly the appeal must be dismissed.

Orders

[74] We order as follows:

(1) Permission to appeal is granted.

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[60] Ibid

(2) The appeal is dismissed.

DECISION OF DEPUTY PRESIDENT COLMAN

[75] I have had the opportunity to read the decision of Ross J and Hatcher VP. I agree that permission to appeal should be granted because the appeal raises issues of importance and wider application, and that the appeal should be dismissed. However, I have a different view about the nature of the relationship between Ms Gupta and Portier Pacific.

[76] Ms Gupta was not an employee of Portier Pacific. The application of the multifactorial test in *Stevens v Brodribb Sawmilling Co Pty Ltd*[61], taking into account the observations of Winneke J in *The Roy Morgan Research Centre P/L v The Commissioner of State Revenue,*[62] points clearly to a conclusion that there was no contract of service, and no employment relationship, between Ms Gupta and Portier Pacific. I agree with the majority that there are three critical factors telling decisively against the existence of an employment relationship: Portier Pacific exercised no control over when or whether Ms Gupta performed work; Ms Gupta had no obligation of exclusivity of service to Portier Pacific when she was undertaking work; and she was not represented to others as an emanation of Portier Pacific's business. However, in my view there is an anterior reason why the appeal must fail.

[77] Portier Pacific contended that there was no 'work-wages' bargain between Ms Gupta and the company, and that this issue arises before the consideration of the various indicia which distinguish a contract of employment from a contract for services. The company submitted that this was not a separate test, but a *sine qua non*; without the work wages bargain, there is no point in considering the gamut of indicators, as no employment relationship can subsist. Portier Pacific submitted that Ms Gupta did not perform delivery work for the company, nor did it pay her for any such service, and that, as clause 8.3 of the service agreement states, Ms Gupta was neither an employee nor an independent contractor of Portier Pacific.

[78] I agree. Ms Gupta undertook delivery work, but it was not work performed *for* Portier Pacific. Ms Gupta and Portier Pacific owed various contractual obligations to one another, all of which pertained to an online system, established by Uber Portier BV, whereby customers order food and request delivery, restaurants sell their food, and drivers collect and deliver it. However none of the contractual obligations owed by Ms Gupta to Portier Pacific required her to perform work for the company. She was free to undertake whatever deliveries she wished, or no deliveries. She could log on at any time. She could choose not to log on. Once she accepted a delivery opportunity, she could cancel it. Ms Gupta made no promise to Portier Pacific to undertake work, and the company did not seek any such promise. Portier Pacific was in fact indifferent to whether Ms Gupta accepted delivery opportunities. Of course, the company had an interest in whether the general body of deliverers was accepting jobs, as this would affect the success of its platform and the revenue it would derive from it. But that is not relevant to the analysis of the nature of the contractual relationship between Portier Pacific and Ms Gupta, or any other individual deliverer. What is relevant, and in fact determinative, is that Ms Gupta was not subject to any contractual obligation to perform any work for Portier Pacific.

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[61] [1986] 160 CLR 16; 60 ALJR 194; 63 ALR 513

[62] (1997) 37 ATR 528

[79] Ms Gupta contended that there were adverse consequences, such as being excluded from the platform, for deliverers who did not undertake a certain volume of work and that this supported her contention that she was, in effect, required to work. However, the evidence did not establish any such consequences. In fact, Ms Gupta rejected over 500 delivery requests without adverse consequence. Even if there had been such adverse consequences, I do not see how they could be said to establish or evidence any promise by Ms Gupta to undertake work for the company. Such consequences would appear to me to be in the nature of a commercial incentive for deliverers to maintain a certain level of engagement in order to retain access to opportunities to do jobs and earn fees.

[80] In *Kaseris v Rasier Pacific*[63], Gostencnik DP considered whether an Uber passenger driver was an employee of the relevant Uber entity in the context of an unfair dismissal application brought by the driver against the company. The Deputy President concluded that in undertaking the relevant work, the applicant was 'not performing any contractual obligation he owed to the Respondent' and that the company 'did not make any payment to the Applicant for the provision of any work or services'. The Deputy President concluded that the work-wages bargain was therefore absent from the contractual relationship between the parties and the applicant was not an employee. The same is the case here.

[81] In my view, not only was Ms Gupta not an employee of Portier Pacific, she was not party to a contract for services with Portier Pacific as an independent contractor. The majority decision reaches a different conclusion and notes three elements which are said to be demonstrative of the proposition that Ms Gupta performed delivery work for Portier Pacific and was paid by the company for that work, as part of a business by which the company delivered restaurant meals to the public. I respectfully disagree, and briefly address the three elements to which reference is made.

[82] The first element relied upon is that there was no contractual relationship between Ms Gupta and the restaurants concerning the delivery of meals to customers. Portier Pacific had contended that, although it was not necessary for it to establish that there were any contracts between Ms Gupta and the various restaurants, such contracts did in fact exist. The terms of these contracts were presumably to be implied by fact. The possibility that such contracts existed cannot be discounted, when one has regard to the substance of the work that was involved in the relevant chain of relationships, which after all involved Ms Gupta attending restaurants, collecting the restaurants' food and taking it to the restaurants' customers. However, I agree that it has not been established that Ms Gupta was party to such contracts with the restaurants whose food she delivered. Nevertheless, the fact that Ms Gupta may not have been party to contracts with the restaurants, and was not performing delivery work for them, does not suggest to me that she must have been performing the work for Portier Pacific, or for any other entity. The fact that an individual is undertaking work does not mean that she must be doing so in the capacity of somebody's employee or contractor. Whether a person is either of these things depends on the evidence. A conclusion that one entity is not her employer or principal does not carry any necessary implication for the question of whether some other entity has such status. There may simply be no employer or principal at all. That is the case here.

[63] [2017] FWC 6610; 272 IR 289, at [51]

[83] It is clear that Ms Gupta was not running an enterprise with the usual indicia of a business such as those identified in *FWO v Quest South Perth Holdings Pty Ltd*,[64] and was not, in the common understanding of the expression, running any business at all. In some cases that may be a factor favouring a conclusion that a person is an employee (see for example the decision of O'Callaghan J in *CFMMEU v Personnel Contracting Pty Ltd*,[65] although in that case the individual concerned was nevertheless found not to be an employee). In other cases, it may favour a conclusion that a person is an independent contractor. But in the present case, the fact that Ms Gupta was not running a business does not favour either conclusion. In my view, the evidence shows that Ms Gupta was simply working for herself.

[84] The second element referred to in the majority decision as supporting a conclusion that Ms Gupta was performing work for Portier Pacific is that the service agreement obliged Ms Gupta to undertake deliveries in accordance with certain standards, including by using due skill, care and diligence, and courtesy. There was also a rating system that enabled customers to evaluate her work, and poor ratings could lead to termination of the service agreement. However, I do not consider this to support a conclusion that Ms Gupta was performing her delivery work for Portier Pacific. Such obligations are common in a variety of commercial contracts. They are consistent with Portier Pacific having an interest in protecting its brand from damage associated with customers having a bad experience with a deliverer. And the fact that the restaurants did not impose any restrictions or standards on deliverers is only relevant to the characterisation of the relationship between those parties. I do not believe it tends to show that Ms Gupta was performing work for and being paid by Portier Pacific.

[85] The third element to which the majority refer is the fact that payment for Ms Gupta's delivery work was facilitated by, and was within the control and responsibility of, Portier Pacific. In particular, the delivery fee was determined by Portier Pacific, and Ms Gupta had no role in the preparation of the invoices sent by Portier Pacific to restaurants on her behalf. However, I do not see that this supports a conclusion that Portier Pacific was paying Ms Gupta for work that she had performed for it.

[86] Portier Pacific collected from the customer the payment for both the meal and the delivery. It then distributed the relevant amounts to the restaurant and Ms Gupta, less the deductions which constituted the company's own fees. The revenue derived solely from the customers who ordered the restaurants' food and asked for it to be delivered. Those who did the work – the restaurant which prepared the food, and the deliverer who delivered it – received their respective payments. Portier Pacific's obligation under clause 4.1 of the service agreement with Ms Gupta was to 'remit, or cause to be remitted', the delivery fee less the service fee she paid to the company. This was not a promise to make a payment to Ms Gupta in consideration for work that she performed for the company. It was an undertaking to transfer to Ms Gupta her share of the monies paid by the person who ordered the food.

[87] In my opinion, the role of Portier Pacific is not analogous to that of a normal labour hire business, a fundamental element of which is a requirement on the part of the principal or contract house that the individual worker promise to perform work for it, or for its clients. Further, I do not share the majority's view that Portier Pacific engaged Ms Gupta to perform delivery services for it as part of a business by which it delivered restaurant meals to the general public. In the decision under appeal, the Commissioner found that Portier Pacific's

[64] [2015] FCAFC 37; 228 FCR 346; 321 ALR 404; 249 IR 256 at 391

[65] [2019] FCA 1806 at 156-157, 181

business was to market and provide a food-ordering and food delivery platform. I see no error in this finding. Moreover, I agree with it. Portier Pacific acts as a commercial intermediary between restaurants, customers and deliverers, from which it earns fees. Deliverers use the company's platform and pay a fee to Portier Pacific to do so. They thereby gain access to opportunities to undertake deliveries and receive a share of the monies paid by the customer.

[88] Finally, there is a question about the nature of an appeal under s 604 from a decision of a single member that determines whether an applicant for an unfair dismissal remedy is an employee. Ms Gupta contended that the Full Bench must determine for itself whether the Commissioner reached the correct conclusion as to her legal status, as this is a question of law and jurisdiction. Portier Pacific submitted that the question of whether a person is an employee is a mixed question of fact and law, and that where, as in this case, the member has applied the correct test and taken into account the relevant considerations, a Full Bench cannot simply conduct a re-evaluation of the various indicia of employment and reach its own conclusion. It relied on the decision of the Full Court of the Federal Court in *ACT VMO Association v AIRC*[66], which noted that reasonable minds may differ as to the proper conclusion to be drawn from the balancing of the various indicia of employment, and that 'provided the correct criteria have been applied, the fact that another decision maker might have attached different weight to the various factors is not a basis for ascribing jurisdictional error.' However, it appears to me that the Court was referring here to the question of whether a Full Bench would commit jurisdictional error by re-evaluating the indicia of employment for itself.

[89] In my view the question we must determine in this appeal is whether the Commissioner's conclusion was correct. Whether a person is an employee is a mixed question of fact and law. However, as Ms Gupta contended, the ultimate characterisation expresses a conclusion of law, and also, in an unfair dismissal proceeding, of jurisdiction. Only a person who has been dismissed may apply to the Commission for an unfair dismissal remedy (s 394(1)), and in order to be dismissed, a person must have been an employee (s 386). The Commissioner concluded that Ms Gupta was not an employee. That conclusion was correct. The appeal must therefore be dismissed.

PRESIDENT

Appearances:

M Gibian SC with *P Boncardo* of counsel on behalf of Amita Gupta.

I Neil SC with *Y Shariff* of counsel on behalf of Portier Pacific Pty Ltd.

Hearing details:

2019.
Sydney:
18 November.

[66] [2006] FCAFC 109; 232 ALR 69; 153 IR 228 at 236

Printed by authority of the Commonwealth Government Printer

<PR717924>